

**THE EXTENT OF THE REGULATION OF ATYPICAL EMPLOYMENT
RELATIONSHIPS IN ETHIOPIAN LAW, WITH COMPARATIVE REFERENCE TO
SOUTH AFRICAN LABOUR LAW**

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Faculty of Law, University of *the* Western Cape



Aychiluhem Yesuneh Gebretsadike

Student number: 2823860

Prepared under the supervision of

Prof. Darcy du Toit

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Declaration

I declare that the extent of the regulation of atypical employment relationships in Ethiopian law, with comparative reference to the South African labour law, has never been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.



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I) Abstract

Universally, workers' protection is centred on the standard employment relationship (full-time, indeterminate employment) based on the distinction between 'employee' and 'independent contractor'; nonetheless globalization coupled with advances in technology and other related processes such as casualization, externalization and informalization, has resulted in the proliferation of different forms of work that deviate from the conventional employment relationship. There is also an increase, worldwide, in the number of persons who perform work outside the employment sphere because they are labelled independent contractors though in fact they are on the same level of economic dependence and vulnerability with those who perform work as 'employees'. It is to this category of workers that literature refers collectively as 'atypical employees' or 'non-standard employees'. Despite the fact that there have been moves internationally and nationally to integrate these classes of worker, it remains clear that they constitute a labour force which is less well paid and less secure. Most of the atypical employees are included in the definition of 'employee' in both jurisdictions though home workers are explicitly excluded under the Ethiopian labour law. However, the collective bargaining system does not function to address the problems of atypical employees in both countries as it does for standard employees.

II) Key words

Ethiopia, Atypical employment, Part-time workers, Home workers, Temporary workers, Outsourcing, Dependent contractors, Subcontracted labour, Globalization, South Africa

Chapter one

(A) Introduction

Increasing non-standardization of employment has been noticed worldwide mainly as a result of forces such as globalization and advance in technology.¹ The phenomenon started in the industrialised countries and is expanding to developing nations.² However, again globally, labour law is designed to regulate the standard employment relationship.³ This has resulted in the emergence of class of marginalized workers, who do not equally benefit from the labour law. Thus nations have started to reconsider their regulatory framework in order to help it catch up with the rapidly changing world of work.

This research is a comparative study of the regulation of atypical employment relationships in South Africa and Ethiopia. South Africa is chosen because it is an African economy with a labour market that has shown high rate of non-standardization of employment. It has also been few years since extending the protection of labour laws to these new vulnerable classes of employees have become a subject of both an academic discourse and a legislative concern.

In Ethiopia also some of the atypical employees have started to emerge, though so far there have been very few legislative measures taken to extend the protection of labour law to these new classes of workers, if at all. Therefore, the comparison is necessary as it can offer an opportunity, particularly to the Ethiopian labour law, to draw a lot from the relatively developed South African system, in Africa.

The research also makes a brief look into the major legislative measures taken on the international plane (ILO instruments) and at the European Union level as they can be rich sources of ideas to be borrowed and somehow adapted to the reality on the ground in the two countries.

The paper is structured as follows. The first chapter shall introduce the changes in the world of work in general. The second chapter focuses specifically on the changes in employment pattern, i.e. proliferation of atypical employment in both labour markets. This chapter will also help to identify

¹ Vettori, *The Employment Contract and the Changed World of Work* (2007) 157. See also, Nienhuser et al, *Flexible Work – Atypical Work – Precarious Work?* (2005) 327

² Van Wezel Stone, *From widgets to digits: Employment regulation for the changing workplace* (2004) 67

³ Christianson 'Defining who is an "employee": A review of the law dealing with the differences between employees and independent contractors' (2001) 11 (3) *Contemporary Labour Law* 21

which forms of atypical employees are present in both labour markets and which ones are recently emerging.

The third chapter delves into the regulatory frameworks in both jurisdictions to identify the extent to which they include and protect atypical workers equally with workers in the standard employment relationship or the extent to which they fail to do so.

The last chapter shall propose further amendments necessary to enhance the protection of atypical workers in both countries.

B) Aim of the study

In this research I set out to investigate the kind of atypical employment relationships in Ethiopia and the extent to which they are incorporated in the protective ambit of labour law and collective bargaining. This is compared with the position according to South African law. I will also try to recommend possible solutions to provide for equal protection of these kinds of employees with conventional employees.

C) Research questions

This research will address, inter alia, the following questions:

- What are the different types of atypical employees in Ethiopia and South Africa?
- To what extent are they included in the definition of 'employee' in both jurisdictions?
- To what extent do they benefit from the protection of labour law?
- Do they have a right to form and/or join trade unions?
- If they have the right to do so, are there practical difficulties preventing them from joining trade unions and engaging in collective bargaining?
- What possible solutions are there to improve the situations of atypical employees?

D) Statement of the problem

Internationally labour laws are crafted to regulate the indeterminate; full-time employment relationship of the industrial period.⁴ However the world of work is undergoing change.⁵ One of the changes happening in the world of work has to do with the form of employment.⁶ Permanent full

⁴ Dicks 'The growing informalization of work: Challenges for labour-recent developments to improve the rights of atypical employees' (2007) 11 Law, Democracy & Development 39

⁵ Ibid.

⁶ Supiot et al, beyond Employment: Changes in work and the future of labour law in Europe (2000) 1

time employment is not any more the only form of employment.⁷ In fact globally there is a shift toward flexible employment relationships.⁸ Ethiopian labour law like its counterparts elsewhere largely aims at regulating standard employment relationships. Nevertheless, there are different forms of employment in practice, including: home workers, casual workers, subcontracted labourers, dependent contractors and so on. Some of these workers are excluded from the meaning of ‘employee’, which is decisive for determining the persons eligible for the protections and benefits accorded by labour laws. Furthermore, there are some, while included within the definition, they are not fully and equally protected as are employees in standard employment relationships.

E) Research hypothesis

This research is based on the assumption that there are many atypical employees who are not as protected, or equally protected, as employees in standard employment relationships in Ethiopia. It is also based on the assumption that atypical employees are better protected in South Africa than in Ethiopia. It is also based on an assumption that improvements are possible.

F) Significance of the study

This research is important because in Ethiopia, too, though the extent might not be the same as in South Africa, due to globalization and informalization a number of different categories of workers have emerged who do not clearly fall within the protective reach of labour law, which is basically designed having standard employees in mind. At this stage the writer is of the opinion, which is further to be established in the research, that atypical employment is increasing both in kind and number in Ethiopia. The study will identify the problems atypical employees face and put forward possible suggestions to improve their situation. The scarcity of prior legal research concerning this issue adds relevance to this study.

G) Methodology

In this research I shall employ the following methodologies: literature review, legal analysis, case studies, comparison and interviews. I use literature review and interview to identify forms of atypical employees in Ethiopia and South Africa. Legal analysis and case study will be employed to pinpoint the extent of legal protection accorded to atypical employees in both countries.

⁷ Ibid.

⁸Theron ‘Who’s in and who’s out: Labour law and those excluded from its protection’. (2007) 11 Law, Democracy & Development

H) Scope of the Study

This paper is designed to assess the extent to which the 2003 Ethiopian Labour Proclamation is accommodative of atypical employees, both with regard to collective representation and minimum conditions of employment, in comparison with the major labour laws in south Africa, namely the Labour Relations Act and the Basic Conditions of Employment Act. Investigation is also made into cases decided by courts in Addis Ababa since the coming into force of the 2003 Labour proclamation. The attempt to identify the existence of different forms of atypical employment is also limited basically to Addis Ababa. This is mainly because of the assumption that the presence of the new forms of atypical employment is relatively higher in Addis Ababa than other parts of the country.



Chapter two

An overview of the changing nature of work

This chapter aims at highlighting, the major drivers of changes in the world of work and the consequent changes happening therein. To help better understand the problem section 2.1 briefly introduces the role and nature of work.

2.1 The role and nature of work

Work plays very crucial social and economic roles in any society. It is a means to earn a livelihood and it is also a nexus between the processes of production and consumption.⁹ On top of being instrumental for our material well-being work is also a source of dignity, self-fulfillment, identity and recognition.¹⁰ That is why almost all societies have an array of institutions, laws and regulations to govern different dimensions of it.

The nature of work generally pertains to one or more of four closely related aspects of a society's primary mode of production. These are: what people do for a living, how people do what they do, the organizational, social, and institutional context in which work takes place and the way work influences and relates to other aspects of daily life such as the standards of living, its relationship to community life, its effects on one's self-esteem and social status, etc.¹¹

2.2 The processes changing the nature of work

Globalization, advances in technology particularly in information and communication sector, demographic factors, and labour laws are some of the most commonly identified drivers of change in the world of work. Below a bird's eye view is given of how these forces are impacting on the world of work.

⁹ International Labour Office, 'Changing patterns in the world of work', (2006) International Labour Conference 95th Session, Report I(C), Geneva. 1

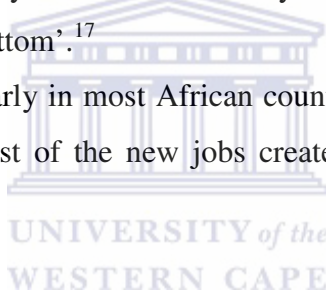
¹⁰ Rycroft and Jordan, A Guide to South African Labour Law 2nd ed (1992) 2. Generally, there are two dominant schools of thought with regard to the role of work; the first one is called 'self-actualization school' which sees work both as economically and intrinsically meaningful where as the second school known as instrumentalist school regards work primarily as a means of material ends.

¹¹ Committee on Techniques for the Enhancement of Human Performance: Occupational Analysis; National Research Council (CBASSE), 'The Changing Nature of Work' (1999) 14

2.2.1 Globalization

There is no single definition of the term globalization that brings all commentators to consensus. Different individuals define it differently from different perspectives. Surprisingly enough, the term is used at one extreme to refer to an 'irresistible benign force that would bring economic prosperity for people all over the world and at the other end it is blamed for all contemporary ills.'¹² For the purpose of this paper it must suffice to see it as a process basically characterized by liberalization of trade, expansion of foreign direct investment (FDI), integration of production processes, and emergence of massive cross-border financial flows.¹³ Globalization is one of the major forces impacting on the world of work, largely by intensifying competition in the global market amongst producers and/or service providers.¹⁴ Firms have continuously resorted to means that allow them attain flexibility in order to remain competitive in the market. One way to do so is to make use of more and more flexible employment forms at a lower cost.¹⁵ At the national level there is also a move by states to deregulate their labour market in order to attract as much FDI as possible and avoid relocation of business away from their territory.¹⁶ This phenomenon is dubbed by some commentators as a 'race to the bottom'.¹⁷

In developing countries, particularly in most African countries, where the share of informal sector employment is already high, most of the new jobs created in the past two decades were in the



¹² World Commission on the Social Dimensions of Globalization, "A fair globalization: Creating opportunities for all" (2003) 24 <http://www.presidenti.fi/netcomm/ImgLib/9/101/WCSDG%20report%20final.pdf> [accessed on 2008-10-16]

¹³ Ibid.

¹⁴ International Labour Office, 'Changing patterns in the world of work', (2006) International Labour Conference 95th Session, Report I(C), Geneva. 8

¹⁵ Rogerson, "Globalization or informalization? African urban economies in 1990s" <http://www.unu.edu/unupress/unupbooks/uu26ue/uu26ue0q.htm> [accessed on 15/10/2008]

¹⁶ Ibid.

¹⁷ Lundahl et al Globalization and the Southern African Economies (2004) 122. It is also noted, by Fenwick et al, that the increasing flow of FDI, as one conspicuous feature of globalization, has made countries, particularly developing countries, revisit their policies to enable them attract as much FDI as possible. This according to them had contributed to the erosion of labour standards in developing countries as the bulk of them can best offer cheap labour in the competition to attract FDI. They further noted that regional and international integration of economies also, as an aspect of the process of globalization, has forced nations to adopt export-oriented industrialization policies. These taken together, they argue, have hastened the move towards a relaxed labour law regime. See Fenwick et al 'Labour law: a Southern African perspective' (2007) ILS, Geneva 15

informal sector of the economy. Globalization is said to have contributed significantly towards this.¹⁸

2.2.2 Advancement in technology

Advances in technology are one of the drivers of change in the world of work.¹⁹ It is noted by Blanpain that the development of our society has always been driven by technology.²⁰ In this era of globalization innovations in information and communication technology have tremendously affected every aspect of all societies in general and the labour market in particular.²¹ It has been noted in an ILO report in 2006 that technological transformation in information and communication has affected, amongst others, the movement of capital and labour, work processes and products and the management system. It has also accelerated the shift towards services and their outsourcing globally.²²

2.2.3 Demographic factors

Demographic factors affecting the world of work can be seen from two vantage points. The first is the increase in the population constituting the potential workforce which is not paralleled by the creation of enough jobs to accommodate the new entrants to the labour market. This contributes for the rise of unemployment rates. High unemployment means there are people who are ready to accept jobs at low conditions and poor security of employment.²³ The second aspect has to do with

¹⁸ This is due to the fact that many small firms tend to move to the informal sector where they can find cheap and precarious labour to survive the stiff competition coming from big companies. See Clarke “Class and identity in the context of labour market restructuring in Africa.” http://www.yorku.ca/African_liberation/conference_papers/Clarke_print.html [accessed on 2008/08/08.]

¹⁹ Blanpain ‘work in the 21st century’ (1997) 18 *ILJ* 189

²⁰ Ibid.

²¹ International Labour Office, ‘Changing patterns in the world of work’, (2006) International Labour Conference 95th Session, Report I(C), Geneva. 6

²² Theron, ‘The shift to service and triangular employment; implications for labour market reform’ (2008) *ILJ*

²³ Mills ‘The situation of elusive independent contractor and other forms of atypical employment in South Africa: balancing equity and flexibility?’ (2004) 25 *ILJ* 1207

the growing presence of women and young workers in the labour market.²⁴ This has helped employers to employ women and young workers on flexible work arrangements.²⁵

2.2.4 Labour laws

There are indications that labour regulation also has a role in fuelling the changing pattern of employment specifically in the shift from standard to non-standard employment. This is so because labour laws are designed to protect permanent employees which in turn serve as an encouragement for employers to opt for non-standard employment.²⁶ Theron noted that labour legislation in South Africa has facilitated the emergence of class of workers that lack basic security of employment particularly in respect of employees placed by temporary employment services.²⁷

2.3 Changes in the world of work

In the past few decades tremendous change has occurred in the world of work. Thompson in explaining this change states: ‘The shape of work has always been changing but things are a little different now.’²⁸ It is far beyond the scope of this paper to assess the changes fully. Instead the paper will only make a brief review of the changes in the world of work that have a prominent impact on labour law.

2.3.1. Production system

Since the mid-1980s, due to increased liberalization of trade, falling of barriers on investment, decline in transportation and communication costs and rapid technological advances, it became possible to break down production processes and locate them in various countries or various firms so as to get advantage of lower production costs, such as labour costs and raw materials.²⁹ It is to

²⁴ Ibid.

²⁵ This is due to the fact that women and young workers needed to get work opportunities that can be reconciled with their family responsibility and education respectively. See, Mills ‘The situation of elusive independent contractor and other forms of atypical employment in South Africa: balancing equity and flexibility?’ (2004) 25 *ILJ* 1207

²⁶ Dick ‘The growing informalization of work: challenges for labour-recent developments to improve the rights of atypical workers’ (2007) 11 *Law, Democracy & Development* (Special Edition) 42. There is also an indication in literature that employers use non-standard employees inter alia to avoid unionization. See for example, Carré, et al *Nonstandard Work: The Nature and Challenges of Changing Employment Arrangements* (2000) 7

²⁷ Theron ‘Intermediary or employee? Labour brokers and the triangular employment relationship’ (2005) 26 *ILJ* 618 at 622. It is noted that in South Africa the use of labour brokers has partly been motivated by employers’ desire to avoid labour law protections.

²⁸ Thompson, ‘The changing nature of Employment ‘ (2003) 24 *ILJ* 1793

²⁹ International Labour Office, loc cit 23

this phenomenon that writers refer to as “a global production system.”³⁰ This global production system has impacted on the world of work since labour costs and skills are some of the factors to be taken in to account by companies in breaking down and relocating the production system in to different countries.³¹

2.3.2 Business restructuring

Since the 1980s, there has also been a growing body of literature indicating that there has been a restructuring of business in such a way that firms increasingly focus on their core business and externalize peripheral activities.³² This entails institutional changes at plant level including downsizing, outsourcing, changing work organization, and transforming the composition of the workforce.³³ Peripheral activities are increasingly performed through non-standard forms of employment which offer employers the latitude to easily change and/or terminate the contract and help them to circumvent the employer’s responsibility emanating from the employment relationship.³⁴ There is also a trend, particularly rampant in developed countries, in changing the hierarchical nature of employment relation.³⁵ One commentator dubbed it ‘vertical disintegration’ to indicate that it is diametrically opposite to hierarchical nature of employment relationship of the industrial revolution period.³⁶ Theron noted that firms in South Africa ‘were able at one stroke to both to cut costs and eliminate vertical command and control structure by restructuring their operation to externalise employment.’³⁷

³⁰ Ibid.

³¹ Ibid.

³² Blanpain loc cit 192

³³ Visser and Kaminska (2008) ‘Globalization and managing change in the world of work’ Amsterdam Institute for Advanced Labour Studies (AIAS) 3

³⁴ Kohler ‘Labour law and labour relations: Comparative and historical perspective’ (1996) International Journal of Comparative Labour Law and Industrial Relations 231

³⁵ It is suggested that, in developed countries, vertical command and control structures in organizations are being replaced where they are perceived less efficient. See, Collines, ‘Independent contractors and the challenge of vertical disintegration to employment laws’ (1990) 10 Oxford Journal of Legal Studies 353.

³⁶ Ibid.

³⁷ Theron, ‘Who’s in who’s out: Labour law and those excluded from its protection’ (2007) 11 Law, Democracy & Development 25

2.4 Employment status

Historically full-time, indefinite employment was the norm all over the world. Nonetheless, in the past few decades the number of employees in flexible working arrangement has risen.³⁸ Virtually all over the world the number of permanent jobs is declining and part-time, temporary, contract, subcontracted, outsourced jobs and other forms of non-standard jobs are increasing.³⁹

According to Hanzelova, internationally there are two approaches to conceptualizing non-standard/atypical employment forms.⁴⁰ The first one involves applying three different criteria: stability of the work relationship, length of working time or the degree of entitlement of an employee to social rights according to the working regime.⁴¹ The second approach is to rely on the literal meaning of the term 'non-standard' or 'atypical'.⁴² This approach was emphasised by Theron, in the South African context, to conceptualise atypical employment.⁴³ Thus this paper also follows the second approach as it is already familiar in the South African context. Literally, non-standard means something that deviates from the normal, standard, typical or regular. This approach, therefore, involves an inverse procedure whereby one first identifies the characteristics of the normal employment relationship and then proceeds to judge whether a specific employment relationship deviates from the standard employment relationship or not.⁴⁴ An employment relationship is considered to be standard/regular when employees sell labour to an employer for remuneration; work full-time according to a known schedule; work continuously for one employer with one contract instead of sequence of contracts of employment; and work at a place and according to a schedule determined by the employer.⁴⁵

³⁸ Thompson, 'The changing nature of employment' (2003) 24 *ILJ* 1798. See also, Spoonley et al *Work and Working in Twenty-First Century New Zealand*, (2004) 29

³⁹ Mills loc cit

⁴⁰ Hanzelova 'Non-standard employment in Slovak Republic.' (2007) Institute for Labour and Family Research, Slovak republic 51.

⁴¹ Ibid.

⁴² Ibid.

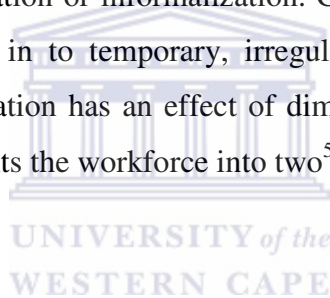
⁴³ Theron 'Employment is not what it used to be' (2004) 25 *ILJ* 1249

⁴⁴ Hanzelova loc cit

⁴⁵ Ibid.

Currently, due to myriads of reasons, some of which are discussed above, there is a shift towards non-standard employment both in developed and developing economies.⁴⁶ This being the situation with regard to those who work within the employment paradigm, an increase in the number of persons who perform work outside the circle of employment relationships has also been recorded worldwide.⁴⁷ This is typically done by portraying the relationship as a commercial arrangement between client and service provider or by designating an intermediary as employer, thereby contracting out the statutory obligations that attach to the employment relationship.⁴⁸ While this is a workplace reality, labour law protections almost universally continue to be centred on the ‘traditional/typical’ employment relationship.⁴⁹ As a result we currently have, all over the world, a tendency whereby workers who should be protected by law are not receiving protection in law or in fact or receiving less protection than those in a standard employment relationships, merely because their relations do not fall within the parameters of standard employment relations.⁵⁰

Put generally, the shift of employment from standard to non-standard employment may take the form of casualization, externalization or informalization. Casualisation pertains to the changing of permanent; full-time employees in to temporary, irregular, fixed-term employees, or part-time employees.⁵¹ Therefore, casualisation has an effect of diminishing the number of permanent full-time employees.⁵² It also fragments the workforce into two⁵³



⁴⁶ Collins ‘Independent contractors and the challenges of vertical disintegration to employment protection laws’ (1990) 10 Oxford Journal of Legal Studies 353

⁴⁷ Van Niekerk op cit 21. In this regard literature identifies different categories of workers ranging from ‘e-lancers’, to dependent contractors and those who are in a disguised employment relationship, where a de facto employment relationship, for various reasons, is given another name. ‘E-lancers’ are workers recruited on the Internet and they have no fixed days or hours of work. They may also have full autonomy as to how the work is performed, and subject only to a deadline.

⁴⁸ Ibid.

⁴⁹ International Labour Office, (2006) ‘The employment relationship’ International Labour Conference, 95th session, Geneva report V(1) 4

⁵⁰ Ibid.

⁵¹ Fenwick et al loc cit 19

⁵² Ibid. It is not a new phenomenon though it is on increase nowadays. It has been taking place in many countries particularly with respect to employees whose skills are readily and easily available, such as, secretarial staff.

⁵³ Dick loc cit 43

Externalization is more drastic than casualization.⁵⁴ It generally pertains to all contractual/commercial arrangements through which employers avoid directly employing workers. It includes arrangements such as subcontracting, outsourcing and use of labour broking.⁵⁵ It increases the number of workers in non-standard employment.⁵⁶ Externalization is justified on a number of grounds; the most common one being that it allows enterprises to focus on their 'core activities.'⁵⁷ It is suggested that in a global market enterprises can only survive and prosper if they keep on becoming more and more focused and specialized.⁵⁸ This idea seems economically quite sensible. However, it is noted by some that the true motivation is an employers' intention to contract out the responsibilities attaching to employment.⁵⁹ This is possible because employers by externalizing employment through outsourcing and/or subcontracting can replace an employment contract, that they should otherwise have with the person actually performing the work and which should have been regulated by labour laws, with some commercial contract which is beyond the regulatory framework of labour laws.

Informalization is defined, by Fenwick et al, as 'a process through which workers are compelled to move from mainstream formal employment to the informal economy.'⁶⁰ According to, Fenwick et al, informalization in the context of employment, creates a class of employees who are de jure covered by labour law but who are in fact unable to enforce their rights.⁶¹ Informal employment worldwide is generally characterized by lack of decent work compared to formal employment.⁶²

⁵⁴ Fenwick et al loc cit 20. It is radical in the sense that it often changes the status of workers from being an employee to independent contractors or at least it involves changing their status of being employees of the person for whom they work while casualization changes the status of employees from permanent full-time employees to temporary, part-time or casual worker of the same employer.

⁵⁵ Cheadle et al, *Current Labour Law* (2004), 139

⁵⁶ Theron and Godfrey, (2006). Its distinguishing characteristic is that it reduces the number of people employed by the enterprise, thereby narrowing the scope of the application of labour law.

⁵⁷ Fenwick et al loc cit 20. That is, the operations and activities in which they have expertise, or areas of business where they have established a competitive advantage.

⁵⁸ Blanpain op cit

⁵⁹ Fenwick et al loc cit 20

⁶⁰ Ibid. 18

⁶¹ Ibid.

⁶² Chen, et al, *Mainstreaming Informal Employment and Gender in Poverty Reduction: A Hand- Book for Policy Makers and Other Stake Holders* (2005) 14

2.5 Legal responses to the changes in the world of work in the international plane

On the international plane, a series of ILO reports since 2000 have identified that the legal protection of workers all over the globe, which is based on the distinction between ‘employees’ and ‘independent contractors’, is not in accord with the reality at workplace level.⁶³ Considerable change has also occurred within the scope of employment relationship, resulting in a proliferation of different forms of employment relationships that do not squarely fit to the full-time permanent employment model, on which labour laws are premised globally. Moreover, the distinction between independent contractors and employees has been blurred.⁶⁴ Hence there have been some moves by the ILO to reconsider the legal scope of the employment relationship in order to extend the protections of labour law to those who need it. In this regard the measures taken with regard to private employment agencies, home workers and the legal scope of the employment relationship are worth noting.

2.5.1 Private employment agencies convention

The ILO adopted a Convention in 1997 to regulate, inter alia, the triangular employment relationship.⁶⁵ This convention though seems at odds with workplace realities in designating the Temporary Employment Agency (TEA) as the employer of the workers it provides for its client, has contributed towards the protection of employees involved in triangular employment relationships. To mention some of its provisions: the convention requires member states to take measures to ensure that workers placed by TEAs are not denied their right to freedom of association and bargain collectively and are not subjected to discrimination.⁶⁶ The convention also requires states to take measures to adequately protect workers placed by TEAs with regard to minimum wages, working time and other working conditions, statutory social security benefits, access to training, safety and health, compensation and maternity protections.⁶⁷

⁶³ See for example, International Labour Office,(2006) ‘The employment relationship’ International Labour Conference, 95th session, Geneva report V(1) 4

⁶⁴ This, it is submitted, has rendered traditional tests developed by courts to distinguish independent contractors from employees incapable of fully addressing the issue.

⁶⁵C 181Private Employment Agency Convention, 1997. ‘Triangular employment relationship’ is defined as a situation where employees of an enterprise (the provider) perform work for a third party (the user enterprise) to whom their employer provides labour or services.

⁶⁶C 181Private Employment Agency Convention, 1997 articles 4 & 5

⁶⁷ C 181Private Employment Agency Convention, 1997 articles 11 (a-j)

2.5.2 The convention on home workers

The ILO has also adopted a convention on home workers.⁶⁸ This convention, among others, is meant to improve the application of international labour standards conventions and recommendations laying down minimum conditions applicable to home workers and accord additional protections that take in to account the unique characteristics of home working.⁶⁹ The convention generally requires states to promote equality of treatment of home workers and other wage earners.⁷⁰ Particularly state parties are required to promote equality of treatment with regard to home workers' right to establish organisations of their choice and participate therein, protection against discrimination in employment, protection in the field of occupational safety and health, remuneration, access to training, maternity protection, minimum age of entry in to work and statutory social security.⁷¹

2.5.3 Employment relationship recommendation

In 1997 there was an attempt by the ILO to adopt a convention on 'contract labour' which was basically intended to regulate disguised employment relationships. Unfortunately the attempt failed, as the social partners could not agree on some of the issues tabled.⁷² Following its failure to adopt the convention on 'contract labour', the ILO has issued a recommendation concerning the employment relationship in 2006.⁷³ The recommendation focuses on the regulation of disguised employment.⁷⁴ The recommendation inter alia proposes that national policies for the protection of workers in an employment relationship should at least combat disguised employment, ensure standards applicable to all forms of contractual arrangements, including those involving multiple

⁶⁸ C177, Home Work Convention, 1996

⁶⁹ C177, Home Work Convention, 1996, preamble

⁷⁰ C177, Home Work Convention, 1996 article 4 (1)

⁷¹ C177, Home Work Convention, 1996, article 4 (2) (a)-(h)

⁷² The incident was noted, by Theron, as the first in the history of ILO where it failed in its standard-setting task. See, Theron 'The shift to service and triangular employment: implications for labour market reform' (2008) ILJ 15

⁷³ R198 Employment Relationship Recommendation, 2006

⁷⁴ R198 Employment Relationship Recommendation, 2006 (I) (4) (b). It defines a disguised employment relationship to include all the situations where an 'an employer treats an individual as other than an employee in a manner that hides his/her true legal status as an employee through contractual arrangements'.

parties, and ensure that standards applicable to all forms of contractual arrangements establish who is responsible for the protection contained therein.⁷⁵

In an effort to combat disguised employment the recommendation proposes that the determination of the existence of employment relationship should be guided primarily by facts relating to the performance of work and remuneration rather than the name given to the contract by the parties.⁷⁶ Moreover it calls on states to lay down a presumption as to the existence of employment relationship upon demonstration of one or more relevant indicators.⁷⁷ However, as a recommendation it is not binding on member states, it will only serve as a guideline for states to consider their laws accordingly. It is important to note that the 2002 amendment to the Labour Relations Act and Basic Conditions of Employment Act in South Africa predates the recommendation.⁷⁸

2.5.4 Relevant European Union (EU) directives

The European Union has taken some sophisticated legislative measures in order to accord protection to some of the kinds of atypical employees that have emerged. What follows is a brief review of the major moves by the EU taken so far to regulate flexible forms of employment.

2.5.4.1 Part-time work Directive

This Directive constitutes one of the first major moves undertaken by the EU to respond to the changing workplace reality. It was issued to implement the framework agreement concluded

⁷⁵ R198 Employment Relationship Recommendation, 2006 (I) (4) (a)-(g). It also proposes that states should take measures to ensure compliance with, and effective application of laws. It also calls upon states to take into account, in their national policies, the protection of specifically vulnerable groups (women, young and older workers and workers in the informal sector, migrant workers and workers with disabilities)

⁷⁶ R198 Employment Relationship Recommendation, 2006 (II) (9)

⁷⁷ R198 Employment Relationship Recommendation, 2006 (II) (13) (a). It provides lists of possible indicators that should give rise to the presumption. It includes inter alia whether the work: is carried out according to and under the direction of the other party; involves integration of the worker in the organization; is performed solely or mainly for the benefit of the other party; is performed within specific working hours or at workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the workers' availability; or involves the provision of tools, materials and machinery by the party requesting the work and periodic payment of remuneration which constitutes the workers' sole or principal source of income.

⁷⁸ See, the Labour Relations Act 66 of 1995 s 200A and the Basic Conditions of Employment Act 75 of 1997 s 83A. Sections 200A of the Labour Relations Act and 83A of the Basic Conditions of Employment Act respectively introduced a rebuttable presumption of the existence of employment contract upon the establishment of any one of the factors listed therein. For more explanation see the discussion on page 40

between Union of Industrial and Employer's Confederation of Europe (UNICE) and the European Centre of Enterprises with Public Participation (CEEP) on the one hand and the European Trade Union Confederation (ETUC) on the other.⁷⁹ The directive states that it has the object of, among other things, eliminating discrimination against part-time workers at the workplace and to assist in the development of part-time work in a manner acceptable to workers and employers.⁸⁰

The directive requires member states, within the context of non-discrimination, to have regard to the Employment Declaration of the Dublin European Council of December 1996 when they design their statutory social security structure.⁸¹ This declaration calls on states to make their social security schemes 'more employment-friendly by developing social protection systems capable of adapting to new patterns of work and of providing appropriate protection to people engaged in such work.'⁸²

The framework agreement also provides that part-time workers shall not be treated in a less favourable manner than 'comparable full-time workers'⁸³ with regard to working conditions.⁸⁴ The principle of *pro rata temporis* is prescribed in all appropriate situations.⁸⁵ It also requires states to take measures to avoid obstacles to opportunities in part-time work.⁸⁶ In addition, it makes it unacceptable to dismiss an employee because an employee has refused to be transferred to part-time worker or vice versa, unless it can be justified by employers' operational requirements.⁸⁷ It

⁷⁹Council Directive 97/81/EC, article 1

⁸⁰ Council Directive 97/81/EC, preamble. As can be seen from the preamble, the framework agreement provides for general principles and minimum requirements relating to part-time work.

⁸¹ Council Directive 97/81/EC, preamble

⁸² Council Directive 97/81/EC, preamble

⁸³ Council Directive 97/81/EC, clause 3 (2). The term 'comparable full-time worker' means a full-time worker in the same establishment having the same type of employment contract or relationship, who is engaged in the same or a similar work/occupation, due regard being given to other considerations which may include seniority and qualification/skills.

⁸⁴ Council Directive 97/81/EC, clause 4 (1). Different treatment that is based on objective grounds is, however, justified.

⁸⁵ Council Directive 97/81/EC, clause 4 (2)

⁸⁶ Council Directive 97/81/EC, clause 5 (1) (a)

⁸⁷ Council Directive 97/81/EC, clause 5 (2)

also stresses that employers should have regard, to the extent possible, to employees' requests to switch from part-time to full-time and the reverse. Employers are also required to take measures, to the extent possible, to provide timely information on the availability of part-time or full-time employment, as the case may be, so as to facilitate transfer from one form of employment to another and facilitate access to part-time workers to vocational training to enhance career opportunities and occupational mobility.⁸⁸

2.5.4.2 Fixed-term workers Directive (FTWD)

This Directive was issued to implement the framework agreement, concluded between the social partners (ETUC, UNICE and CEEP), on fixed-term workers.⁸⁹ The framework agreement on fixed-term workers recognizes both the paramount importance of indefinite employment and the responsiveness of fixed-term employment to the needs of both employers and employees under certain circumstances and aims at preventing abusive use of successive fixed-term contract.⁹⁰

The Directive emphasises the principle of non-discrimination to promote the quality of fixed-term work. It provides that fixed-term workers must not be treated in a less favourable manner than comparable permanent workers in respect of employment conditions merely because of the fixed-term nature of their contract or employment.⁹¹

The Directive provides for minimum working conditions for fixed-term workers.⁹² Furthermore, the Directive requires employers to inform fixed-term workers about vacancies for permanent employment opportunities in the undertaking and as far as possible facilitate access to training opportunities for them.⁹³

⁸⁸ Council Directive 97/81/EC, clause 5 (3)

⁸⁹ Council Directive 1999/70/EC, article 1.

⁹⁰ Council Directive 1999/70/EC, preamble

⁹¹ Council Directive 1999/70/EC. Clause 4 (1). Where appropriate the principle of *pro rata temporis* is prescribed: see clause 4 (2). Comparable permanent worker is defined under clause 3 (2) as a worker with an employment contract or relationship of indefinite duration, in the same establishment, engaged in the same or similar work/occupation, due regard being given to qualifications/skills.

⁹² Council Directive 1999/70/EC, preamble.

⁹³ Council Directive 1999/70/EC. Clause 6 (1) & (2)

The Directive also provides measures that member states shall take to prevent the abusive use of successive fixed-term contracts.⁹⁴

2.5.4.3 The draft Directive on temporary agency workers

Another move worth noting by the European Union with regard to the protection of non-standard employees is the draft Directive on temporary agency workers.⁹⁵ The underlying principle in the draft is ensuring a balance between the need to protect temporary agency workers and the need for allowing sufficient flexibility in labour markets.⁹⁶ It stresses the principle of equal treatment.⁹⁷ It provides that temporary workers posted by agencies must at least receive a working and employment conditions they could have received had they been recruited by the user undertaking itself.⁹⁸ The client is not required to treat them in the same way it is treating its permanent employees but, rather, in the same way it would have treated them had it recruited them on its own.

However, when it comes to the protection of pregnant workers, nursing mothers, children and young workers, it requires employers to comply with protections that are established by legislation, regulations, administrative provisions, collective agreements and/or any other general provisions. Basic working and employment conditions are defined to include only working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other general provisions relating to the duration of working time, overtime, work breaks, rest periods, night work, paid holidays and public holidays and pay.⁹⁹

⁹⁴ Council Directive 1999/70/EC. Clause 5. The following measures are required by states members; objective reasons justifying the renewal of such contracts or relationships; the maximum total duration of successive fixed-term employment contracts or relationships; the number of renewals of such contracts or relationships.

⁹⁵The Draft Directive of the European Parliament and the Council on temporary work, 2002/0072 (COD) article (1) (1). The draft directive applies to workers with a contract of employment or employment relationship with a temporary agency, which are posted to user undertakings to work temporarily under their supervision.

⁹⁶ Ibid. preamble

⁹⁷ Ibid. Article (5) (1)

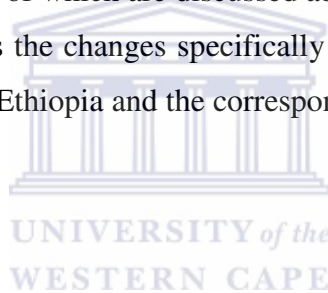
⁹⁸ Ibid. Article (5) (1)

⁹⁹Ibid. Article (3) (1) (f). The basic working and employment conditions listed by the draft directive fall short of those afforded by the Fixed Term Workers Directive (FTWD). For instance, the FTWD provides workers on temporary fixed-term contracts the same access to occupational pension schemes and training as permanent staff and makes it unlawful for such workers to waive their right to a redundancy payment.

The draft directive provides for possibilities by States to derogate from the principle of non-discrimination and regulates it.¹⁰⁰

The draft did not come into force because of lack of consensus on the part of the social partners. However, the Council recently reached a political agreement on a package for the regulation of agency work.¹⁰¹ This it is submitted signals the likelihood of the coming into force of the draft directive.

To sum up, in this chapter it is pointed out that the world of work is undergoing a tremendous change mainly driven by globalization, advanced in technology and demographic factors. Some of the changes such as thorough restructuring of firms, changes in the production system and a shift to non-standard employment present profound challenges to labour law which was designed in advance and without fully foreseeing the changes. Cognizant of the changes the ILO and the EU have so far taken measures, some of which are discussed above, in order to respond to the changing reality. The next chapters discuss the changes specifically with regard to the shift to non-standard employment in South Africa and Ethiopia and the corresponding legal responses so far.



¹⁰⁰ Ibid. Article 5 (2) (3). States, therefore, can derogate from the principle of non-discrimination, but only where there is a collective agreement in place which gives adequate protection to agency workers. And with regard to pay the principle of equal treatment does not apply unless the workers' assignment is to last longer than six weeks or he/she is employed by the agency as a permanent employee and gets paid in between assignments.

¹⁰¹ Council of the European Union, Employment, Social Policy, Health and Consumer Affairs, 2876th council meeting, Press release 9-10 June 2008

Chapter three

Forms and incidence of atypical employment in South Africa and Ethiopia

This chapter focuses on identifying the different forms of atypical employees in South Africa and Ethiopia. It also highlights the trend of non-standardization of employment in both countries.

3.1 A brief overview of the South African labour market

The South African labour market is characterized by high unemployment rate.¹⁰² It is also one of the labour markets with relatively high level of trade unionism. The average trade union coverage is 31 percent.¹⁰³ However, a decline in trade union membership has already been noticed.¹⁰⁴ High income inequality, immigration and a growing informal sector are also among the noticeable features of the South African labour market.¹⁰⁵ The formal sector contributes 64.5% of total employment.¹⁰⁶ South Africa, however, is the economic giant in Africa.¹⁰⁷

3.2. Forms and incidence of atypical employment in South Africa

Flexible forms of employment are not new to the South African labour market.¹⁰⁸ Nonetheless, the kinds and number of workers performing work under flexible forms of employment have considerably increased since the country's integration into the global economy.¹⁰⁹

¹⁰² According to the Labour Force Survey 2007, the unemployment rate is 26.7 %, 25.5% and 23% respectively in the years 2005, 2006 and 2007. See Statistics South Africa, P0210, Table C

¹⁰³ Country trading profile South Africa- labour market <http://emporikitrade.com/uk/countries-trading-profiles/south-africa/labour-market> [accessed on November 1 2008]

¹⁰⁴ Theron & Godfrey Protecting workers on the periphery (Development & Labour Monographs) 2000 UCT 3000

¹⁰⁵ Standing et al Restructuring the Labour Market: The South African Challenge (1996) 106 and Davis and Thurlow, 'Formal-informal linkages and their policy implications in South Africa' (2008) IFPRI, DPRU Conference 27-29 october 2008, 3. See also, the Labour Force Survey, March 2006. According to the Labour Force Survey 2006 the percentage of informal employment has grown from 15.5% in 2004 to 17.6% in 2006.

¹⁰⁶ The Labour Force Survey, March 2006.

¹⁰⁷ The South Africa's economy is ranked, according to the list by the World Bank, first in Africa and 28 in the world in 2007 with a GDP of 277,581, 000, 000 USD. See, "list of countries by GDP (nominal)": List by the World Bank

<[http://en.wikipedia.org/wiki/List_of_countries_by_GDP_\(nominal\)](http://en.wikipedia.org/wiki/List_of_countries_by_GDP_(nominal))> [accessed on April 5, 2009]

¹⁰⁸ Valodia, et al A review of labour market in South Africa: Low-waged and informal employment School of Development Studies University of KwaZulu-Natal (2005) 13. For example it is noted by Valodia et al, that Contract labour and informal employment was among the most conspicuous features of apartheid regimes' labour market.

¹⁰⁹ Makino op cit 2

Theron noted that global economic pressure and technological changes are the main forces behind the rise in non-standard employments in South Africa, while ideology and legislation have also played a significant role.¹¹⁰ He further noted that the increase in non-standard employment in South Africa can be attributed to three interrelated process; casualization, externalization and informalization of employment.¹¹¹

3.2.1 Casual, Part-time and temporary workers

Even though it is difficult to maintain a water tight distinction between these different categories of atypical employees, as they overlap, it is quite important to deal with them separately as their conditions are not all the same. Temporary workers are employees employed on a fixed-term contract of employment.¹¹² Casual workers sometimes referred as, occasional or irregular employees, are defined as ‘employee hired on a periodic basis when the need arises.’¹¹³ They are employed on separate fixed-term contracts normally for a day at a time.¹¹⁴ They often work irregular, indeterminate long daily hours, on weekend and holidays and during the night.¹¹⁵ This class constitutes the most vulnerable group. Part-time employees are defined as those who work substantially less than the ‘normal’ working hours.¹¹⁶ They are usually employed on a continuous basis.¹¹⁷ It is suggested that part-time employees are relatively better off than casuals and temporary workers, as they constitute permanent employees.¹¹⁸ Lack of employment security is common among casual and temporary workers.¹¹⁹ It is submitted that, because of insecure and precarious

¹¹⁰ Theron ‘Employment is not what it used to be’ (2004) 25 ILJ 1248. What is termed as the flexibility debate constituting one of the central issues in current labour law, according to Theron, has had a significant ideological impact on firms to restructure their employment relation.

¹¹¹ Theron ‘Employment is not what it used to be’ (2004) 25 ILJ 1256

¹¹² Theron ‘Employment is not what it used to be’ (2004) 25 ILJ 1250

¹¹³ Ibid.

¹¹⁴ Basson et al Essential labour law (2005) 4th ed 32

¹¹⁵ Mills loc cit 1219

¹¹⁶ Ibid. The normal working hour pertains to the maximum working hour set by the law.

¹¹⁷ Mills op cit

¹¹⁸ Mills loc cit 1219. The distinction between permanent full-time employees and part-time workers is in terms of hours worked per day or week. However, part-time employees are still less well paid as the number of hours they work is less. They also do not benefit from collective bargaining as they often are not organized

¹¹⁹ Ibid.

nature of their employment, most casual workers work under poor working conditions.¹²⁰ This is mainly because of the difficulty they face in exercising their rights though in theory they qualify as employees.¹²¹ The insecure and unstable nature of their employment also makes it difficult to organize them and hence most of them constitute unorganized labour force.¹²²

Despite the paucity of statistical figures on each and every type of the above mentioned kinds of non-standard workers, South African literature indicates, almost invariably, that they have been increasingly in use since the country's re-entry into the globally liberalized market.¹²³

3.2.2 Different forms of externalization of employment relationships in South Africa

Outsourcing, subcontracting and the use of Temporary Employment Services (TESs) are the usual ways of externalizing work in South Africa.¹²⁴ In most cases the relationship involves three persons. Hence, sometimes internationally, the term triangular/tripartite employment relationship is used to refer to all of them though the term triangular employment is often used in South Africa to refer particularly to TESs. A triangular employment relationship, according to ILO Convention on Temporary Employment Agencies, occurs when 'employees of an enterprise (the provider) perform work for a third party (the user enterprise) to whom their employer provides labour or services.'¹²⁵

Another way of conceptualizing these kinds of workers is to regard them as workers who are not directly employed by the company but, rather, supplied through outsourcing, subcontracting or temporary employment agencies (TES as they are known in South Africa).¹²⁶

¹²⁰ Ibid.

¹²¹ Theron 'Employment is not what it used to be' (2004) 25 ILJ 1275

¹²² Bramble and Barchiesi, Rethinking the Labour Movement in the 'new South Africa' (2003), 122. For example, in the retail sector, according to a study conducted in 1999, only 37 % of the non-standard workers were organized while 90 % of standard workers were organized. It was also shown that the hourly wage of the unorganized non-standard workers was 50 % less than that of unionized permanent fulltime workers.

¹²³ See for example, Bramble and Barchiesi, Rethinking the Labour Movement in the 'new South Africa' (2003), 122, Esselaar, "The debate over outsourcing in South Africa: evidence from a case study (2002)" <http://www.commerce.uct.ac.za/Research_Unit/DPRU/Conf2002pdf/Esselaar.pdf> [accessed June 15 2008], and Mills loc cit, 1212.

¹²⁴ Theron and Godfrey (2000) have used the term externalization to refer to variety of 'contracts that remove work from employment relationship to a commercial contract regulated by rules of contract'. This includes all the situations where the circumstance under which work is performed assumes a triangular/tripartite form. Internationally the term triangular employment relationship is used to refer to all the situations where there is externalization, however, in South Africa it is often used to refer to Temporary Employment Services arrangement.

¹²⁵ C 181 Private Employment Agency Convention, 1997

¹²⁶ The Labour Relations Act 66 of 1995, s 198

Outsourcing, as a modality of externalizing work, is defined as ‘an arrangement whereby an activity or service performed by employees within an employer’s business (usually a ‘non-core’ or ‘ancillary’ service such as cleaning, catering or maintenance) is ‘contracted out’ to be performed by an outside party.’¹²⁷ Another way to conceptualise outsourcing is to see it as a job subcontracting often relating to ancillary activities.¹²⁸ It is submitted that employers’ desire to concentrate on their ‘core’ business in pursuit of achieving greater competitiveness, against the backdrop of globalization, together with the advantage outsourcing offers in getting rid of the employment relationship between the outsourcer and workers and its associated responsibilities, while ensuring the performance of the same activity cheaply via others (contractors), have led to increased outsourcing in South Africa.¹²⁹ A study by Bezuidenhout et al also shows an increasing trend in outsourcing in South Africa.¹³⁰

Subcontracting is another variant of triangular employment relationships that has long been in use in South Africa.¹³¹ It can take a number of forms. Subcontracting has been broadly classified by ILO into labour-only and job subcontracting.¹³² In the latter the terms of the contract are based on the completion of a certain task, or delivery of a product or service. In labour-only subcontracting, which is also known as TES in South Africa, the contractor is paid for the number of workers supplied and the amount of time they work. The employee of the contractor work alongside the company’s other employees, but they are paid by the contractor, their official employer.¹³³

¹²⁷ Esselaar, “The debate over outsourcing in South Africa: Evidence from a case study”

<http://www.commerce.uct.ac.za/Research_Unit/DPRU/Conf2002pdf/Esselaar.pdf> [accessed June 15 2008]

¹²⁸ International Labour Office, *Contract Labour* (Geneva, 1997) 20

¹²⁹ Ibid. It is suggested that it is not uncommon to notice the person/entity to whom the work/service is outsourced offers to employee those workers who were previously performing the work for the employer, but at relatively less favourable terms.

¹³⁰ Bezuidenhout, et al ‘Non-standard employment and its policy implications’, Report submitted to the Department of Labour, 30 June 2004. See also, Kenny & Bezuidenhout ‘Fighting sub-contracting: Legal protections and negotiating strategies, South African Labour Bulletin (1999) 23 (3)

¹³¹ Kenny and Bezuidenhout, ‘Contracting complexity and control: An overview of the changing pattern of subcontracting in the South African mining industry’, (1999) *The Journal of the South African Institute of Mining and Metallurgy*, 185

¹³² International Labour Office, *Contract Labour* (Geneva, 1997), 20. In labour-only subcontracting, the contractor is paid for the number of workers supplied and the amount of time worked.

¹³³ Both the LRA and the BCEA regard the TES as the legal employer. See the Labour Relations Act 66 of 1995, s 198 (1) and the Basic Conditions of Employment Act 75 of 1997, s 82 (1). TES is defined under the LRA as ‘ any person who, for reward, procures for or provides to a client other persons who render services to or perform work for, the

TES is the most widely used form of externalizing the employment relationship in South Africa. Despite the paucity of statistical figures to get a complete picture of the rise in the number of workers provided by TESs, it can be assumed from the increase in using TES employees by employers coupled with results of some research conducted in particular sectors or industries, that the number of employees provided by TESs is increasing in South Africa.¹³⁴ Indeed, the use of labour subcontracting has increased particularly in the mining and construction sectors.¹³⁵ In this form of relationship it is the TES that the law (the LRA and the BCEA) considers as the employer whereas in fact the 'client' may be the one making important decisions and is in control of the workplace. It is suggested that employees provided by TES are less secure. The contract of employment between the TES and an employee very often contains a clause that provides that the employment relationship shall terminate if the client for whatsoever reason communicates to the employer that it wishes to do so.¹³⁶ Like other forms of flexible work it allows employers to attain some level of flexibility and cut costs, while exposing workers to less stable and secure employment and worse working conditions.¹³⁷ It also fragments the workforce and hence weakens unions. Buhlungu suggests that 'subcontracting probably is the single most serious threat to workers solidarity in post-apartheid South Africa.'¹³⁸

3.2.3 Other forms of non-standard employees

Home workers and dependent 'independent' contractors are other types of atypical employees in South Africa.

Home working pertains, according to Godfrey et al, to 'work that is home-based, involves an employment relationship, and, in the case of the owner of the enterprise, involves a relationship of

client and are remunerated by the temporary employment service'. See the Labour Relation Act 66 of 1995, s 198 (1) (a & b)

¹³⁴ See for example, Theron, 'Intermediary or employer? Labour brokers and the triangular employment relationship' (2005) 26 *Industrial Law Journal*, 622 and Theron et al, 'The rise of labour broking and its policy implications' (2005) *Development and Labour Law Monograph* 1/2005, 9

¹³⁵ Buhlungu, *State of the Nation* (2007) 256

¹³⁶ Hutchinson and Le Roux 'Temporary employment services and the LRA: Labour brokers, their clients and the dismissal of employees' (2000) 9(6) *Contemporary Labour Law* at 56.

¹³⁷ Kenny and Bezuidenhout op cit

¹³⁸ Buhlungu op cit

economic dependence on a supplier or intermediary that is akin to an employment relationship.’¹³⁹ Research conducted by Godfrey et al in 2005 in the clothing sector showed that home working is on the rise in South Africa in that particular sector.¹⁴⁰ Home working is identified as one of the most precarious forms of employment. This is due to the difficulty it poses for institutions in enforcing minimum conditions of employment and the difficulties associated with identifying and organizing home workers.¹⁴¹ It is also indicated that most home working operations do not comply with labour statutes and bargaining council agreements.¹⁴²

Dependent ‘independent’ contractors constitute another category of atypical employees. Often it is a consequence of employers’ attempts to disguise the employment relationship.¹⁴³ Thus, employers with a view to cutting their costs, which in turn will help them to stay competitive in the market, resort to disguising a true employment relationship by giving a different name to the contract and allowing a certain level of autonomy to the employee, while the latter is economically or in fact dependent on the employer.¹⁴⁴ There has been an increase in the number of own-account employees in South Africa.¹⁴⁵

3.3 Overview of the labour market in Ethiopia

Ethiopia is a country with high and increasing unemployment rate.¹⁴⁶ Among the employed persons, in the urban areas, unpaid family workers and self-employed persons represent 51.4 and 44



¹³⁹ Godfrey et al ‘Home working in the south African clothing industry: The challenges to organization and regulation’ (2005) Monograph 2, Labour and Enterprise Project University of Cape Town 13

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Benjamin ‘An accident of history: Who is (and should be) an employee under the South African labour law’ (2004) 25 ILJ 789. This is basically due to the fact that protection is accorded to workers based on the distinction between ‘employees’ and ‘independent contractors’.

¹⁴⁴ Mills loc cit 1203

¹⁴⁵ Quarterly Labour Force Survey, Quarter 1 and Quarter 2, 2008, table 3.6. The table shows that in the period between January-march 2008 the number of own-account employees in South Africa was 1,279,000 and has increased up to 1,286,000 in the period between April-June 2008.

<http://www.statssa.gov.za/PublicationsHTML/P02112ndQuarter2008/html/P02112ndQuarter2008.html> September 10, 2008

¹⁴⁶ See, Urban employment unemployment survey, (2006) Central Statistical Agency, Statistical bulletin 373, table 1.15. In the period between 1999 and 2004 the employment rate in urban areas declined from 48.2 to 40.9 percent.

percent respectively.¹⁴⁷ The informal sector offers employment to a significant portion of the population.¹⁴⁸

The Confederation of Ethiopian Trade Unions (CETU) consists of nine federations and had a total membership of 181,647 workers organized in 445 trade unions in 2006, which was less than one percent of the total labour force in the country. The fact that the large majority of the labour force is employed in agriculture, mostly in unpaid jobs or self-employment, makes it difficult for them to get organized.

3.3.1 Forms and incidence of atypical employment in Ethiopia

Despite the paucity of literature to provide exact figures on non-standard employment relationships in Ethiopia, it can be established that some of the kinds of atypical employment relationships have been in place for a long time and some have been recently introduced into the Ethiopian labour market. It can even be assumed that relatively new phenomena such as outsourcing and subcontracting are on the rise.¹⁴⁹ This is evident from the emergence of Private Employment Agencies (PEAs) that render services, basically of cleaning and security, and medium scale subcontractors.

In dealing with the incidence of non-standard employment in the Ethiopian context, however, two points are worth remembering. First is the country's non-membership to the World Trade Organization so far. The country is still in the process of accession into the world trading system. This is important because liberalization will inevitably increase the competition among producers or service suppliers, which in turn may cause firms among other things to go for more flexible work arrangements. Thus it can be assumed that such accession may create an atmosphere that breeds and fuels most of the changes happening in the world of work discussed above. The second point is the poorly performing private sector of the economy as compared to South Africa.¹⁵⁰ However, the

¹⁴⁷ Ibid. Table 1.16

¹⁴⁸ Ibid. Table 1.26, employment in the informal sector, in the urban areas, constituted 45.8 percent of the employed persons in 2004.

¹⁴⁹ De Gobbi, Labour market flexibility and employment and income security in Ethiopia: Alternative considerations, (2006) International Labour Office, p 21. A high level of flexibility and insecurity at the same time emerges from the fact that employment nationwide is mainly in agriculture as a sector, in self-employment as status, and informal in nature. The number of Private Employment Agencies registered to perform private employment service in Addis Ababa had reached 56 in June 2008. This is found from the official record of the Addis Ababa City Administration civil and Social Affairs Bureau, which is entrusted with the power, to give licenses to PEAs operating in the city. It is also indicated that there are some Private Employment Agencies operating without having the license to do so or with a license that has already been cancelled for different reasons.

¹⁵⁰ The private sector, for example, took only 16.5% of the total employment in urban areas in 2004. See the National Labour Force Survey, (2004) Central Statistical Agency, table 1.17

private sector in urban areas offers employment for a significant portion of the society, though often it is in the form casual work or fixed-term employment.¹⁵¹ Generally it can, however, be submitted that effects of globalization and the advancing technology in the world of work are being felt one way or the other, though the extent may not be the same as in South Africa.

From the interviews and limited literature available the following forms of atypical employees were identified in Addis Ababa: part-time workers, home-workers, dependent contractors and workers in outsourced and subcontracted jobs. The national labour force survey conducted in 2005 by the Central Statistical Authority shows that the Ethiopian labour force consists of, among others, self-employed, temporary, casual and contract workers.¹⁵² The highest number of temporary, contract and casual workers is recorded in the construction sector.¹⁵³

Like the situation everywhere these classes of employees are generally less protected than the permanent workforce. Some of them are explicitly excluded from the scope of application of the Labour Proclamation No. 377/2003.¹⁵⁴ Those who are supposedly covered by the labour proclamation are less protected or they do not in fact enforce their rights. It is also hardly possible to find them organized.¹⁵⁵ Almost all of them in Addis Ababa constitute an unorganized labour force.¹⁵⁶ They also hardly benefit from skills development training at the workplace.¹⁵⁷

Part-time employment is commonly used among private colleges in Addis Ababa. According to the interviews conducted in three private colleges, part-time employees are not conceived, unlike in South Africa, as belonging to the permanent work force of the workplace where they work as part-timers.¹⁵⁸ This is due to the fact that most of them are people who are permanently employed

¹⁵¹De Gobbi op cit.

¹⁵²National Labour Force Survey (2005) Central Statistical Agency, table 7.5

¹⁵³ Ibid.

¹⁵⁴ See for example, article 3 & 46 of the Labour Proclamation No. 377/2003. Those who perform work without there being employment contract are totally excluded and with regard to home workers it is provided that they are not automatically entitled to all the protections under the proclamation.

¹⁵⁵ Interview with, Ato Birhanhiwt Libanos, Senior Expert of Industrial Relations and unionisation department of Confederation of Ethiopian Trade Unions (CETU) [July 5, 2008]

¹⁵⁶ Ibid.

¹⁵⁷ Interview with, Ato Birhanhiwt Libanos ,Senior Expert of Industrial Relations and unionisation department of Confederation of Ethiopian Trade Unions (CETU), [July 5, 2008]

¹⁵⁸ Interviews with, Ato Kifle beyen, Administration Department Head, Alpha University College, W/o Fantaye Awash, Personnel department Head, Unity University College and Ato Desalegne berihe, Assistant Administrator of the Law Faculty, Saint Mary College. [July 10, 2008]

somewhere else.¹⁵⁹ Almost all of them in the colleges that the interviews covered are employed on a fixed-term contract that lasts only for a semester and it is within the exclusive prerogative of their employer to renew the contract or to terminate it upon the expiry of the semester.¹⁶⁰ As the amount of time they work is considerably less than normal working hours, they earn less and do not benefit from any kind of social security scheme and collective representation. Because of the joint nature of their work they usually work on weekends and get no or little chance to attend training.¹⁶¹

Fixed-term employees are another category of non-standard employees in Ethiopia. They are defined in the Labour Proclamation as employees who perform work under a contract of employment for a definite period of time or a specific project.¹⁶² It is generally submitted that this class of employees are less secure.¹⁶³ Mostly they are not organized¹⁶⁴ and have less access to vocational training.¹⁶⁵

Home working is another form of employment that has been traditionally in use in Ethiopia. Though there is no evidence to establish whether the use of this form of atypical employment is rising or not in Addis Ababa, a rapid assessment conducted by Ministry of Labour and Social Affairs (MOLSA) indicates that there are workers who perform work for another person from their home or any other place of their choice.¹⁶⁶ The study showed that almost all of the workers work under a contract for a definite period or a specific task.¹⁶⁷ It also indicated that only 17% of those

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² The Labour Proclamation No. 377/2003 s 2, 4 and 10 read together. The proclamation provides an exhaustive list of circumstances under which fixed-term employment is allowed. In all other cases the contract of employment is deemed to be for permanent employment. See the discussion under chapter three.

¹⁶³ Yehenew, Labour market flexibility and employment income insecurity: Legal and institutional frame work (2005) 3 www.ilo.ch/public/english/employment/strat/download/bg2.pdf [accessed on 18/06/2008]

¹⁶⁴ Interview with Ato Birhanhiowt Libanos, Senior Expert of Industrial Relations in the unionisation department of Confederation of Ethiopian Trade Unions (CETU) [July 5, 2008]

¹⁶⁵ Ibid.

¹⁶⁶ Negaligne, Rapid assessment on home work contract, Ministry of Labour and Social Affairs, Industrial Relation Department (2008). [Translation mine] See also proclamation No. 377/2003, article 46. It provides that a home-working contract exists when a person habitually performs work for an employer in his home or any other place freely chosen by him in return for a wage, without any direct supervision or direction.

¹⁶⁷ Ibid.

who are interviewed get annual leave, only 25% are given maternity leave and 50% do not benefit from weekly rest days and holiday leaves.¹⁶⁸ They are not totally organized.¹⁶⁹

Concerning triangular employment relationships in Addis Ababa, the use of private employment agencies (PEAs), subcontracting and outsourcing is known. However, all of these kinds of employment are only just emerging. This makes it difficult to find statistical information.

The number of registered/licensed private employment agencies (PEAs) in Addis Ababa has now reached 56. PEAs perform as intermediaries to bring employers and those who seek work together without being a party to the employment contract, and/or render a service of making workers available, locally or internationally, to third parties (client/user enterprises) by concluding a contract of employment with the workers.¹⁷⁰ Thus, in instances where they perform the second function, which is the focus of this paper; they are employers for all legal purposes while, in fact, the client is the one in complete control of the workplace and who decides on important aspects of work.

Subcontracting labour is also known, though not widely and formally in use.¹⁷¹ It is in use in the construction sector in Addis Ababa. Some construction companies make use of job-subcontracting.¹⁷²

Despite an acute shortage of information on outsourcing practices in Addis Ababa, it is quite discernable that very recently employers have started to outsource mainly their cleaning and security services.¹⁷³ This can be supplemented by the fact that persons or institutions providing

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Private Employment Agency Proclamation No. 104/1998, art. 2 (1) (a & b)

¹⁷¹ Seleshi, 'Subcontracting strategy for the Ethiopian Micro and Small Enterprises' (2001) Ethio-German Micro and Small Enterprises Development Program, 16

¹⁷² For example, there were 250 workers employed by subcontractors and working for sunshine construction at the time this interview was conducted. Interview with, Ato Gobeze Asebe, head of the human resource division of the sunshine construction company. [July 20, 2008]

¹⁷³ The interview with Ato Birhanhiwot Libanose, Senior Expert of Industrial Relations in the unionisation department of Confederation of Ethiopian Trade Unions (CETU) [July 5, 2008], showed that some institutions both in the public and private sectors, such as National Bank, Road Transport Authority, Ethiopian air lines, Unity university college, Kharafi construction, have recently outsourced their security and cleaning services.

security and cleaning services have emerged in the past few years. The reasons for outsourcing, some of the employers who have outsourced their security and cleaning services have said, is primarily to get rid of the concomitant responsibilities of employment relationship and reduce administrative burdens and costs.¹⁷⁴ It is done by entering in to a commercial agreement with persons or companies that hold themselves out to render these services with their own labour force.



¹⁷⁴ Interviews with Hiruy Girma, A Site Agent for Kharafi Construction Company and Fantaye Awash, Personnel Department Head, for Unity University College. [august 3, 2008]

Chapter four

4 The legal regulation of atypical employment relationships in South Africa and Ethiopia.

The extent and nature of the regulation of atypical employment relationships in both jurisdictions constitutes the theme of this chapter. Therefore, investigation is made to expose areas where the laws fail to protect atypical employees equally with those in standard employment relationships. An assessment of amendments made to accord protection to this class of employees is also made.

4.1 Protection of atypical employees under the South African labour law

The South African labour market is mainly regulated by the Constitution,¹⁷⁵ the 1995 Labour Relations Act (LRA),¹⁷⁶ the Basic Conditions of Employment Act (BCEA),¹⁷⁷ the Employment Equity Act (EEA)¹⁷⁸ and the Skills Development Act (SDA).¹⁷⁹ Below, a critical analysis of these laws, particularly the Constitution, the LRA and the BCEA, is made with regard to the protection they accord to atypical employees.

4.1.1 The Constitution

The coming into force of the country's first democratic constitution in 1994 had a major impact on labour relations. It laid a firm constitutional base for employment and labour relations.¹⁸⁰ It devoted one section to entrench labour rights.¹⁸¹ All major labour laws, except the Employment Equity Act, enacted thereafter have, as one of their main purpose, to give effect to this constitutional provision.¹⁸² Section 23 (1) of the constitution provides that 'everyone has the right to fair labour

¹⁷⁵ The Interim Constitution of the Republic of South Africa 1994. The interim constitution was replaced by the final constitution in 1996 and section 27 of the interim constitution that dealt with 'labour rights' has been superseded by section 23 of the final constitution.

¹⁷⁶ The Labour Relations Act 66 of 1995

¹⁷⁷ The Basic Conditions of Employment Act 75 of 1997

¹⁷⁸ The Employment Equity Act 55 of 1998

¹⁷⁹ The skills Development Act 97 of 1998

¹⁸⁰ Du Toit et al Labour Relations Law: A comprehensive Guide (2006) 5th ed

¹⁸¹ The Constitution of the Republic of South Africa 1996, s 23

¹⁸² See for example, S 1(a) of the Labour Relations Act 66 of 1995 and s 2 (a) of the Basic Conditions of Employment Act 75 of 1997. The Employment Equity Act gives effect to section 9 of the constitution. See, the Employment Equity Act 55 of 1998, preamble.

practices.¹⁸³ At face value it seems to apply to everyone; however, the overall reading of the section shows that the section applies to a worker-employer relationship.¹⁸⁴ It has been suggested by Benjamin that the section should be interpreted purposively to protect all those who need the protection of the law. Accordingly the section should apply not only to ‘employees’ (those who perform work under the common law contract of employment) but also to those who work for another in a relationship of economic dependence without there being common law contract of employment.¹⁸⁵ This purposive interpretation has also been supported in SANDU III¹⁸⁶ when the Constitutional Court held; that the section applies to those whose relationship is based on employment contract and those who are in relationship that is ‘akin to employment relationship.’¹⁸⁷ This interpretation it is submitted will accord protection to dependent contractors. It is against this back ground that the major labour laws are enacted and ought to be interpreted.

4.1.2 The Labour Relations Act 66 of 1995 (LRA)

The LRA constitutes one of the major pieces of labour legislation in South Africa enacted among other things to give effect the ‘labour clause’ of the constitution.¹⁸⁸ The protections accorded by the LRA are available only to employees. This makes the meaning ascribed to the term ‘employee’ crucial. The word ‘employee’ is defined under the LRA as; ‘(a) any person, excluding an independent contractor, who works for another person or for the state and who receives, or is entitled to receive, any remuneration; and (b) Any other person who in any manner assists in carrying on or conducting the business of an employer.’¹⁸⁹

¹⁸³ The Constitution of the Republic of South Africa 1996, s 23 (1). The constitution also recognizes inter alia workers’ right to form trade unions, to organize and engage in collective bargaining.

¹⁸⁴ Cheadle et al South African Constitutional Law: The Bill of Rights (2006) 18. The constitution uses the word worker in the subsequent sub-sections. Worker-employer relation, it is suggested, encompasses all relationships ranging from the employment relationship in its strict sense - based on common law contract of employment- to those who are economically dependent on the person for whom they work though they might not be working under the common law contract of employment.

¹⁸⁵ Benjamin ‘ An Accident of History: Who is (and Who Should Be) and Employee under South African Labour Law’ (2004) *ILJ* Vol. 25 787 p 802 and 804.

¹⁸⁶ SANDU v Minister of Defence & others (1999) 20 *ILJ* 2265 (CC)

¹⁸⁷ Ibid.

¹⁸⁸ The Labour Relations Act 66 of 1995, s 1 (a)

¹⁸⁹ The Labour Relations Act 66 of 1995, s 213

It has been held that the first prong of the definition applies to all persons who perform work under the common law contract of employment (*locatio conductio operarum*).¹⁹⁰ The definition expressly excludes only independent contractors. So, legally speaking, all atypical employees, except independent contractors, fall within the meaning of employee for all intents and purposes.

To distinguish an employee from an independent contractor judges have developed different tests. The first test adopted is what is known as the 'control test'.¹⁹¹ According to this test to say the relationship is that of employment the person for whom the work is done must have the right to prescribe to the employee what work is to be done and how it is to be done. The second test called the 'organization' or 'integration' test emphasises on whether the worker is integrated in the employer's organization or not.¹⁹² According to the third test which is the 'dominant impression test', no one indicator is decisive; rather, an examination should be made into the whole relationship so as to reach on the dominant impression as to whether the relationship is based on a contract of employment or a contract for performance of independent service.¹⁹³ It is, however, correctly suggested that a test based on economic realities would better go in line with the main purpose of labour law i.e. protecting those who are vulnerable.¹⁹⁴

Regarding the issue whether courts should take a contractual relationship not to be an employment relationship because the parties have labelled it so, the LAC in the SA Broadcasting case¹⁹⁵ held that the nature of the relationship 'must be gathered primarily from the construction of the contract and the realities of the relationship, not simply from the way they have described it.'

¹⁹⁰ SA Broadcasting Corporation v McKenzie (1999) 20 ILJ 585 (LAC) at 588D

¹⁹¹ See for example, LAD Brokers (Pty) Ltd v Mandla [2001] 9 BLLR 993 (LAC). See also; Colonial Mutual Life Association v Macdonald 1931 AD 412 at 426.

¹⁹² Bank voor Handle en Scheepvaart NV v S latford [1953] 1 QB 248 (CA) at 295. The question is whether the person works as part and parcel of the organization or whether the work although done for the business, is not integrated in to it but is only accessory to it. Kahn Freund argued that the English courts should accept 'organizational test' rather than the control test. He argued the 'control test' was not sufficient when there was a combination of managerial and technical elements in a contract of services. See, Kahn-Freund, 'Servants and independent contractors' (1951) 14 Modern Labour Review 504

¹⁹³ Smit v Workmen's Compensation Commissioner 1979 (1) SA 51 (A). This test has also been criticised, by Mureinik, for it fails to say anything about the legal nature the contract of employment and gives no assistance in difficult cases on the border between employment and self employment. See, Mureinik 'The contract of service: An easy test for hard cases' (1980) 97 SALJ 258

¹⁹⁴ Du Toit et al op cit, 78

¹⁹⁵ SA Broadcasting Corporation v McKenzie [1999] 1 BLLR 1 (LAC) at 10

The second paragraph of the definitional article does not require remuneration and it is not even necessary to have a contract of employment. It is suggested that this paragraph could have been used by courts even to protect ‘independent contractors’ who are economically dependent on the person for whom they work.¹⁹⁶

It is against this back ground that the amendments to the LRA and BCEA were introduced in 2002. Section 200A and 83A of the LRA and BCEA respectively have enhanced the protection of ‘dependent contractors.’ They provide for a rebuttable presumption that an employment relationship exists upon establishment of one of the seven listed grounds irrespective of what the contract purports to be.¹⁹⁷ It has the effect of shifting the burden of proof to the employer who then has to prove that an employment relationship does not exist on balance of probabilities to rebut the presumption.¹⁹⁸

In this regard NEDLAC has issued ‘The Code of Good Practice Who is an employee’?¹⁹⁹ It offers a guideline in determining whether a person is an employee or independent contractor and requires any person making such a determination, in terms of all labour laws, to take the Code into

¹⁹⁶Du Toit et al op cit, 73

¹⁹⁷The Labour Relations Act 66 of 1995, s 200A and the Basic Conditions of Employment Act 75 of 1997 s 83A. The grounds upon whose establishment the presumption must be taken includes; the manner in which the person works is subject to the control or direction of another person; the person’s hours of work are subject to the control or direction of another person; in the case of a person who works for an organisation, the person forms part of that organisation; the person has worked for that other person for an average of at least 40 hours per month over the last three months; the person is economically dependent on the other person for whom he or she works or renders services; the person is provided with tools of trade or work equipment by the other person; or the person only works for or renders services to one person.

¹⁹⁸Du Toit et al op cit 79. It is also important to note that the presumption applies only with respect to workers earning less than a maximum threshold of income which is decided by the Minister of Labour. Currently the threshold is fixed at R 149 736 per annum and those persons earning in excess of this threshold must prove that they are employees to claim any protection under the LRA and BCEA. See GN 100 in 30720, 2008-11-17

¹⁹⁹ The Code of Good Practice: Who is an Employee? GNR 1774 in GG 30720, 1 December 2006, item 2. The code has the purpose of; ‘promoting clarity and certainty as to who an employee is, ensuring that a proper distinction is maintained between employment relationship and independent contracting, ensuring that all employees who are not on equal bargaining positions with their employer are protected through labour laws and are not deprived of these protection through different contracting arrangements, help judges and commissioners understand and interpret variety of employment relationships that are present in the labour market, including disguised, ambiguous, atypical and triangular employment relationships’. In this regard the code does not only elaborate on the seven circumstances that are relevant in determination of whether a person is an employee or not but also provides for some factors that may be relevant such as remuneration and benefits, being a member of same medical aid or pension scheme with other employees of the employer, the inclusion of payments in kind for items such as food, transportation or weekly rest periods and annual leaves and provisions rewarding years of service in a contract. The code finally provides that courts or tribunals must decide whether a person is an employee or not based on the ‘dominant impression’ gained after considering the matrix of factors that emerge from the examination of the realities of the parties’ relationship.

account.²⁰⁰ It is submitted that the code will contribute towards the realization of extending labour law's protection to 'dependent contractors'.

Though it is clear that the definition of the term 'employee' under the LRA is broad enough to cover all forms of atypical employees, including those in the informal sector, thereby equally entitling them to protections under it, there are, however, certain problems with the law to fully protect atypical employees on equal footing with those in the standard employment relationship.

One such area has to do with collective bargaining system. Labour law is designed in such a way that collective bargaining takes a centre stage position. The law provides a floor of rights, and leaves significant part of the relationship to be determined through voluntary collective bargaining.²⁰¹ Atypical employees like permanent full-time employees have the right to form trade union and engage in collective bargaining.²⁰²

The collective bargaining system, however, as it stands now is not capable of fully addressing the needs of the non-standard employees. This is so because, first, organizational rights²⁰³ are accorded to trade unions on the basis of their level of representation at the workplace and 'workplace' is defined as a place or places where the employees of an employer work.²⁰⁴ In instances where an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organization workplace is the place or places where employees work in respect of each independent operation. In all other cases where an employer operates in different places without each being independent of one another these different place do not constitute different workplaces.²⁰⁵ Secondly, organizational rights are limited to employees employed in workplaces as it is defined above and some atypical employees such as; home-

²⁰⁰ Ibid. Item 3 (a-d).

²⁰¹ Explanatory Memorandum prepared by the Ministerial Task Team, published in (1995) 16 ILJ 278 at 292.

²⁰² This follows from the fact that most of atypical employees fall within the legal definition of the term 'employee'. It is, however, noticed that globalization and other related processes such as technological advances have resulted in casualisation, externalisation and informalisation of employment which in turn has segmented and fragmented the workforce.

²⁰³ See The Labour Relations Act 66 of 1995 s 11-22. Organizational rights that are available for a registered trade union, or two or more registered unions acting jointly which have sufficient representation in a workplace are; access to workplace (s 12), stop-order facilities (s 13), and leave to fulfil union duties (s 15 (1)). While a registered trade union, or two or more unions acting jointly which have majority representation in a workplace are entitled to elect trade union representatives if the union has at least ten members and the right to disclosure of information in addition to rights available to sufficiently representative trade unions. See s 14 and s 16 of the LRA.

²⁰⁴ The Labour Relations Act 66 of 1995 s 213

²⁰⁵ The Labour Relations Act 66 of 1995 s 213

workers, employees placed by TESs and dependent contractors, do not work in the conventional workplaces.

To have this definition of ‘workplace’ and make some rights depend on the attainment of ‘sufficient representation’ or ‘majority representation’ as the case may be, in a century where the work force is highly segmented and its solidarity is put under threat, it is submitted, will make it extremely difficult for atypical employees to get organized and achieve the required representation to enable them enjoy the organizational rights. In addition, some kinds of atypical employment may mean that there is no ‘workplace’. In this regard one can think of the situation of TES employees and home workers.

Another area where the LRA fails to adequately protect atypical employees is related to Temporary Employment Services (TES). Both the LRA and BCEA designate the TES as employer of the employees placed by the TES.²⁰⁶ The test that must be fulfilled to regard the TES as an employer is whether procurement and payment of wages are made by the TES or not. If the answer is in the affirmative then the TES is the employer to all intents and purposes irrespective of the length of time the employee is going work for that particular client. It is suggested that the lack of any limitations in respect of time has allowed employers to permanently outsource recruitment and employment functions.²⁰⁷ Employees are without security of employment because the client’s decision to terminate employment of work is conveyed from the client to the employment service and therefore falls outside of the employment relationship and beyond the reach of labour law.²⁰⁸ This is so because dismissal is defined as termination of contract of employment by the employer, in this case the TES. Both the LRA and the BCEA provide for a joint and several liability of the client in cases of contraventions of BC collective agreements, the BCEA, binding arbitration awards and a determination made in terms of the wage act by the TES. However, this shared responsibility of the client does not extend to instances of contraventions of the LRA.²⁰⁹

Another area where the LRA fails to protect atypical employees equally is with regard to employment security of fixed-term employees. Concerning fixed-term employees the LRA defines employers’ refusal to renew a fixed-term contract when an employee has a reasonable expectation of renewal upon expiry of the specified period, or offer to renew a contract on less favourable terms

²⁰⁶ The Labour Relations Act 66 of 1995 s 198 (2) and the Basic Conditions of Employment Act 75 of 1998 s 82 (1)

²⁰⁷ Theron ‘Employment is not what it used to be’ (2004) 25 ILJ 1277

²⁰⁸ Mills op cit 1226

²⁰⁹ The Labour Relations Act 66 of 1995 s 198 (4)

as one species of dismissal.²¹⁰ This protects employees who are able to prove a reasonable expectation of renewal on their side. However, the law does not prohibit employers from placing employees consecutively on a fixed-term or temporary arrangements. It is submitted that employers should not be allowed to misuse fixed-term and temporary employment arrangements by making their employees enter into a series of contracts one after another just to avoid indefinite employment. There is also no legal obligation on employers to assist workers in fixed-term employment to graduate into permanent employment as is the case under the EU Directive on fixed-term employees.

4.1.3 The Basic Conditions of Employment Act (BCEA)

The Basic Conditions of Employment Act (BCEA) is another important piece of legislation that lays down minimum conditions of employment with regard to hours of work, annual leave, sick leave, maternity leave, severance pay, and notice pay that are applicable to employees. It defines the term employee in the same manner as the LRA.²¹¹ Thus all the discussion above dealing with the LRA with regard to who is covered by the law is apposite.²¹² In fact the BCEA provides for sectoral determination of working conditions including minimum wages by the Minister of Labour. This can be used to enhance protection of atypical employees by making sectoral determination in sectors where atypical employees are rampant. Thus, in 2002 the minister issued the first sectoral determination that applies to domestic workers without regard to whether they are employed through employment services or work as independent contractors.²¹³

However, there are certain provisions of the BCEA that accord less protection or exclude certain types of non-standard employees from certain protections. This includes section 19, 28 and 36 that limit the application of chapters three, four and five respectively to employees who work for more than 24 hours a month for an employer.²¹⁴ Section 27 also excludes some atypical employees from

²¹⁰ Labour Relations Act 66 of 1995 s 186 (1) (b)

²¹¹ The Basic Conditions of Employment Act 75 of 1998 s 1

²¹² Therefore, legally speaking, the floor of rights provided under the BCEA applies to all employees – standard or non-standard.

²¹³ Sectoral Determination Seven: Domestic worker sector, Government Gazette, No. 2373215, August, 2002, Part A s (1) (1) (a & b).

²¹⁴ The Basic Conditions of Employment Act 75 of 1998 s 19 (1), 28 (1) and 36 (1). Chapter three, four and five of the BCEA are about leave, particulars of employment and remuneration and benefits up on termination of employment respectively.

the benefit of family responsibility leave.²¹⁵ Section 6 limits the applicability of the chapter regulating working time by excluding inter alia employees engaged as sales staffs who travel to the premises of customers and who regulate their own hours of work and employees who work less than 24 hours a month for an employer. This it is submitted excludes quite a few non-standard workers. Another noticeable short coming of the BCEA in protecting atypical employees on an equal footing relates to sick leave. It defines a sick leave cycle as ‘a period of six months’ of employment with the same employer immediately following the employees’ commencement of employment or the completion of that employee’s prior sick leave cycle’.²¹⁶ This totally excludes those who are in employment relationship with one employer for a period less than six months from the benefit of paid sick leave.

Thus, despite the fact that all atypical employees are included in the definition of employees both under the LRA and BCEA, the laws are not designed to equally protect atypical employees with those in the standard employment relationship on equal basis.

4.2. The Legal Protection of Atypical Employees in Ethiopia

The legal regime that governs employment and labour relations in Ethiopia in the private sector is basically composed of the 1991 Constitution of the Federal Democratic Republic of Ethiopia and the Labour Proclamation No. 377/2003. Hence a critical analysis of the protections they accord to atypical employees is made here.

4.2.1 The Constitution of the Federal Democratic Republic of Ethiopia (the FDRE Constitution)

The FDRE constitution adopted in 1995 devotes one article to entrench labour rights under the heading economic, social and cultural rights.²¹⁷ The constitution provides inter alia for workers’ right to form associations to improve their conditions of employment and economic well-being.²¹⁸ It further states that the right includes the right to form trade unions and other associations to bargain collectively with their employers and it also entrenches their right to strike.²¹⁹ With regard

²¹⁵ Basic Conditions of Employment Act, s 27 (1) Those who has not been in employment relation with an employer for longer than four months and who do not at least work four days a week are excluded from the section.

²¹⁶ The Basic Conditions of Employment Act 75 of 1998 s 22 (1) (a & b)

²¹⁷ The Constitution of the Federal Democratic Republic of Ethiopia 1995, art 42

²¹⁸ Ibid. Art 42 (1) (a)

²¹⁹ Ibid. Art 42 (1) (b)

to government employees' right to form trade unions and/or associations and bargain collectively and strike the constitution provides that those who enjoy the right shall be determined by law.²²⁰ Therefore, government employees' right to form trade unions and bargain collectively under the constitution is not automatic.

Article 41(2) further entrenches a 'floor of rights' that is automatically applicable to all workers including government employees.²²¹ The constitution uses the word 'worker' and so far it has not been interpreted. However, it is submitted that the word should be interpreted purposively to encompass all those who need the protection of the law owing to their relationship with the person to whom they work. Hence it should apply to those who perform work under an employment contract - as it is technically defined under the Labour Proclamation - and to those who perform work without being in a contract of employment but are in need of protection because of their economic vulnerability in their relationship with the person for whom they work.

4.2.2 The Labour Proclamation No. 377/2003

The labour proclamation of the 2003 constitutes the principal source of regulation of employment and labour relations in Ethiopia.²²² The proclamation applies to employee-employer relationships and the term 'employee' is defined with reference to the contract of employment.²²³ Article 4 (1) provides that 'a contract of employment shall be deemed to be formed where a person agrees directly or indirectly to perform work for and under the authority of an employer for a definite or indefinite period or piece work in return for a wage.'²²⁴

²²⁰ Ibid. Art 42 (1) (c). Currently, workers in the public service cannot form trade unions and hence bargain collectively, as the civil service proclamation, which is enacted to regulate employment in the public service sector, does not confer those rights on civil servants.

²²¹ Ibid. Art 42 (2). This includes workers' right to reasonable limitation of working hours, to rest, to leisure, to periodic leave with pay, to remuneration for public holidays and a healthy and safe work environment.

²²² Labour Proclamation No. 377/2003. It regulates among other things formation and termination of employment contracts. It protects employees against unlawful dismissal and provides remedies where there is unlawful dismissal. It also provides for minimum conditions of employment such as maximum hours of work, weekend, and holyday, sick and annual leave. It also limits and regulates overtime work and provides for healthy and safe working environment and adopts the principle of strict liability of employers for disablement compensation, which is to be reckoned according to the formula it provides, in the event of occupational accidents and diseases. And finally it provides rules and procedures that regulate formation of trade unions and the collective bargaining process.

²²³ The word 'worker' is sometimes used in the proclamation interchangeably with the term 'employee'. However, the overall reading of the proclamation and particularly articles 3, 2(3) and 4(1) of the proclamation make it clear that what is intended is 'employee' in the strict sense of the word.

²²⁴ The Labour Proclamation No. 377/2003 art 4 (1). The proclamation does not directly define the word employee, rather it defines it, by making a cross reference to the definition of contract of employment under article 4; 'as a person who has an employment relationship with an employer in accordance with article 4 of this proclamation.'

Thus direction by the employer and the existence of a wage are together made the determinant factors in characterising a contractual relationship as an employment relationship, thereby subjecting it to the regulation of the proclamation. It is submitted that this excludes categories of workers that are deemed to be employees by virtue of section 213 (1) (b) of the LRA in South Africa.²²⁵ It also enables employers to easily avoid labour law through contractual arrangements whereby they only contract out the payment of a wage for other persons and maintain the direction aspect of the relationship. Moreover the direction element tends to exclude those who perform work under economically dependent and vulnerable conditions, but only have autonomy in deciding on how and when the work is to be done, whose protection would have been in line with the central purpose of labour law, i.e. rectifying the power imbalance between an employer and employee. It is assumed that this may encourage employers to allow some level of authority for employees and easily circumvent the proclamation.

Again it is not clear under the law whether courts should simply accept that a contractual relationship is a relationship other than employment merely because the contract purports to be so or whether they have to inquire into the real nature of the relationship and determine the existence of an employment relationship regardless of the label attached to the contract. However, courts seem to just give effect to what the contract purports to be.²²⁶ This it is submitted runs counter to the central purpose of labour law and may encourage employers to conclude contract with their employees, where the latter's undertake to perform work as an independent contractor while the real nature of the relationship is that of employment, and hence bypass the labour law.

The absence of any kind of presumption in favour of the existence of employment relationship, upon establishment of some factors, which ought to shift the onus, as is the case in South Africa, makes the situation worse for workers in a disguised and truly ambiguous employment relationship. Despite the problems associated with protecting workers who work outside of the narrowly defined circle of the contract of employment under the proclamation, the proclamation applies to all employees - standard or non-standard. Indeed the Federal High Court, has interpreted the phrase 'any other conditions' under article 14 (1) (f) generously to include forms of employment. The

²²⁵ See the discussion on page 35.

²²⁶ See for example, *Ato Gelana & others v Hayat Share Company* (2007) Federal First Instance Court, Case Number 37016. In this case the plaintiffs requested compensation for unlawful termination of their employment and the respondent (the employer) contended that they were not employees any more but, rather, independent contractors, and it adduced a document in which they all signed that they will be working as independent contractors. The judge held, just by relying on the contract without any further investigation into the real nature of the relationship between the parties, that they were not employees and as such could not bring any claim based on the labour proclamation.

article reads; 'it shall be unlawful for an employer to discriminate between workers based on nationality, sex, religion, political outlook or any other conditions'. The court held that an employers' act of exclusion of an employee from a bonus because he/she is temporarily employed is unlawful even when a collective agreement provides so.²²⁷ Those who work in the informal sector under a contract of employment are technically also protected in law.

There are, however, some atypical employees who are not fully protected under the proclamation. For instance with regard to home workers the proclamation gives the Ministry of Labour and Social Affairs the power to prescribe provisions of the proclamation that shall apply to them and the manner of their application by directive.²²⁸ Thus home workers are not automatically entitled to all the benefits and protections under the proclamation; rather, it is up to the Ministry to decide which protections under the proclamation are available to them. However, so far the Ministry has not issued any directive to that effect. It means that they are now practically left without any protection whatsoever under the proclamation.

There are also some exclusions that are applicable both to standard and non-standard employees. These include persons employed in terms of contracts for the purpose of upbringing, treatment, care or rehabilitation, educating or training other than apprenticeship and managerial employees and domestic servants.²²⁹

Any contract of employment is deemed to have been concluded for an indefinite period irrespective of what the parties provide.²³⁰ However, the proclamation provides circumstances under which contracts for a definite period can be concluded.²³¹ Even in those circumstances a contract of

²²⁷ See for example, *Basha Alemayehu & others v Ethiopian Electric Power Company* (2000) Federal First Instance Court, Case Number 24182. [Translation mine.] The absence of precedent under the Ethiopian legal system should however be noted. As such court judgements can only be used to see how the law is being practically applied.

²²⁸ The Labour Proclamation No. 377/2003 art. 46.

²²⁹ The Labour Proclamation No. 377/2003 art. 3 (2)

²³⁰ The Labour Proclamation No. 377/2003 art. 9 The word 'any' makes it clear that the principle applies to all employment contracts including instances where there exists triangular relationship.

²³¹ The Labour Proclamation No. 377/2003 art 10 (1) (a-i). This includes instances where an employee is employed for; a specified piece work, replacement of a worker who is temporarily absent due to leave, sickness or any other cause; in the event of abnormal pressure of work; for performance of urgent work needed to prevent damage or disaster to life or property, to repair defects or break downs in works, materials, buildings or plant of the undertaking; an irregular work which relates to permanent work of the employer but performed on an irregular interval; seasonal work that relates to permanent part of the employers work but performed only for a specified period of the year but which are regularly repeated in the course of the years; an occasional work which does not form the permanent activity of the employer but which is done intermittently; temporary replacement of a permanent employee who has suddenly vacated his/her post

employment does not automatically become a contract for a definite period unless the parties agree to that effect. When a contract for a definite period is allowed the duration of the contract should be fixed based on objective grounds such as completion of specific job or occurrence of specific events. The proclamation further limits the duration of a contract for a definite period of time to not more than 45 consecutive days and not to be done more than once, if the purpose for which it is done is either to replace a permanent employee who suddenly and permanently vacated his post or temporary placement to fill a vacant position in the period between the study of the organizational structure and its implementation.²³² There is, however, no protection in the case of non-renewal of a contract of employment by an employer when the employee has a reason to objectively expect so. There is a tendency among judges to treat part-time employees as temporary employees.²³³ This will make part-time work more precarious in Ethiopia than South Africa. However, it is submitted that unless the employer can establish that part-time workers are employed under one of the circumstances listed under article 10 (1) (a-i) it will be contrary to the purpose of the article to generally hold that part-time employees are always temporary workers because their contract says so. It should also be noted that as an exception the article must be interpreted restrictively.²³⁴

Regarding contractual arrangements under which the relationship is given a triangular appearance such as employment of workers through TEA, outsourcing or subcontracting the employment relationship is deemed to exist between the worker and subcontractor and/or the person to whom the work is outsourced or the TEA regardless of the economic reality between the parties. This it is submitted may be used by employers to avoid regulatory frameworks by resorting to use TEA or subcontracting arrangements. At times, however, the true nature of the relationship may dictate that the principal subcontractor or the client be regarded the employer of the person actually performing the work for all purposes and intents.

There is a proclamation promulgated to regulate the operation of TEAs.²³⁵ The proclamation allows any person among other things to provide services consisting of making a worker available locally

or temporary placement of a worker to fill a vacant position in the period between the study of the organizational structure and its implementation.

²³² The Labour Proclamation No. 377/2003 art 10 (2)

²³³ Yehenew, op cit 3

²³⁴ See the Labour Proclamation No. 377/2003, art 9 and 10. Article 9 of the labour proclamation lays down the principle that every contract of employment is a contract for indefinite period of time and article 10 provides exhaustive list of circumstances under which a contract for a definite period is acceptable. Therefore, article 10 is an exception to article 9.

²³⁵ Private Employment Agency Proclamation No. 104/1998

or abroad by concluding a contract of employment with such a worker without receiving any payment from the worker.²³⁶ A license is made mandatory to render the abovementioned service and once issued it stays valid for two years subject to renewal.²³⁷ Under this circumstance the employment relationship exists between the TEA and the worker to all intents and purposes. The proclamation provides for joint and several liability of the third party with the TEA only in the event of contravention of the contract of employment.²³⁸ It does not provide for joint and several liability of the third party with the TEA in the event of contravention of the protections under the labour proclamation.

With regard to collective representation the proclamation entitles all employees to establish trade unions inter alia to bargain collectively regardless of the form of their employment.²³⁹ However, only workers in undertakings that employ at least ten workers are allowed to form trade unions provided that trade unions must at least have ten members.²⁴⁰ For workplaces with fewer than ten workers it is provided that employees of different undertakings can form what is known under the proclamation as a 'general trade union', which will have the same function as other trade unions and must also at least have ten members.²⁴¹ This can be said at least legally offers an opportunity for non-standard employees and to those in the informal sector to form their own organization. However, this does not address the practical challenges non-standard employees face in organizing which are partly linked to the unstable and precarious nature of their employment.

Even if article 115 (1) (a) of the proclamation, at face value, seems to allow the existence of more than one trade union at an enterprise, it practically makes it difficult by providing that, in cases of multiple unions at workplace, only the trade union that achieves membership of 50 + 1 percent can enter into collective agreements.²⁴² This it is submitted will practically make it difficult if not impossible for non-standard employees, who often constitute an unorganized workforce, to form their own union and bargain for better working conditions at workplaces where there is another

²³⁶ Private Employment Agency Proclamation No. 104/1998 art 1 (b)

²³⁷ Private Employment Agency Proclamation No. 104/1998 art 8

²³⁸ Private Employment Agency Proclamation No. 104/1998 art 17

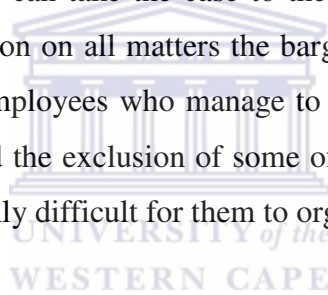
²³⁹ The Labour Proclamation No. 377/2003 art 113 (1)

²⁴⁰ The Labour Proclamation No. 377/2003 art 114 (1)

²⁴¹ The Labour Proclamation No. 377/2003 art 114 (2)

²⁴² The Labour Proclamation No. 377/2003 art 115 (1) (a)

trade union. Under the proclamation collective agreements can be concluded either at plant level or industry level; however, there is no mechanism of extending collective agreements to non-parties. The proclamation provides for a duty to bargain in good faith.²⁴³ Thus once employees have formed trade unions then they can seek judicial assistance not only to bring a recalcitrant employer to negotiation but also to make sure that he/she/it is negotiating in good faith. The industrial court introduced a duty to bargain in good faith in South Africa using its ‘unfair labour practices’ jurisdiction.²⁴⁴ Accordingly employers were ordered to sit and bargain bona fide with trade union representatives. However, the court did not go to the extent of imposing agreements on the parties.²⁴⁵ To have this sort of procedural compulsion per se might be of no help to non-standard employees. The situation in Ethiopia is quite different. The duty to bargain goes beyond compelling the reluctant party to come to the negotiating table and involves imposing outcomes on the parties by the Labour Relations Board (LRB).²⁴⁶ Issues on which the parties could not agree after negotiating in good faith are submitted to a conciliator and, when the conciliation process runs out of solutions, either of the parties can take the case to the Labour Relations Board (LRB).²⁴⁷ The LRB will then pass a final decision on all matters the bargaining partners could not agree.²⁴⁸ This seems helpful to non-standard employees who manage to organize. Nonetheless, the insecure and unstable nature of their work and the exclusion of some of them, such as home workers, from the labour proclamation, make it highly difficult for them to organize, if at all.



²⁴³ The Labour Proclamation No. 377/2003 art 130 (4)

²⁴⁴ See for example, *BAWU v Umgeni Iron Works* 1990 11 ILJ 589 (IC)

²⁴⁵ *BAWU v Umgeni Iron Works* 1990 11 ILJ 589 (IC)

²⁴⁶ The Labour Relations Board is a body established by the Labour Proclamation to resolve collective labour disputes. The LRB is composed of seven permanent members and two alternate members. The chairman and two other members are chosen by the MOLSA and the remaining members are chosen from representatives of unions and employers proportionally. One important thing that should also be noted in relation to labour dispute resolution in Ethiopia is the absence of distinction of disputes into rights and interest disputes. Rather disputes are grouped into individual and collective disputes and all collective disputes including conclusion, amendment and interpretation of collective agreements are to be arbitrated by the LRB. See arts 142 (1-3) and 130 (5) of the Labour Proclamation.

²⁴⁷ The Labour Proclamation No. 377/2003 arts 142 (1-3) and 130 (5).

²⁴⁸ The Labour Proclamation No. 377/2003 art 153. All the findings of the board on factual matters are final and not appealable. An aggrieved party can only appeal on questions of law to the Federal High Court.

Chapter five

Conclusion and recommendations

The world of work has been evolving tremendously, posing a major challenge to labour law which was mainly set to regulate standard employment relationship based on the distinction between ‘employee’ and ‘independent contractor’. Though it has always been one of the most vexed and difficult issues in labour law to distinguish between an ‘employee’ and ‘independent contractor’, the changes happening in the workplace such as externalization of employment, not only increased the number of workers performing work outside the narrower notion of the employment contract, but also further blurred the distinction between an ‘employee’ and ‘independent contractor’.²⁴⁹ Furthermore, regarding ‘employees’, different forms of non-standard employees, such as part-time workers, temporary workers, casual workers, home workers and those in a triangular employment relationship, have been increasingly employed in South Africa. These kinds of atypical employment are also already in use in Ethiopia though not as rife as they are in South Africa.

Vulnerability, precariousness, lesser employment tenure and poor working conditions are among the common traits of these different forms of atypical employment.²⁵⁰ As a result these new classes of workers constitute an underclass workforce in both countries.

In South Africa courts have adopted different tests at different times; including the ‘dominant impression’ test, which is currently in use, to distinguish an ‘employee’ from an ‘independent contractor’. However, the application of these tests, it is submitted, may not ensure the protection of all those who really need the protection of the labour law due to their subordinate and financially dependent position to the person for whom they work.

The presumption introduced in 2002 amendment on the LRA and the BCEA²⁵¹ only shifts the onus to the employer and once the employer initiates to rebut the presumption the actual protection of workers lies in the test to be used.

Under the Ethiopian labour proclamation also, the existence of control by the person for whom the work is done is given a central position, leaving all scenarios where a person performs work

²⁴⁹ See the discussion on page 13

²⁵⁰ See for example, the discussion on page 23

²⁵¹ The Labour Relations Act 66 of 1995, s 200A and Basic Conditions of Employment Act 75 of 1997, s 83A

without being under the control of the employer outside of the regulatory frame work of labour law. Moreover, by making wages another defining element it totally excludes all who are deemed employees under section 213 (1) (b) of the LRA in South Africa, from its ambit. In addition, the Ethiopian labour proclamation does not provide for a presumption in favour of the existence of employment, as is the case under the LRA and the BCEA in South Africa.

It is not also clear, under the Ethiopian labour proclamation, whether courts should simply rely on what the contract purports to be or can go beyond and look into the real nature of the relationship in determining whether a relationship is that of employment or independent contract.

The position under South African law is that terms of the contract are given a primary role while at the same time judges can go beyond it and consider the real nature of the relationship.²⁵² The ILO employment relationship recommendation also adopts the principle of primacy of facts.²⁵³ This it is submitted will extend the scope of the protection to those who are in disguised employment relationship.

The Ethiopian labour proclamation excludes home workers unlike the situation in South Africa.

Another major problem with regard to non-standard employees has to do with the inability of the collective bargaining system, which is designed to fit the standard employment relationship, to fully address the needs of non-standard employees.

Under the South African labour law all employees (standard and non-standard) have the right to form trade unions and bargain collectively.

The LRA, in South Africa, adopts a voluntary collective bargaining system and backs trade unions by entitling them to 'organizational rights' and a right to strike. However, the organizational rights are available only to employees employed in 'workplaces' and to trade unions that are at least 'sufficiently representative'.²⁵⁴ Therefore, non-standard employees who do not work in a conventional 'workplace' such as home workers and employees of TESs are unable to benefit from organizational rights. Moreover, the way workplace is defined makes it difficult for non-standard employees to achieve the required level of representation to be entitled to organizational rights.

In addition to the legal impediments there are also practical difficulties in organizing most non-standard employees. This includes amongst others trade unions perception that their power mainly depends on permanent full-time employees and their perception of non-standard employee as a

²⁵² See the discussion on page 35

²⁵³ R198 Employment Relationship Recommendation, 2006 (II) (9)

²⁵⁴ See the Labour Relations Act 66 of 1995, s 11- 22

threat to job security and minimum conditions.²⁵⁵ Moreover, the insecure and unstable nature of the employment of most of the atypical employees makes it difficult to organize them in both countries.²⁵⁶

Under the Ethiopian labour proclamation, too, non-standard employees, who are included within the definition of 'employee', have the right to form trade union and engage in collective bargaining. However, trade unions can only be formed in an undertaking that employees at least ten workers and they must have at least ten members.²⁵⁷ In addition in cases where there are multiple trade unions at a workplace only the one having 50+1 majority membership of the total workers of that undertaking can engage in collective bargaining.²⁵⁸ This, it is submitted, makes it difficult for non-standard employees to form trade unions and bargain collectively.

Regarding workers placed by TESs, both the LRA and BCEA designate the TES as the employer regardless of how long the employee is placed with the client and the 'client' is the one actually making important decisions affecting the terms and conditions of employment and the continuity of the employment.²⁵⁹ The joint and several liability of the 'client' do not extend to instances of contravention of the LRA.²⁶⁰

Under the Ethiopian law, too, it is the TEA that is, regarded as employer and there is also no time limit on the expiry of which the employee becomes an employee of the 'client enterprise'.²⁶¹ It also does not matter that the agency's role is no more than 'pay rolling' and the actual determination of all aspects of the work is made by the 'client'.

Moreover, the shared responsibility of the client is also limited to instances of contravention of the contract of employment of the worker by the agency.²⁶² It does not extend to instances of contravention of the proclamation.

²⁵⁵ For example, see the discussion on page 23

²⁵⁶ Ibid.

²⁵⁷ The Labour proclamation No. 377/2003 art 114 (1)

²⁵⁸ The Labour Proclamation No. 377/2003 art 115 (a)

²⁵⁹ The Labour Relations Act 66 of 1995, s 198 (2) and the Basic Conditions of Employment Act 75 of 1997, s 82 (1)

²⁶⁰ The Labour Relations Act 66 of 1995, s 198 (3)

²⁶¹ See the discussion on page 45

²⁶² Private Employment Agency Proclamation No. 104/1998, art 17

TEAs are required to register and get their licenses renewed every two years under Ethiopian law, while there is no such requirement under South African law. Registration, if submitted, will assist in monitoring whether temporary employment agencies/services, as the case may be, are complying with the laws or not.

The Ethiopian labour proclamation provides an exhaustive list of circumstances under which employment for a definite period is permissible.²⁶³ In all other cases a contract of employment shall be for an indefinite period of time.²⁶⁴ Under the South African law, however, employers are at liberty to employ workers on a fixed-term contract in all circumstances. There is also no time limit, in South Africa, upon the expiry of which an employee must be regarded as a permanent employee. Under the Ethiopian labour proclamation, however, in a case where the reason for employing an employee on a fixed-term contract is either to replace a permanent employee who suddenly and permanently vacated his post or temporary placement to fill a vacant position in the period between the study of the organizational structure and its implementation, the contract must not be for more than 45 days and can only be done once. However, there is no protection against non-renewal of the contract by the employer. The South African labour law defines refusal by the employer to renew a fixed-term contract or an offer to renew on less favourable terms, while the employee has a reasonable expectation of renewal on the same terms, as dismissal.²⁶⁵ This is not available under the Ethiopian labour proclamation.

Concerning minimum conditions of employment the BCEA generally applies to all employees both standard and non-standard. Nonetheless there are certain minimum conditions that are made unavailable to certain employees such as those who work less than 24 hours a month for an employer. In Ethiopia minimum conditions are also regulated by the same proclamation and as such, except for the problem associated with the meaning of 'employee' to accommodate some categories of non-standard employees, are applicable to all employees (as defined under the proclamation) standard and non-standard alike.

Based on the problems identified above, I recommend the following to strengthen the protection of atypical employees in both countries;

- In both countries a test, which is primarily based on the economic reality of the relationship between the parties, should be adopted to distinguish an employee from an independent

²⁶³ The Labour proclamation No. 377/2003 art 10 (1) (a-i)

²⁶⁴ The Labour proclamation No. 377/2003 art 9

²⁶⁵ The Labour Relations Act 66 of 1995 s 186 (1) (b)

contractor. The definition of an employee, under the Ethiopian proclamation, should also be expanded to include unpaid workers who are really in need of protection as is the case in South Africa.

- Judges or arbitrators should primarily rely on the surrounding facts rather than on the label attached to the contract by the parties in determining whether a person is an employee or independent contractor.
- A presumption comparable to the one introduced in the 2006 amendments to the LRA and the BCEA in South Africa, which is also in tandem with ILO's stand, should also be introduced into Ethiopian labour law.
- The exclusion of home workers, under the Ethiopian labour proclamation, should be done away with for all purposes. I also recommend that the principle of equality of treatment with regard to conditions of work such as that which is promoted by the ILO convention be adopted in both countries. In this regard to allow flexibility employers should also be allowed to derogate from the principle of equality of treatment as long as it is done by collective agreement and the collective agreement accords comparable treatment.
- As regards employees placed by TESs or TEAs, as the case may be, there should be a time limit upon the expiry of which the employees should be regarded employees of the client. In addition to this regard should be had to the real nature of the relationship between the 'client' and the TES/TEA. I suggest that the 'client' should be regarded an employer if the role of the TES/TEA is no more than pay rolling. The joint liability of the 'client' under the LRA and the BCEA, in South Africa, should also be extended to cases of contravention of the LRA. Under Ethiopian law also the shared responsibility of the client should be extended to instances of contravention of the labour proclamation.
- In order to strengthen the protection of fixed-term employees in South Africa, I recommend that, like the case in Ethiopia, circumstances under which a fixed-term contract is permissible should be listed. There should also be, in both countries, a time limit upon the expiry of which an employee who is on fixed-term/temporary contract should graduate into permanent employment. There should also be in Ethiopia, as is the case in South Africa, protection of an employee on a fixed-term contract in instances of non renewal or renewal

on less favourable terms while they have reasonable expectation of renewal on the same terms.

- I also suggest that certain minimum conditions which are not made available to those who work less than 24 hours a month for a worker, in South Africa, should be extended to them. I also recommend that the principle of pro rata should be used, as in Ethiopia, to make some of the benefits that are calculated on the basis of 'cycle' or 'period' such as annual leave, available to those who work for less than the qualifying period.
- I also recommend that sectoral determinations of minimum conditions including minimum wages, as per section 54 of the BCEA, should be made in sectors where atypical employees are prevalent. The Ethiopian labour proclamation, however, does not provide for sectoral determination of minimum conditions. Therefore, I recommend that the Ministry of Labour and Social Affairs, in Ethiopia, be enjoined with the same power enjoined to the Minister of labour by section 51 of the BCEA.
- The notion of workplace, in South Africa, should also be redefined in such a way that all places where an employer operates constitute a separate workplace regardless of the fact that they are not independent in terms of size or function. In cases where there are employees who work in a workplace which is controlled by an employer other than their own employer, they should be allowed to enforce their rights both against the employer who is in charge of the workplace and their own employer. In such cases I also suggest, as is the case under the EU directive on temporary agency workers, there should be protection, in both countries, that at least ensures that these workers do not get less favourable treatment than they could have got had they been directly employed by the person who is in charge of the workplace.
- Extension of collective agreements to non parties is totally unknown in Ethiopia. It, however, can be used to enhance the protection of atypical employees. In this regard I suggest that there should be a mechanism, in Ethiopia, to allow extension of collective agreements to non parties.
- The requirement that an enterprise must employ at least ten workers and a trade union must at least have ten members, in Ethiopia, should be done away with.

- I also suggest the requirement, in Ethiopia, that only the trade union with 50+1 membership shall enter into collective bargaining in instances where there are multiple trade unions in an enterprise be done away with.

I believe the implementation of the above proposed points will promote social well-being in the society, which in fact is one of the main purposes of labour law, by enhancing the protection of atypical employees and without much direct investment from the employer's side.



Bibliography

Books

- Basson, A et al (2005) *Essential Labour Law*, (4th combined ed) Labour Law Publications
- Bramble, T and Barchiesi, F (2003) *Rethinking the Labour Movement in the 'new South Africa'* Ashgate Publishing, Ltd
- Buhlungu, S (2007) *State of the Nation*, (4 ed) HSRC Press
- Carré, J et al (2000) *Nonstandard Work: The Nature and Challenges of Changing Employment Arrangements*, Cornell University Press
- Cheadle, H et al (2004) *Current Labour Law*, Durban: LexisNexis Butterworths.
- Cheadle, H et al (2006) *South African Constitutional Law: The Bill of Rights*, Durban: LexisNexis Butterworths.
- Chen, M et al, (2005) *Mainstreaming Informal Employment and Gender in Poverty Reduction: A Hand- Book for Policy Makers and Other Stake Holders*, published by common wealth secretariat.
- Conaghan, J et al, (2002), *Labour Law in an Era of Globalization*, Oxford university press
- Du Toit, D et al, (2003) *Labour Relations Law: A comprehensive Guide* (4th ed) Durban: LexisNexis Butterworths, Interpak Books Pietermaritzburg
- Grogan, J (2007) *Workplace Law* (9th ed) Juta & Co., Ltd
- Lundahl, M et al (2004) *Globalization and the Southern African Economies*, Nordic Africa Institute
- Nienhuser et al, (2005) *Flexible Work – Atypical Work – Precarious Work?* Rainer Hampp Verlag
- Rycroft, A and Jordan, B (1992) *A Guide to South African Labour Law* (2nd ed) Cape Town: Juta 7 Co., Ltd.
- Spoonley, P et al (2004) *Work and Working in Twenty-First Century New Zealand*, Thomas Learning Nelson
- Standing, G et al (1996) *Restructuring the Labour Market: The South African Challenge*, International Labour Organization
- Supiot, A et al, (2001) *Beyond Employment: Changes in Work and the Future of Labour Law in Europe*, Oxford University Press.
- Van Neikerk, A *Law @ Work*, Durban: LexisNexis
- Van Wezel Stone, K (2004) *From widgets to digits: Employment regulation for the changing workplace*, Cambridge University Press.
- Vettori, S (2007) *The Employment Contract and the Changed World of Work*, Corporate Social Responsibility Series, Ashgate publishing

Vosko, L and Stanford, J (2003) *Challenging the Market: The Struggle to Regulate Work and Income*, Montreal: McGill-Queen's University Press.

Journals

Baskin, J 'South Africa's Quest for Jobs, Growth and Equity in a Global Context' (1998) 19 *ILJ* 986

Benjamin, P 'An accident of history: who is (and should be) an employee under South African labour law.' (2004) 25 *ILJ* 787

Blanpain, R 'Work in the 21st century' (1997) 18 *ILJ* 185

Christianson, M 'Defining who is an "employee": A review of the law dealing with the differences between employees and independent contractors' (2001) 11 (3) *Contemporary Labour Law* 21

Collins, H 'Independent contractors and the challenge of vertical disintegration to employment laws' (1990) 10 *Oxford Journal of Legal Studies* 353

Davidov, G 'Who is a worker?' 2005 *ILJ* 34

Dicks, R 'The growing informalization of work: Challenges for labour-recent developments to improve the rights of atypical employees' (2007) 11 *Law, Democracy & Development* 39

Fenwick, K et al 'Labour law: A Southern African perspective' (2007) *IILS*, Geneva 15

Hutchinson, W and Le Roux, P 'Temporary employment services and the LRA: Labour brokers, their clients and the dismissal of employees' (2000) 9(6) *Contemporary Labour Law* 56.

Kahn-Freund, O 'Servants and independent contractors' (1951) 14 *Modern Labour Review* 504

Kenny, B et al, 'Contracting complexity and control: An overview of the changing pattern of subcontracting in the South African mining industry', (1999) *The Journal of the South African Institute of Mining and Metallurgy*, 185

Kohler, T 'Labour law and labour relations: Comparative and historical perspective' (1996) *International Journal of Comparative Labour Law and Industrial Relations* 213

Mills, S 'The situation of the elusive independent contractor and other forms of atypical employment in South Africa: balancing equity and flexibility.' (2004) 25 *ILJ* 1203

Mureinik, E 'The contract of service: An easy test for hard cases' (1980) 97 *SALJ* 246

Theron, J 'Employer or intermediary: labour brokers and the triangular employment relationship' (2005) 26 *ILJ* 618

Theron, J 'who's in and who's out: labour law and those excluded from its protection.' (2007) 11 *Law, Democracy and Development* 25

Theron, J 'The erosion of workers' rights and the presumption as to who is an employee' (2002) 6, *Law Democracy and Development*, 27

Theron, J 'Employment is not what it used to be.' (2003) 24 *ILJ*, 1247

Theron, J 'The shift to service and triangular employment; implications for labour market reform' 2008 *ILJ*

Thompson, C 'The changing nature of Employment' (2003) 24 *ILJ* 1793

Legislation

The Constitution of the Federal Democratic Republic of Ethiopia, 1995

The Constitution of the republic South Africa, 1996

Labour Relations Act 66 of 1995

Basic Employment Conditions Act 75 of 1997

The Employment Equity Act 55 of 1998

The skills Development Act 97 of 1998

Ethiopian Labour proclamation No 377/2003

Ethiopian Federal Civil Servants Proclamation No 262/2002

Private Employment Agency Proclamation No. 104/1998

Sectoral Determination Seven: Domestic worker sector, Government Gazette, No. 2373215, August, 2002,

ILO Conventions and recommendations

C181 Private Employment Agencies Convention, 1997

R188 Private Employment Agencies Recommendation, 1997

C177 Home Worker Convention, 1996

R198 Employment Relationship Recommendation, 2006

EU Directives

Council Directive 97/81/EC

Council Directive 1997/70/EC

The Draft Directive of the European Parliament and the Council on temporary work, 2002/0072 (COD)

Links

Esselaar, J "The debate over outsourcing in South Africa: Evidence from a case study"

<http://www.commerce.uct.ac.za/Research_Unit/DPRU/Conf2002pdf/Esselaar.pdf> (2002)

International labour conference report I (C) 95th session "The changing patterns in the world of work" International labour office, Geneva, ILO 2006

<www.ilo.org/public/english/standards/relm/ilc/ilc95/reports.htm>

International labour conference report V (1) 95th session “The employment relationship”

International Labour office, Geneva, ILO 2006

<www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-v-1.pdf> (2006)

Monika, S “National labour law profile: Federal Democratic Republic of Ethiopia”

<www.ilo.org/public/english/dialogue/ifpdial/info/national/eth.htm> (2003)

“Quarterly Labour Force Survey”

<<http://www.statssa.gov.za/PublicationsHTML/P02112ndQuarter2008/html/P02112ndQuarter2008.html> September 10> (2008)

Rogerson, C “Globalization or informalization? African urban economies in 1990s”

<<http://www.unu.edu/unupress/unupbooks/uu26ue/uu26ue0q.htm>> (1997)

“Country trading profile South Africa- labour market”

<<http://emporikitrade.com/uk/countries-trading-profiles/south-africa/labour-market>>

World Commission on the Social Dimensions of Globalization, “A fair globalization: Creating opportunities for all” (2003)

<<http://www.presidentti.fi/netcomm/ImgLib/9/101/WCSDG%20report%20final.pdf>>

Yehenew, T “Labour market flexibility and employment income insecurity: Legal and institutional frame work” (2005) < www.ilo.ch/public/english/employment/strat/download/bg2.pdf>

Other

Bezuidenhout, A et al ‘Non-standard employment and its policy implications’, Report submitted to the Department of Labour, 30 June 2004.

Clarke, M and Kenny, C ‘Falling out of the loop: Protecting Casual Workers in South Africa’s Retail Sector’ *LRS*, Cape Town: South Africa, 2002.

Committee on Techniques for the Enhancement of Human Performance: Occupational Analysis; National Research Council (CBASSE), ‘The Changing Nature of Work’ (1999) 14

Council of the European Union, ‘Employment, Social Policy, Health and Consumer Affairs’, 2876th council meeting, Press release 9-10 June 2008

Davis, R and Thurlow, J ‘Formal-informal linkages and their policy implications in South Africa’ (2008) *IFPRI*, DPRU Conference 27-29 October 2008, 3

De Gobbi, M ‘Labour market flexibility and employment and income security in Ethiopia: Alternative considerations’ (2006) International Labour Office, Geneva

Godfrey, S & Clarke, M ‘From formal to informal: the restructuring of employment through labour broking and home working’ (2003) at the LexisNexis Butterworths 16th Annual Labour Law Conference, Johannesburg.

Godfrey, S et al 'On the outskirts but still in fashion: home working in the South African clothing industry' (2005) *Development and Labour Law Monographs 2/2005*, Institute of Development and Labour Law: University of Cape Town.

Hanzelova, E 'Non-standard employment in Slovak Republic', (2007) *Institute for Labour and Family Research*, Slovak republic

International Labour Office, 'Contract Labour' (1997), Geneva

Kenny, B & Bezuidenhout, A 'Fighting sub-contracting: Legal protections and negotiating strategies', (1999) *South African Labour Bulletin 23* (3)

National Labour Force Survey, (2005) *Central Statistical Agency*, Ethiopia

Negaligne, M 'Rapid assessment on home work contract', (2008) Ministry of Labour and Social Affairs, Industrial Relation Department.

'Report on the 2005 national labour force survey' Central Statistical Agency (2006) *statistical bulletin 365*

Selelshi, L 'Subcontracting strategy for the Ethiopian Micro and Small Enterprises' (2001) Ethiopian Micro and Small Enterprises Development Program

Theron, J et al 'The rise of labour broking and its policy implications' (2005) *Development and Labour Law Monographs 1/2005* Institute of Development and Labour Law: University of Cape Town.

Theron, J et al 'Globalization, the impact of trade liberalization, and labour law: The case of South Africa' International Institute for Labour Studies, Discussion paper, Geneva, 2007

Urban employment unemployment survey, (2006) Central Statistical Agency, Ethiopia

Valodia, I et al, 'A review of labour market in South Africa: Low-waged and informal employment', (2005) School of Development Studies University of KwaZulu-Natal

Visser, J and Kaminska, M 'Globalization and managing change in the world of work' (2008) AIAS 3 paper prepared for the ILO High Dialogue on the EU Social Model in the Context of Globalization, Turin, 1-3 July 2008

Table of cases

SANDU v Minister of Defence & others (1999) 20 *ILJ* 2265 (CC)

Smit v Workmen's Compensation Commissioner 1979 (1) SA 51 (A)

SA Broadcasting Corporation v McKenzie [1999] 1 *BLLR* 1 (LAC)

LAD Brokers (Pty) Ltd v Mandla [2001] 9 *BLLR* 993 (LAC)

Colonial Mutual Life Association v Macdonald 1931 AD 412

Bank voor Handel en Scheepvaart NV v S latford [1953] 1 *QB* 248 (CA)

BAWU v Umgeni Iron Works 1990 11 ILJ 589 (IC)

Basha Alemayehu & others v Ethiopian Electric Power Company (2000) Federal First Instance Court, Case Number 24182.

Ato Gelana & others v Hayat Share Company (2007) Federal First Instance Court, Case Number 37016

Interviews

Ato Birhanhiwot Libanos, Senior Expert of Industrial Relations in the unionisation department of Confederation of Ethiopian Trade Unions (CETU) [July 5, 2008]

Ato Gobeze Asebe, head of the human resource division of the sunshine construction company. [July 20, 2008]

Ato Kifle beyen, Administration Department Head, Alpha University College. [July 10, 2008]

W/o Fantaye Awash, Personnel Department Head, Unity University College. [July 10, 2008]

Ato Desalegne berihe, Assistant Administrator of the Law Faculty, Saint merry college. [July 10, 2008]

Hiruy Girma, A Cite Agent for Kharafi Construction Company and Fantaye Awash, Personnel Department Head, for Unity University College. [August 3, 2008]

