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INDUSTRIAL LAW JOURNAL

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Reflections on Marginalised Workers and the Role of Trade Unions in the Changing World of Work

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STEFAN VAN ECK**

ABSTRACT

The world of work is changing rapidly. The globalisation of economies and brisk technological changes severely impact all nations. These changes have had a significant impact on traditional employer-employee relations. Labour and social security protections for workers are being eroded through informalisation, casualisation and externalisation. Added to this, new forms of platform work have been established during the fourth industrial revolution that have had a disruptive effect on the notion of secure and indefinite employment. Collective bargaining and trade unions have in the past played an important role in protecting workers' rights. This contribution interrogates the role of trade unions and collective bargaining in the changed world of work and considers strategies that unions should consider implementing. The article concludes by suggesting that the solution to problems associated with non-standard and platform work may not lie in the bargaining power of trade unions. Governments will have to step in to fill the gaps in order to protect persons involved in new forms of work.

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1 INTRODUCTION

Globalisation and technological developments have intensified competition between enterprises.¹ This has resulted in an increased need for business flexibility in the global production system, the informalisation and externalisation of traditional employer-employee relationships and the spawning of new forms of work.² In many instances these developments have had an eroding effect on labour and social security protection associated with traditional employees.³

Kahn-Freund pointed out that labour law serves as a 'countervailing force' against employers' superior economic and social power.⁴ The acclaimed author stated that the two main techniques for creating a more equitable balance are to establish a floor of protective workers' rights for employees and to protect the institution of collective bargaining. In instances where legislation does not provide basic protection in respect of maximum working hours and paid leave, trade unions play a crucial role in ensuring that workers' conditions of service are suitably adapted during changing circumstances.

This article explores the problems confronting the erosion of workers' rights during this era of the casualisation of labour and the challenges that trade unions face during the so-called fourth industrial revolution. Following the introduction, part two of the contribution traverses the destandardisation and informalisation of labour in the modern era, part three touches on the development of new forms of work, part four comments on the protection by the International Labour Organisation (ILO) of the institution of collective bargaining, part five considers the challenges being faced by trade unions in the southern African region, part six evaluates the role of trade unions in the era of non-standard and new forms of work and part seven reflects on strategies that trade unions could consider to adopt in the new world of work. In the final part of the contribution the authors draw conclusions and offer recommendations regarding the sustainability of trade unions during the modern era.

2 INFORMALISATION, CASUALISATION AND EXTERNALISATION OF WORK

Harbridge & Walsh define 'globalisation' as a development that has resulted in an

'increase in cross-border economic interdependency resulting from a greater mobility of factors of production and of goods and services [that] has established linkages over a broader geography of location. This trend is reflective of an increasing economic liberalisation and falling tariff barriers, modern communications, free

¹ R Harbridge & P Walsh 'Globalisation and labour market deregulation in Australia and New Zealand: Different approaches, similar outcomes' (2002) 24 (4) *Employee Relations* 424.

² *ibid.*

³ B Hepple 'The Labour Relations Act and global competitiveness' (2005) 9 (2) *Law, Democracy and Development* 137.

⁴ P Davies & M Freedland *Kahn-Freund's Labour and the Law* (Stevens and Sons 1983) 18.

flow of capital and modern technologies, integrated financial markets and corporate strategies of multinational companies that operate on the premises of a homogenous world market'.⁵

Globalisation and the implementation of new technology have transformed the patterns of engagement in labour markets in the world at large. Studies in Australia, Europe, and North America published in the last 20 years of the 20th century have shown shifts in the hiring of workers.⁶ In a study of employment trends in the 'new economy' in the United States of America, Smith contends that 'uncertainty and unpredictability ... have diffused into a broad range of post-industrial workplaces' and this development is 'intertwined with temporariness and risk'.⁷ At about the same time, Osterman noted that 'the ties that bind the workforce to the firm have frayed. ... New work arrangements, captured by the phrase "contingent work" imply a much looser link between firm and employee'.⁸

Cappelli argues that 'the old employment system of secure, lifetime jobs with predictable advancement and stable pay is dead'.⁹ Hacker mentions that the unpredictability of the labour market is increasingly borne by workers as employers back off from long-term employment standards.¹⁰ Weil observes that 'fissured' workplaces have led to growth in more non-standard categories of work and an erosion of labour's capacity to bargain for better employment conditions.¹¹

The orthodox model of an indefinite employment paradigm based on a model of full-time employment with one employer has not escaped the impact of globalisation in the southern African labour market where a significant rise in non-standard work relationships has occurred.¹² Theron confirms that since South Africa's first democratic election in 1994, the need for firms to achieve flexibility in order to remain competitive in the global age has resulted in a meteoric rise in the informalisation of

⁵ Harbridge & Walsh n 1 above 424.

⁶ P Cappelli & G Taylor *The New Deal at Work: Managing the Market-Driven Workforce* (Harvard University Press 1999) 17.

⁷ V Smith *Crossing the Great Divide: Worker Risk and Opportunity in the New Economy* (ILR Press 2001) 7.

⁸ P Osterman *Securing Prosperity: The American Labour Market: How It Has Changed and What to Do about It* (Princeton University Press 2000) 3-4.

⁹ Cappelli & Taylor n 6 above 17.

¹⁰ J Hacker *The Great Risk Shift: The Assault on American Jobs, Families, Health Care and Retirement and How You Can Fight Back* (OUP 2006) 48.

¹¹ D Weil *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It?* (Harvard University Press 2014). G Standing *The Precariat: The New Dangerous Class* (Bloomsbury 2003) also argues that a new category of worker, the 'precariat', has emerged. These are workers in less secure employment who enjoy few employment benefits and minimal social protection.

¹² Department of Labour *Policy Proposals for a New Employment Standards Statute* Green Paper, Minimum Standards Directorate (February 1996).

traditional employer–employee relationships.¹³ Furthermore, Klerck¹⁴ observes that with the expansion of a flexible labour market in Namibia there is a threat to the number of indefinitely employed employees. This, the author declares, can be seen as a symptom of employer greed.

Non-standard or precarious employment in Zimbabwe is referred to as ‘labour casualisation’. Muchichwa & Matombo¹⁵ perceive labour casualisation as ‘the replacement of permanent or standard employment with temporary, short-term or renewable contracts’. The same views are supported by Chiutsi,¹⁶ who defines casualisation of labour as ‘the reduction in full time employment and their replacement with workers who are called in as needed on [a] casual basis’. Muchichwa & Matombo¹⁷ further argue that labour casualisation implies job insecurity, irregular working hours, low remuneration and the lack of standard employment benefits, amongst other things.

The overlapping processes of ‘informalisation’, ‘casualisation’ and ‘externalisation’ have all played variant roles in diminishing workers’ labour and social security safety nets. A brief discussion of each one of these developments follows.

The process of informalisation migrates workers from conventional employment to the informal economy.¹⁸ Informalisation relates to the situation where ‘employees who are *de jure* covered by labour law ... are *de facto* not able to enforce their rights’ as well as to the situation where employees ‘are *de jure* not covered by labour law because they are independent contractors’.¹⁹

Kanbur aptly points out that the term ‘informal sector’ needs to be distinguished from the notion ‘informal employment’.²⁰ The informal sector relates to whether a firm and/or a worker is registered with the appropriate authorities for tax and social security purposes. Informal employment relates to the protections and benefits afforded to workers. Do the workers receive the minimum wage, paid leave and social security protections? This means that informal employment can occur in both the informal and the formal sectors. Informal-sector businesses

¹³ J Theron ‘Employment is not what it used to be’ in E Webster & K von Holdt (eds) *Beyond the Apartheid Workplace: Studies in Transition* (UKZN Press 2005) 293–4.

¹⁴ G Klerck ‘Trade union responses to the “flexible” workforce in Namibia’ (2002) 6 (2) *African Sociological Review* 110–4.

¹⁵ N Muchichwa & T Matombo ‘The effects of casualization on the workforce of Zimbabwe’ Labour and Economic Development Research Institute of Zimbabwe (2006) 69.

¹⁶ See F Ncube ‘Precarious employment as survival strategy: An emerging reality in Zimbabwean hotels’ (2017) 5 (2) *International J of Business and Management* 67–9.

¹⁷ Muchichwa & Matombo n 15 above.

¹⁸ C Fenwick, E Kalula & I Landau ‘Labour law: A southern African perspective’ in T Tekle (ed) *Labour Law and Worker Protection in Developing Countries* (Hart Publishing 2007) 20.

¹⁹ H Cheadle ‘Regulated flexibility: Revisiting the LRA and the BCEA’ (2006) 27 *ILJ* 663 at 699 confirms that the modern workplace has witnessed an ‘increase of non-standard employment due to informalisation, casualisation, and externalisation of work’.

²⁰ See R Kanbur ‘Conceptualising informality regulation and enforcement’ (2009) 52 (1) *Indian J of Labour Economics* 33–42.

are generally small and seldom run from business premises. Instead, they operate, in the main, from homes, street pavements, and other informal settings.²¹

Turning to the process that is referred to as ‘casualisation’ the following observations can be made. It is clear that this notion is derived from the term ‘casual worker’. Even though the term has no exact meaning, it is sometimes used to describe anyone who is not engaged in full-time standard employment.²² This predominantly points to part-time and fixed-term employees. In North America the term ‘day labourer’ is often used to refer to someone who is employed on a day-to-day basis.²³

The South African Basic Conditions of Employment Act (BCEA)²⁴ distinguishes between ‘employees’ who work fewer than 24 hours a month for an employer and those who work 24 hours or more a month.²⁵ This distinction is not particularly helpful to casual workers as only employees who work for longer than 24 hours a month are provided with protection in respect of aspects like additional payments for overtime pay and paid leave.

Added to this, it is not always easy for a worker to know whether he or she works 24 hours or more a month and the part-time worker who is regularly employed but works fewer than 24 hours is not covered.²⁶ There are, for example, a substantial number of domestic workers who work for different employers, and may well be employed for fewer than 24 hours a month for each employer. Such workers would not be protected by provisions regulating hours of work, leave, and those requiring an employer to provide his or her employee with particulars of employment.²⁷

Nonetheless, it is important to note that the National Minimum Wage Act (NMWA)²⁸ potentially offers some measure of protection to persons rendering on-demand services on online platforms. The NMWA applies to ‘workers’. The definition of this term does not exclude ‘independent contractors’ as do the definitions in the BCEA, the Labour Relations Act (LRA)²⁹ and the Employment Equity Act (EEA).³⁰ Section 1 of the NMWA defines a worker as ‘any person who works for another and

²¹ The ILO defines the notion ‘informal economy’ as ‘all economic activities by workers and economic units that are — in law or practice — not covered or insufficiently covered by formal arrangements’. See in this regard the ILO *Resolution concerning Decent Work and the Informal Economy* https://www.ilo.org/asia/info/WCMS_098314/lang--en/index.htm.

²² J Theron, S Godfrey & M Visser *Key Words for a 21st Century Workplace* Institute of Development and Labour Law (UCT 2011) 62.

²³ *ibid.*

²⁴ Act 75 of 1997.

²⁵ ss 6(1), 19(1) and 28(1) of the BCEA.

²⁶ See chs 2 and 3 of the BCEA.

²⁷ See chs 2, 3 and 4 of the BCEA.

²⁸ Act 9 of 2018.

²⁹ Act 66 of 1995.

³⁰ Act 55 of 1998.

who receives ... any payment for that work whether in money or in kind'. Added to this, workers and employees who only work for limited hours per day also receive protection. Section 9A of the NMWA reads as follows:

'9A. Daily wage payment — (1) An employee or a worker as defined in section 1 of the National Minimum Wage Act, 2018, who works for less than four hours on any day must be paid for four hours work on that day.

(2) This section applies to employees or workers who earn less than the earnings threshold set by the Minister in terms of section 6(3).³¹

Further, the introduction of s 198A of the LRA has ameliorated the position of temporary employment service (TES) employees in many ways. For example, should a low earning employee be placed with a client for a period longer than three months, or should he or she no longer be substituting for an employee of the client who was temporarily absent, the worker will be considered an employee of the client. Amongst other things, this will entitle the employee to refer disputes concerning unfair dismissal and unfair labour practices against the client.³² The above are relevant legislative attempts to protect employees who do not have the assistance of trade union representatives.

Theron confirms that in South African literature on non-standard work, the term casualisation is often used as a 'catch all' term to describe the ways in which employment is changing, and can be used more or less interchangeably with the terms 'contingent' or 'precarious' employment.³³ The term has been used by both organised labour and the Department of Employment and Labour in the above sense to justify policy reforms.³⁴ The term has, however, also been criticised for conflating direct employment (whether part-time or temporary) and indirect or triangular employment where labour is externalised. As discussed later in this part, South African policy makers have responded to the plight of fixed-term and part-time employees to some extent in as far as amendments to the LRA have improved their situation in relation to the termination of employment.³⁵

In relation to the third development, namely 'externalisation', Benjamin observes that this notion as is 'a process of economic restructuring whereby employment is regulated by a commercial contract

³¹ See s 5(2) of the NMWA and s 9A of the BCEA.

³² ss 198A–D and s 187 of the LRA.

³³ Theron n 13 above 293–4.

³⁴ *ibid.*

³⁵ Those making a living as casual workers, home workers, independent contractors, fixed-term and part-time employees can be categorised as 'vulnerable' or 'atypical'. Notwithstanding the wide scope of these terms, the LRA identifies only three categories of persons for improved protection, namely employees placed by a TES or labour broker, fixed-term employees and part-time employees. See the discussion of ss 198A, 198B, 198C and 198D below.

rather than a contract of employment'.³⁶ Theron et al³⁷ explain that this may occur in one of two ways: a business may engage an employee as a contractor rather than an employee to provide services; and an employer may engage a contractor to provide workers who will provide services for it. Such a contractor may be regarded as either a service provider or an intermediary. This second category gives rise to a relationship in which at least three parties are involved: the agency worker; the service provider, or agent, who is the legal employer; and the client, or the receiver of the agency worker.

This leads to the fragmentation of the workplace where the workers are seen as external to the workplace as they fall outside the enterprise which is making use of their services.³⁸ One of the main characteristics of this type of employment model is that it reduces the number of workers employed by the enterprise and, as such, restricts the implementation of labour legislation. Externalisation has the effect that the client, or the user enterprise, avoids the duties and risks associated with standard employment arrangements, such as payment of social benefits, medical aid contributions, and the costs involved in paying a living wage.³⁹

Externalisation may also be achieved through the process termed 'outsourcing'. This takes place when a core enterprise retrenches workers performing non-core duties, and employs an external contractor to do the work. Theron notes that the core firm may or may not transfer the work to the external contractor.⁴⁰ A classic example of outsourcing in South Africa is when large companies, such as hotels and educational institutions, for example, universities, outsource their protection services and hospitality and cleaning duties to external contractors.⁴¹

The South African government and the social partners investigated the need to amend the LRA in light of these developments. This led to the adoption of the Labour Relations Amendment Act, 2014 (LRAA).⁴² At the heart of the LRAA is the understanding that work today is less secure. The amendments derive from the position that the labour laws and regulations introduced in the decades following World War II, when the standard work relationship was more widespread, no longer serve the needs of South African workers.⁴³

³⁶ P Benjamin 'Beyond the boundaries: Prospects for expanding labour market regulation in South Africa' in G Davidov & B Langille (eds) *Boundaries and Frontiers of Labour Law* (Bloomsbury 2006) 188.

³⁷ Theron et al n 22 above 21–22.

³⁸ C Owen & H Bound *Strategic Alliances and the New World of Work* National Centre for Vocational Education Research (2001). Fenwick et al n 18 above 20 are of the view that 'externalisation is more radical and complex than casualisation'.

³⁹ Fenwick et al n 18 above 20.

⁴⁰ Theron n 13 above 62.

⁴¹ *ibid.*

⁴² Act 6 of 2014.

⁴³ C Mitchell & J Murray 'Changing Workplaces Review: An Agenda for Workplace Rights' Special Advisors' Interim Report, Ministry of Labour, Canada (2017) 8.

The three categories of employees covered are fixed-term employees, part-time employees, and those who work for a TES. In terms of the LRAA such workers may not be subjected to discriminatory practices. For example, a fixed-term employee whose remuneration falls under the threshold and who is employed for longer than three months (without justifiable reason) will be deemed an indefinite employee and may not be treated less favourably than permanent employees doing the same or similar work. Such an employee must also be provided with the same work opportunities as permanent employees.⁴⁴ Similarly, a part-time employee, compensated under the legal threshold, may not be treated differently if there is not a justifiable reason for doing so.

Furthermore, the new s 198A(1) of the LRA⁴⁵ introduces a deeming provision that applies only to employees earning below the prescribed earnings threshold⁴⁶ referenced in the BCEA. These employees will only be regarded as employees of the TES if they are performing temporary services. The amendment now allows the employee or a labour inspector to take action either against the TES, the client or both where joint and several liability applies or in instances where the client is deemed to be the employer.

The rise of the platform economy and the new forms of work related to it are creating new challenges for labour relations — in addition to those that hitherto existed. In fact, technological and organisational changes, and globalisation and the growth of flexible forms of work have resulted in new forms of work. Yet good labour relations are vital to manage the transition to the future of work successfully.

However, it is worth noting that it may not be feasible to rely only on trade unions and collective bargaining to handle this transition. The government must also play a significant role as exemplified by amendments to the LRA and the introduction of the NMWA. As referred to, the scope of application of the NMWA has now been broadened arguably to cover independent contractors as well. But, it is important to note that the national minimum wage is a recent development and its application to independent contractors has not been tested by the courts yet and we do not know what the outcome will be. Nonetheless, this development provides an opportunity for workers engaged in platform work to gain added protection.

⁴⁴ s 198B(4) of the LRA provides a guide as to what would be considered to be 'justifiable' in specific instances.

⁴⁵ Inserted by the LRAA with effect from 1 January 2015.

⁴⁶ The amount is currently R211 596.30 per annum.

3 NEW FORMS OF WORK

Disruptive technological changes and increasing socio-economic imbalances have had an impact on the entire globe in recent decades.⁴⁷ According to Ndung'u & Signé the fourth industrial revolution is a blend 'of the digital, biological, and physical worlds' and this has 'ushered in a new era of economic disruption with uncertain socio-economic consequences for Africa'.⁴⁸

Non-standard employment, as the expression implies, is described by what it is not. It is not standard employment.⁴⁹ It differs from the conventional standard employment relationship where work is usually full-time and anticipated to continue until the regular retirement age, or until either party gives notice of termination.⁵⁰

Notwithstanding the positive outcomes that technological advances may have on the economy and increase in new jobs, they also have negative ramifications. Complicated networks make the difficulty of identifying the parties to the employment relationship a global concern.⁵¹ The entrance to labour and social security protection is through the presence of an employment relationship.⁵² Nonetheless, the nebulous line that distinguishes between the situation where there is an employment relationship and one where there is independent contracting has been a matter of contention.⁵³

The application of labour law in its narrowest sense excludes the self-employed and independent contractors. Therefore, persons engaged in modern forms of work, such as on-demand platform work, may not be regarded as employees, and as such they would not fall within the safety net of labour law.⁵⁴ Be that as it may it should be noted that the wide definition of 'worker' in the NMWA could to some measure assist those persons performing new forms of work. The digital platform

⁴⁷ T Klebet & M Weiss 'Workers' participation 4.0 — digital and global?' (2019) 40 (2) *Comparative Labor Law and Policy J* 263. See also D du Toit 'Platform work and social justice' (2019) 40 *ILJ* 1.

⁴⁸ N Ndung'u & L Signé 'Capturing the fourth industrial revolution: A regional and national agenda' in B Coulibaly (ed) *Foresight Africa* (Brookings Institute 2020) 61 https://www.brookings.edu/wp-content/uploads/2020/01/ForesightAfrica2020_Chapter5_20200110.pdf, accessed 12 April 2021.

⁴⁹ Theron et al n 22 above 62.

⁵⁰ A Kalleberg 'Non-standard employment relations: Part-time, temporary and contract work' (2002) 16 (26) *Annual Review of Sociology* 341-65.

⁵¹ Du Toit n 47 above 1.

⁵² A van Niekerk, N Smit, M Christianson, M McGregor & S van Eck *Law@Work* (LexisNexis 2019) 59.

⁵³ M Brassey 'The Nature of Employment' (1990) 11 *ILJ* 889 refers to *National Labour Relations Board v Hearst Publications* (1944) 322 US 111 at 121 where an American court said more than 60 years ago that '[f]ew problems in the law have given greater variety of application and conflict in result than cases arising in the borderline between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing'.

⁵⁴ D du Toit, S Fredman & M Graham 'Towards legal regulation of platform work: Theory and practice' (2020) 41 *ILJ* 1493.

economy, exemplified by online suppliers of goods and services like Uber, represents an important stage in this development.

The question that arises is whether the reversing of the eroding effect of new forms of work, such as provided by Uber, rests solely in the broadening of the definition of employee? Uber drivers in South Africa, like their counterparts in many other countries, have tried to gain labour law protection through the gateway of being classified as employees. In *Uber South Africa Technology Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others*,⁵⁵ the Commission for Conciliation, Mediation and Arbitration (CCMA) held that Uber drivers whose services were 'deactivated' were employees for the purposes of the LRA. However, in a disappointing development, the South African Labour Court upheld an application for review and concluded that the CCMA's commissioner had conflated the roles of Uber SA and the foreign mother company, Uber BV. The drivers did not contract with the applicant in this matter (Uber SA), and hence they could not succeed with their case.⁵⁶ The question remains open whether Uber drivers will be classified as employees of Uber BV.

Subsequent to this decision the Supreme Court of the United Kingdom in *Uber BV v Aslam* held that Uber drivers were not self-employed or independent contractors as they had the status of 'workers'.⁵⁷ It can be argued that it would have been appropriate for the South African Labour Court to adopt a broader approach. It could have explored ways of piercing the legal complexities associated with triangular relationships created by online platforms and it could have placed less emphasis on the existence of a contract of employment by recognising an employment relationship.

There can be no doubt that the future world of work can open up opportunities for workers that may improve the quality of their working lives.⁵⁸ Nonetheless, it can also lead to jobs being lost. In the words of Weiss:

⁵⁵ *Uber South Africa Technology Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure & Others* [2017] ZACCMA 1 (7 July 2017).

⁵⁶ *Uber SA Technology Services (Pty) Ltd v National Union of Public Service & Allied Workers & others* (2018) 39 ILJ 903 (LC). See also the criticism against the decision in S van Eck & E Nemusimbori 'Uber drivers: Sad to say, but no employees in SA' (2018) 81 (3) *THRHR* 473-83. Amongst others, the authors criticise the Labour Court for following the approach of the Labour Appeal Court in *Universal Church of the Kingdom of God v Myeni & others* (2015) 36 ILJ 2832 (LAC), where the court at para 49 held that 'the existence of an employment contract or a contractual working relationship was, in my view, still prerequisite for the creation of an employment relationship'.

⁵⁷ [2021] UKSC 5.

⁵⁸ See also L Nxumalo & C Nxumalo 'The impact of the fourth industrial revolution on workplace law and employment in South Africa' (2019) 42 *ILJ* 16..

'Digitalisation contains many risks but it also is a chance to improve working and living conditions to the benefit of workers. It is not an apocalyptic evil but something which needs to be shaped'.⁵⁹

To this, he adds that the future challenge for policy makers and social partners will be to ensure that human beings do not become 'the slaves of this new technological phenomenon'.⁶⁰ Digitalisation has wide ramifications for the social, labour, and economic spheres. It leads to dangers as well as to new chances for the workforce, and therefore labour law must develop efficient ways both to protect workers and allow them to gain from new technological developments.

It is clear from the above exposition that there is still uncertainty regarding the status of platform workers and the protection that they should ideally be entitled to rely on in South Africa in particular. As will be discussed under the next heading, the struggle to regulate new forms of work and to achieve social justice and workplace democracy is closely related to the struggle to ensure viable collective bargaining, which underpins the goals of the ILO.

4 THE ILO AND COLLECTIVE BARGAINING

Freedom of association and collective bargaining form part of the DNA of the ILO. Since the establishment of the ILO in 1919, these core policy considerations have been recognised as a vehicle for improving workers' terms and conditions of work thereby fostering social justice.⁶¹ The principles contained in the Freedom of Association and Protection of the Right to Organise Convention 87 of 1948 and the Right to Organise and Collective Bargaining Convention 98 of 1949 are acknowledged as core rights and principles in the ILO Declaration on Fundamental Principles and Rights at Work.⁶²

It goes without saying that the realisation of freedom of association is an essential precondition for the effective achievement of the right to

⁵⁹ See M Weiss 'Challenges for labour law and industrial relations' in D Kim & M Rönönmär (eds) *Global Labour and Employment Relations. Experiences and Challenges* (Park Young Publishing & Company, Seoul 2020) 133-62.

⁶⁰ *ibid.*

⁶¹ ILO 'Fundamental rights at work and international labour standards' https://www.ilo.org/wcmsp5/groups/public/@ed_norm/.../wcms_087424.pdf, accessed 17 February 2021.

⁶² Adopted by the International Labour Conference at its 86th Session, Geneva (18 June 1998) (annex revised 15 June 2010) 5-12. The 1998 Declaration notes that all member states are obliged to comply with, advance, and fulfil the principles concerning fundamental rights, irrespective of whether they have ratified the relevant Conventions.

bargain collectively.⁶³ Davies & Freedland express the value of the right to collective bargaining in the following words:

'The importance of collective bargaining can be explained by the fact that it has value for employers as well as workers — for employers, as a means of maintaining "industrial peace"; for workers, primarily as a means of maintaining certain standards of distribution of work, of rewards and of stability of employment.'⁶⁴

Although these principles are well known and may seem trite, the question remains to what extent this framework still is relevant during the era of the fourth industrial revolution. There can be no doubt that the ILO is of the opinion that the rights to freedom of association and the institution of collective bargaining remain relevant during the modern age. The ILO Declaration on Social Justice for a Fair Globalisation⁶⁵ highlights the importance of freedom of association and the right to collective bargaining to assist in achieving the ILO's strategic goals, which include job creation, job security, social protection and the strengthening of social dialogue. These fundamental rights apply to all workers, and, in theory at least, would also include workers engaged in modern forms of work.⁶⁶

Added to this, and in a more recent development, the 2019 ILO sponsored Future of Work report⁶⁷ contemplates that the revitalisation of social dialogue should aid developments regarding the future of work.⁶⁸ The report, inter alia, states:

'All workers and employers must enjoy freedom of association and the right to collective bargaining, with the State as the guarantor of those rights. Workers' and

⁶³ As mentioned, the ILO deems the right to bargain collectively as a fundamental right. Para 2(1) of the ILO Collective Agreements Recommendation 91 of 1951 defines 'collective agreements' as 'all agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more representative workers' organisations ... on the other'. Recommendation 91 further states that collective agreements are binding on the signatories thereto and on those on whose behalf the agreements are concluded.

⁶⁴ Davies & Freedland n 4 above 69.

⁶⁵ This Declaration was adopted in 2008 by the representatives of governments, employers and workers from all ILO member states. The declaration expresses the contemporary vision of the ILO's mandate in the era of globalisation.

⁶⁶ See G Bosch 'Low wage work in five European countries and the US' (2009) 148 (4) *International Labour Review* 337-56. The author does mention though that there may be exceptions for members of the armed forces, the police and other essential services.

⁶⁷ ILO Global Commission on the Future of Work: *Work for a Brighter Future* (2019) (Future of Work report) https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_662410.pdf. The report calls for a human-centred approach to the future of work. The idea is to place people and their work 'at the centre of economic and social policy and business practice'. The report contains three pillars in which it promotes state investment. These pillars are based on investing in people's capabilities, in institutions of work, and in decent and sustainable work.

⁶⁸ *ibid* 41. See also the address by President Cyril Ramaphosa at the launch of the Future of Work report <https://www.gov.za/speeches/address-president-cyril-ramaphosa-launch-report-ilo-global-commission-future-work-fairmont>. The Future of Work report was launched in South Africa on 1 March 2019. The commission was co-chaired by the Prime Minister of Sweden, Mr Stefan Lofven, and President Ramaphosa.

employers' organizations must strengthen their representative legitimacy through innovative organizing techniques that reach those who are engaged in the platform economy, including through the use of technology.⁶⁹

The Future of Work report recommends in this regard that workers' organisations must use digital technology to organise labour in workplaces as this may improve the effectiveness of collective bargaining.⁷⁰ This, however, may be easier said than done. The current changes in the workplace where there is a disconnection between fellow workers and the physical workplace make it more difficult for trade unions to organise and represent their collective interests. In addition, it seems that at least some South African trade unions have not been agreeable to making use of digital mechanisms for purposes of consultations and collective bargaining. So, for example, in *Food & Allied Workers Union v SA Breweries (Pty) Ltd & another*,⁷¹ the trade union FAWU vehemently objected to the use of video conferencing when the employer sought to engage in consultations in a retrenchment exercise. The CCMA appointed a facilitator who arranged consultation sessions during the Covid-19 lockdown period. The trade union lodged an application with a view to postponing all consultations until after this period.

The Labour Court quite correctly adopted a pragmatic approach and placed emphasis on the health and safety considerations of the parties involved. The court noted that even though consultations do normally take the form of physical meetings, this was not a necessary requirement. Despite the trade unions' objections, the court held that the use of the zoom application was a necessary tool to ensure that social distancing was observed. This, the court held, did not necessarily give rise to procedural unfairness and FAWU's court application was dismissed.⁷² It is submitted that such resistance to the use of digital means will not stand trade unions in good stead in the changed world of work.

All of the Southern African Development Community (SADC) countries are members of the ILO and are bound by all eight core labour standards.⁷³ According to Zvobgo, who conducted research on collective agreements on the African continent, it is particularly relevant for parties in developing countries in Africa to engage in inclusive social discourse and collective bargaining as a way to ensure that there is an

⁶⁹ Future of Work report n 67 above 12.

⁷⁰ The report (*ibid* at 42) states that '[w]orkers across diverse workplaces and countries can be organized through digital means and engage in new forms of connected action. Digital technology provides workers' organizations with the potential to connect with workers outside traditional workplaces and offer new services, such as the mining of data to design effective strategies and the sharing of information about crowdworking platforms or portable benefits'.

⁷¹ (2020) 41 *ILJ* 2652 (LC).

⁷² *ibid* paras 31-33.

⁷³ See *Promoting Decent Work for all in the Southern African Development Community Region* Southern African Development Community Decent Work Programme https://www.ilo.org/wcmsp5/groups/public/---ed_mas/---program/documents/genericdocument/wcms_561085.pdf, accessed 12 April 2021.

equal voice for all workers irrespective of their status.⁷⁴ However, to be effective, Fenwick & Kalula aptly argue that 'labour law in southern Africa needs to take into account the region's particular socio-economic profile and develop an indigenous paradigm'.⁷⁵ The authors further suggest that labour law should be widened to include job creation, the regulation of immigration, the education of workers and the extension of social security.⁷⁶

Therefore, it is clear that collective bargaining in southern Africa should not only be viewed in light of the proliferation of non-standard work. It should be considered in a context where the labour markets are characterised by poverty, 'stark income inequality',⁷⁷ 30 per cent to 40 per cent unemployment, extremely low skills levels, HIV/AIDS, large-scale labour migration and an extensive informal sector.⁷⁸ More recently, the Covid-19 pandemic has compounded some of these factors. It is against this background that the role of trade unions in a number of southern African states is examined in the next part of this article.

5 TRADE UNIONISM AND ITS CHALLENGES IN SOUTHERN AFRICA

Throughout history, trade unions have fought for the protection and improvement of their members' remuneration, workplace security, and health and safety.⁷⁹ Nonetheless, in southern Africa, the beginnings of many trade unions can be traced back to liberation struggles for national independence.⁸⁰ In many instances, organised workers were the most visible and effective social forces campaigning for independence and social transformation. The roles played by the National Union of Namibian Workers (NUNW) and the Congress of South African Trade Unions (COSATU) must be noted in this regard. The close relationships

⁷⁴ T Zvobgo 'Collective bargaining and collective agreements in Africa' Turin School of Development, Working Paper 11 (2019) 35.

⁷⁵ Fenwick et al n 18 above 20.

⁷⁶ This is also reflected in the policy of the South African Department of Labour. Its strategic objectives for 2004 to 2009 included: contribution to employment creation; enhancing skills development; promoting equity in the labour market; protecting vulnerable workers; and strengthening social protection — see http://www.labour.gov.za/media/speeches.jsp?speechdisplay_id=5877. One important outcome of this approach has been the Skills Development Act 97 of 1998.

⁷⁷ See Development Policy Research Unit *An Exploratory Look into Labour Market Regulation* (University of Cape Town 2007) 56.

⁷⁸ C Fenwick & E Kalula 'Law and labour market regulation in East Asia and southern Africa: Comparative perspectives' (2001) 21 (2) *International J of Comparative Labour Law and Industrial Relations* 193; T Cooney, T Lindsey, R Mitchell & Z Ying *Law and Labour Market Regulation in East Asia* (Routledge 2005) 193–226.

⁷⁹ B Millen *The Political Role of Labour in Developing Countries* (The Brookings Institution 1963) 148; H Schillinger *Trade Unions in Africa: Weak but Feared* International Development Cooperation Occasional Papers (2005) 2; and E Webster 'Ten years of the South African Labour Bulletin 1974–1984' (1984) 9 (8) *South African Labour Bulletin* 1–7.

⁸⁰ J Jauch *Building a Regional Labour Movement: The Southern Africa Trade Union Co-ordination Council* (SATUCC 2003) 18.

between liberation movements and trade unions in certain parts of southern Africa can still be seen. Jauch confirms that trade unions that once were

'close allies of liberation movements found themselves in the forefront of advocating for democracy and thus openly challenged the ruling parties of the day. Because of their large social base, trade unions in Zambia and Zimbabwe played a crucial role in forming political opposition parties that overthrew former liberation movements in power (as occurred in Zambia) or presented a serious political challenge (as in Zimbabwe)'.⁸¹

Moreover, trade unions in the region are not identical and differ substantially in terms of organisational ability, membership base, and discernment. In countries such as Botswana, Malawi, and Mozambique, for instance, union federations were established at the initiative of the state and barely play the role of an autonomous working-class organisation. Nonetheless, trade unions are essential for the protection of non-standard employees because the concerns and voices of these vulnerable employees cannot be heard unless they are members of a trade union.

Post-independence, trade unions in the southern African region have remained at the forefront of the fight for social and economic justice, workers' rights, fairness and good governance. Nevertheless, the labour movement in southern Africa has been confronted by many challenges in its endeavours to protect the rights of workers — and the most vulnerable in particular.⁸²

In some southern African countries such as South Africa, Namibia and Malawi, tripartism takes central stage in labour law structures. The structures rely on the existence of comparatively successful and efficient trade union movements. Nevertheless, trade unions in a number of southern African states, such as Botswana and Tanzania, suffer from the consequences of repression and control.⁸³ Many southern African states which have ratified the two core ILO conventions regarding freedom of association and the right to bargain collectively have failed to meet the requirements of the ILO.⁸⁴

Malawi has been criticised for its early brutal repression of workers' protest marches and because it accepted employers' conduct that is in direct conflict with trade union policies.⁸⁵ Dzimbiri argues that the transition to democracy in Malawi in the 1990s, although leading to

⁸¹ *ibid.*

⁸² L Dzimbiri 'The state and labour control in Malawi: Continuities and discontinuities between one-party and multiparty systems' (2005) 30 (4) *Africa Development* 77.

⁸³ P Takiramubudde & A Molokomme 'The New Labour Law in Botswana' *Southern African Labour Monographs*, Labour Law Unit, University of Cape Town (1994) 20.

⁸⁴ See the numerous individual observations by the Committee of Experts on the Application of Conventions and Recommendations at <http://www.ilo.org/ilolex/english/index.htm>.

⁸⁵ *ibid.*

an increase in trade unions and improvement of the legal framework,⁸⁶ has not, in practice, led to freedom of association. During the decades of dictatorship, the government marginalised trade unions through administrative and legal means. In the democratic era, it has adopted more 'diplomatic' forms of hostility towards trade unions by adopting 'divide-and-rule' tactics. The state sponsors 'splinter unions' and manipulates union leaders using bribes.⁸⁷ In this situation, it is unsurprising that trade unions struggle with limited organisational, financial, and administrative capabilities, and with a lack of leadership and research skills.⁸⁸

In addition, a lack of capacity among trade unions limits the extent to which they can effectively protect and serve members' interests at the workplace level. There is evidence from Namibia that, despite the existence of a modern labour law framework that depends to a large extent on collective bargaining, parties are often not sufficiently familiar with the requirements of the labour laws.⁸⁹

Unions frequently find it difficult to achieve significant levels of union density in southern African labour markets.⁹⁰ A key challenge for unions in this regard is the spread of informalisation, casualisation, and externalisation. It is problematic for trade unions to organise among non-standard workers.⁹¹ The declining level of formal employment in most labour markets in southern Africa poses further challenges, as do retrenchments and other structural factors that result in a loss of employment. Where unions do not adopt flexible strategies to respond to these labour market realities, their capacity to attract members and to represent them is significantly diminished.⁹²

Another institutional factor affecting the capacity of trade unions in some southern African states is their close affiliation to ruling political parties. Such relationships are largely the legacy of cooperation between the two organisations during the struggle for independence. For instance, in Namibia, the NUNW continues to be affiliated with the South-West People's Organisation (SWAPO), the ruling party. In South Africa, COSATU is in an alliance with the African National Congress (ANC) and the South African Communist Party (SACP), while in

⁸⁶ Dzimbiri n 82 above 77. In Malawi, individual and collective labour rights are formally recognised in the 1994 Constitution, the Labour Relations Act 1996 and the Employment Act 2000.

⁸⁷ *ibid.* This observation is supported by the conclusion of a human rights and employment study commissioned by the Ministry of Labour in 2000 to assess the effectiveness of freedom of association and collective bargaining. The study observed that the state constrained freedom of association because it 'took with one hand what the other gave'. See Ministry of Labour, Human Rights and Employment Report, as cited in Dzimbiri n 82 above 77.

⁸⁸ G Bauer *Labour and Democracy in Namibia, 1971-1996* (Ohio University Press 1998).

⁸⁹ C Fenwick 'Labour law reform in Namibia: Transplant or implant?' in T Lindsey (ed) *Law Reform in Developing and Transitional States* (Routledge 2007) 317-43.

⁹⁰ Klerck n 14 above 98-129.

⁹¹ Fenwick et al n 18 above 20.

⁹² *ibid.*

Mozambique, the Organisation of Mozambican Workers (OTM) is still closely associated with the Frente de Libertação de Moçambique (Front for Liberation of Mozambique or FRELIMO). Being in close affiliation with the ruling party may in some instances be beneficial for the trade union movement as organised labour may then influence the policy-making process in its favour. However, these affiliations may also mean that workers' interests are easily subordinated to other priorities of the ruling party.⁹³ In Namibia, NUNW-affiliated unions and union members have expressed concern over the fact that its close association with SWAPO has led the union movement to rely on this relationship to influence the government, rather than focusing on shop-floor power and trying to translate this into policy-making strength.⁹⁴

Generally, despite the introduction of laws encouraging employers to recognise unions, the downward trend in union membership and the fragmentation of federations of trade unions have continued in recent years. In South Africa, for example, the country's biggest trade union federation, COSATU, which represents 1.6 million workers, mostly employed in the public sector, has lost more than 300,000 members since 2015 and the documents presented to its 13th national congress indicate that affiliates' failure to pay subscriptions, which amounted to 41% of overall income in 2017,⁹⁵ has forced the federation to operate on a shoe-string budget. Furthermore, in Malawi while the membership rate increased by 1.1% in the period from 2014 to 2018, trade union density (ie the percentage of the workforce who are union members) dropped from 2.2% to 1.9% in the same period.⁹⁶

How unions respond to the challenges and opportunities presented by the changing nature of work and employment relations will be decisive in determining their level of influence in the workplace in the coming years. It is therefore crucial to examine the relationship between non-standard work and trade unions.

6 TRADE UNIONS AND NON-STANDARD AND NEW FORMS OF WORK

Trade unions are under pressure in the changed world of work. As Gladstone⁹⁷ states:

⁹³ *ibid* 24-5.

⁹⁴ *ibid.*

⁹⁵ See T Mahlakoana 'Fault lies with unions, not Cosatu leaders' *Business Day* September 2018 <https://www.businesslive.co.za/bd/opinion/columnists/2018-09-19-theto-mahlakoana-fault-lies-with-unions-not-cosatu-leaders/>, accessed on 2 March 2021.

⁹⁶ See 'Malawi Labour Market Profile 2019', report of the Danish Trade Union Development Agency https://www.ulandssekretariatet.dk/wp-content/uploads/2020/03/Malawi_lmp_2019.pdf.

⁹⁷ A Gladstone 'Reflections on the evolving environment of industrial relations' in R Blanpain & M Weiss *Changing Industrial Relations and Modernisation of Labour Law* (Kluwer Law International 2003) 151.

'The changing patterns of world production, the decline in the industrialized economies of basic manufacturing and extractive industries and the changed employment patterns between major economic sectors, as well as continuing and even more revolutionary technological developments, and a change in the nature, composition and aspirations of the labour force are all exercising and will continue to exercise pressures and constraints on industrial relations systems. These pressures are considerable in respect of the industrial relations actors — in particular the trade unions.'

There are numerous reasons for the global trend in trade union decline.⁹⁸ To a large extent, union power during the industrial era was a result of historically specific and socio-economic conditions. The Fordist era was conducive to the establishment and success of centralised systems of collective bargaining.⁹⁹ Globalisation and technological progress have changed all of this: the result is the diminished relevance of the previous rationale of trade unions, namely to bargain collectively.¹⁰⁰ Accordingly, collective bargaining has been decentralised and the contract of employment has been individualised in numerous industrialised countries.¹⁰¹

Southern Africa has not escaped this reality. This is linked to, among other things, a shrinking formal sector from which unions have customarily drawn their membership, and the increasing numbers of informally employed workers.¹⁰² Workers in non-standard forms of employment, such as labour broker employees, fixed-term workers and part-time workers have often found it problematic to participate in union activity. This leaves many non-standard workers in tenuous and vulnerable employment situations. The question that arises is why union membership is noticeably lower in general, as well as among non-standard workers.

Firstly, a general shift to non-unionisation in employment could be related to a change in the attitude of formal workers, which makes them less willing to join a trade union.¹⁰³ Workers' attitudes towards trade unions, particularly among the youth, may have changed because of an increasing individualistic orientation resulting in less interest in union representation and so eroding the basis for collective mobilisation and organisation.¹⁰⁴

⁹⁸ *ibid.*

⁹⁹ *ibid.*

¹⁰⁰ R. Adams 'Regulating unions and collective bargaining: Global historical analysis of determinants and consequences' (1993) 14 (3) *Comparative Labor Law and Policy J* 272.

¹⁰¹ S Vettori *Alternative Means to Regulate the Employment Relationship in the Changing World of Work* (University of Cape Town 2005) chs 5 and 6.

¹⁰² *ibid.*

¹⁰³ D Gallagher & M Sverke 'Contingent employment contracts: Are existing employment theories still relevant?' (2005) 26 (2) *Economic and Industrial Democracy* 189-203.

¹⁰⁴ See A Hodder & L Kretsos 'Young workers and trade unions: Context and overview' in A Hodder & L Kretsos (eds) *Young Workers and Trade Unions* (Palgrave Macmillan 2015) 1-15. The authors mention that even though a number of trade union initiatives to foster a new generation of activists have been implemented, the number of young trade union members have not grown.

Secondly, trade unions are inclined to ignore non-standard types of employment, especially 'own-account' self-employment, fearing that these types of employment will erode existing rewards and working conditions. The traditional trade union approach towards non-standard employment has been centred on the defence of full-time employment and hostility towards non-standard forms of employment. This is because unions seek, among other things, to increase job quality and the job security of their members.¹⁰⁵ Since most, if not all unions consist of members who are engaged in standard employment contracts, the unions seek to resist the use of non-standard workers who are seen as a threat to unionised workers.¹⁰⁶ Given the above, non-standard workers have blamed unions for primarily representing the concerns of the 'insiders' and for not considering their specific concerns in collective bargaining arrangements, employment regulations, or bargaining on social insurance coverage.¹⁰⁷ On the whole, they have a positive attitude towards trade unions and thus there is a significant unsatisfied demand for union membership which means that there is potential for an increase in membership. Moreover, one should bear in mind that some of these workers may have experienced collective organisation in the course of previous employment (on a standard contract basis) and are therefore likely to be more accepting of a collective orientation than others, among whom union membership is less well known.¹⁰⁸

Thirdly, according to Mackenzie, the under-representation of non-standard workers in unions arguably mirrors, in the main, structural constraints or barriers encountered by trade unions in organising these workers.¹⁰⁹ On a practical level, organising costs for trade unions are higher for non-standard workers compared with standard employees. They are often more difficult to contact directly than their counterparts.

Fourthly, in a sociological study by Klerck based on trade union responses to flexibility in Namibia, the author identified the divergence in the needs and interests of standard and non-standard employees and

¹⁰⁵ K Olsen & A Kalleberg 'Non-standard work in two different employment regimes: Norway and the United States' (2004) 18 (2) *Work, Employment & Society* 328; I Campbell *Trade Unions and Temporary Employment: New Initiatives in Regulation and Representation* (University of Melbourne 2011) 1-28.

¹⁰⁶ Olsen & Kalleberg *ibid* 328.

¹⁰⁷ B Ebbinghaus 'Trade union movements in post-industrial welfare states opening up to new social interests?' in K Armingeon & G Bonoli (eds) *The Politics of Post-Industrial Welfare States: Adapting Post War Social Policies to New Social Risks* (Routledge 2006) 123-43. Currently, most unions have accepted, although to differing degrees, the specific needs of non-standard workers. They have also acknowledged, though somewhat unenthusiastically, that non-standard work may represent not only an employment opportunity but also a stepping-stone to regular employment, particularly for younger and female workers.

¹⁰⁸ R Mackenzie 'Union responses to restructuring and the growth of contingent labour in the Irish telecommunications sector' (2010) 30 (4) *Economic and Industrial Democracy* 539.

¹⁰⁹ *ibid.*

the high labour turn-over as problems that undermine the continuity of union structures in the workplace.¹¹⁰

The discussion of non-standard employment and trade unions provides an excellent platform for developing possibilities and recommendations that may be adopted by the unions to surmount the challenges that they face.

7 POSSIBILITIES AND RECOMMENDATIONS

Thus far, the contribution has highlighted existing and future challenges that trade unions are facing in the spheres of freedom of association and collective bargaining. To recapitulate: there has been a steady growth of non-standard and new forms of work across the globe; trade unions are faced with significant socio-economic and political problems in the southern African region; and the digitalisation of the workplace makes it problematic for trade unions to fulfil their traditional roles. How these challenges can be met is still rather uncertain. Taking account of the significant role that trade unions could potentially play in coming to the assistance of non-standard workers, it is worthwhile to venture into a discussion about the strategies that they could adopt to turn the tide around. It is submitted that the traditional approach of merely resisting change will not have the ultimate effect of improving protection for non-standard and digital workers.

The first option for trade unions is to embrace the realities of the changing world of work and to make it one of their priorities to identify and recruit non-standard workers. Heery and Abbot¹¹¹ refer to this as the 'servicing approach'. Although this will remain a daunting task for trade unions there are examples of instances where advances have been made.¹¹² For example, Keune confirms that in the Netherlands, the Confederation of Dutch Trade Unions (FNV) has identified sectors in which workers face particular risks as a consequence of non-standard forms of work, including 'the postal sector, the cleaning sector, meat processing, domestic aid, the taxi sector, construction and temporary agency work', and has recruited members actively in these sectors.¹¹³

Furthermore, trade unions that represent non-standard workers should join other unions to form trade union federations. Yun refers to the example in the Republic of Korea where the Korean Federation of Construction Industry Trade Unions (KFCITU) 'grew out of a merger

¹¹⁰ Klerck n 14 above 114-115. The author also notes that since union membership has experienced a decline with the expansion of a flexible labour market, the use of non-standard labour is seen as a symptom of employer greed and an attempt to undermine the unions.

¹¹¹ E Heery & B Abbot 'Trade unions and the insecure workforce' in E Heery & J Salmon (eds) *The Insecure Workforce* (Routledge London 2000) 158.

¹¹² R Gumbrell-McCormick 'European trade unions and "atypical" workers' (2011) *International Relations J* 293-310.

¹¹³ M Keune 'Trade union responses to precarious work in seven European countries' (2013) *International J of Labour Research* 59-96.

between the specialised National Association of Construction Day Labourers Union (initially a union of day labourers) and the Korean Federation of Construction Trade Unions'.¹¹⁴ Despite these examples, it does not seem that any significant advances have occurred in this regard in the southern African region. Yes, e-hailing drivers have on occasion engaged in strikes in South Africa to highlight the reduction in their fees by Uber and Bolt, but these were not organised or even supported with any great effect by trade unions in the region.¹¹⁵

The second option for trade unions would be to support strongly the notion of a 'co-operative turn' in partnership with all role players in the digital era.¹¹⁶ Weiss makes reference to a group of trade unions that have already started to devote themselves to this task. Representatives from trade unions in Austria, Denmark, the United States of America and Germany joined forces with industrial relations experts when they gathered in 2016 to discuss possible strategies. This resulted in a joint declaration on platform work. Therein they referred to the 'possibilities for a "co-operative turn" in labour-management relations in the "platform economy", in which workers, clients, platform operators, investors, policy makers, and worker organisations work together to improve outcomes for all stakeholders'.¹¹⁷ They identified platform providers as 'appropriate bargaining partners' and they insisted that all workers on platforms 'regardless of whether they are employees or independent contractors' are to be included in a platform's policies and information flows.

The third option also flows from the co-operative turn initiative: the establishment of a mechanism for dispute resolution. The co-operative turn declaration proposes 'that platform operators work — with workers, clients, researchers, and other actors as appropriate — to develop transparent, accountable methods for resolving disputes between clients and workers, and, as needed, between workers'.¹¹⁸ In this context, Weiss refers to an initiative between the German Metal Workers' Union, eight crowd-sourcing platforms and the German Crowd-sourcing Association which established an ombudsman's office.¹¹⁹ A judge from the

¹¹⁴ A Yun 'Curbing precarious informal employment: A case study of precarious workers in the South Korean construction industry' Working Paper 49, Global Labour University (2017) 19-30.

¹¹⁵ N Thukwana 'Some Uber and Bolt drivers embark on strike' *Business Insider* <https://www.businessinsider.co.za/some-uber-and-bolt-drivers-have-embarked-on-a-two-day-strike-over-fees-and-safety-2021-3> mentions that '[t]here has been discontent among Bolt drivers since July last year, when the company first introduced its Bolt Go product, with fares that are 20% cheaper than standard rates. They launched a strike in protest last year. In November, Uber followed suit with its cut-price version, with trips starting at R19. Some drivers objected, but Uber said that the product would help boost demand for rides among price-sensitive consumers'.

¹¹⁶ Weiss n 59 above 153.

¹¹⁷ *ibid.*

¹¹⁸ *ibid* 154.

¹¹⁹ *ibid.*

Frankfurt labour court chairs an equal number of platform and workers' representatives and monitors compliance with a code of conduct which the platforms agreed upon. This is a form of voluntary self-regulation.

The fourth option would be to recognise the growing importance of training. The fourth industrial revolution has already brought about new paradigms for the world of work, and there may be many more to come. Despite these uncertainties, one aspect that is clear from the era of digitalisation is that the content of work will be very different compared to today. Not only governments but also trade unions, platform providers, and workers engaged in new forms of work will have to play a much bigger role in establishing mechanisms for lifelong learning. The ILO's Future of Work report recognises that '[t]echnological advances — artificial intelligence, automation and robotics — will create new jobs, but those who lose their jobs in this transition may be the least equipped to seize the new opportunities'.¹²⁰ To counter this, it sets the following strategic goal, namely that '[g]overnments, workers and employers, including collective bargaining partners, as well as educational institutions, have complementary responsibilities in building an effective and appropriately financed lifelong learning ecosystem'.¹²¹ Trade unions will have to place pressure on policy makers and platform providers to set aside financial resources and to provide space — most likely in a digital format — for continuing education. To this end, trade unions will have to embrace technological change and demand that continuous vocational training is as important as improved conditions of service.

The fifth strategy would be for trade unions to recognise that they should embrace modern technology. As already indicated, the relative homogeneous workforce of the Fordist era has been segmented by the increased use of non-standard workers. This trend has been given momentum by the era of digitalisation of the workforce. One of the main effects of this is that there is little connection between the physical workplace and the worker and among workers themselves with the result that it is very difficult for trade unions to identify potential members. The first step for any collective bargaining entity would be to 'overcome worker anonymity and isolation'.¹²² In the words of Karolia-Hussain and Mokoena '[c]ollective bargaining ... needs to include digital technology to aid the transitions that will take place in the 4th IR. There needs to be an introduction of an online platform to organise workers'.¹²³

¹²⁰ Future of Work report n 67 above 10.

¹²¹ *ibid.*

¹²² W Liebman 'Crowdworkers, the law and the future of work: The USA' in B Waas, W Liebman, A Lyubarsky & K Kezuka (eds) *Crowdwork — A Comparative Law Perspective* (Bund-Verlag GmbH 2017) 115–116.

¹²³ See F Karolia-Hussain & K Mokoena 'Lessons from the ILO's Global Commission on the Future of Work report for South Africa' in S van Eck, P Bamu & C Chungu (eds) *Celebrating the ILO 100 Years on: Reflections on Labour Law from a Southern African Perspective* (Juta 2020) 324.

Despite these proposed strategies for trade unions there are no signs that trade unions have made notable progress in respect of the organising of non-standard and digital workers in the southern African region. Their best strategy, it now seems, would be to attempt to influence government policies in order to reduce the insecurities experienced by non-standard and platform workers.¹²⁴

Turning to the first area, and as mentioned earlier in the article, at least some advances have been made in respect of the improvement of rights of TES employees, fixed-term workers and part-time employees in South Africa. This came about through concerted pressure exerted by the trade union movement.¹²⁵ It is also submitted that a door of opportunity has opened given that the restrictive definition of 'employee' was not used in the new minimum wage legislation in South Africa. Moreover, in countries like England and Germany, a special category of 'worker' was introduced that falls somewhere between the traditional definitions of employee and independent contractor.¹²⁶ This has borne some fruit in England in so far as Uber drivers have gained additional protection subsequent to the decision in *Uber BV v Aslam*.¹²⁷ Similarly, trade unions in South Africa could make it their mission to have the definition of 'worker' inserted in other legislative measures, such as the LRA, the BCEA and the EEA.

Unions' second focus area on policy reform could be to argue for a basic layer of rights that applies to all persons rendering work and who become dependent on their providers of work irrespective of whether such workers are classified as employees or independent contractors. These rights, which would not cover all labour rights such as protection against unfair dismissal, would at the very least include the rights to a minimum wage, health and safety, and the right not to be discriminated against. Trade unions will find justification for claims to such policy reforms in the ILO's Future of Work report. In the report, the ILO calls on all member countries to introduce a 'universal labour guarantee' that includes 'fundamental workers' rights, an "adequate living wage", limits on hours of work and ensuring safe and healthy workplaces'.¹²⁸ As mentioned in the report, for workers in the informal sector, 'expanding the scope of labour protection provides a pathway for making the

¹²⁴ Klerck n 14 above 114.

¹²⁵ S van Eck 'Temporary employment services (labour brokers) in South Africa and Namibia' (2010) *PER/PELJ* 13 (2) 107–126; C Aletter & S Van Eck 'Employment agencies: Are South Africa's recent legislative amendments compliant with the International Labour Organisation's standards?' (2016) *SA Merc LJ* 28 (2) 285–310.

¹²⁶ Waas et al n 122 above 147.

¹²⁷ *Uber BV v Aslam* n 57 above.

¹²⁸ Future of Work report n 67 above 38–9 also states that 'all workers, regardless of their contractual arrangement or employment status, must equally enjoy adequate labour protection to ensure humane working conditions for everyone'.

transition from informal to formal employment by ensuring they enjoy basic workers' rights and income security'.¹²⁹

Lastly, unions may adopt the approach of assuming the characteristics of a social movement by joining forces with existing initiatives that are aimed at ensuring decent working conditions for non-standard and digital workers. Two examples of such initiatives come to mind. Firstly, they could throw their weight behind a class action that is currently being conceptualised against Uber on behalf of South African Uber drivers. The UK law firm, Leigh Day, in collaboration with the South African law firm, Mbuyisa Moleele Attorneys, plans to base a class action on the arguments that drivers should be provided with paid leave, overtime pay and membership of unemployment insurance funds.¹³⁰ Secondly, they could publicly support the Fairwork Project, which, following two years of empirical research, drafted the Code of Good Practice for the Regulation of Platform Work in South Africa.¹³¹ This code is aimed at providing platform workers with five key rights: minimum wages, protection under the Occupational Health and Safety Act, written contracts setting out their working conditions, fair management, and freedom of organisation. In addition, trade unions could improve their case in the modern world of work through the engagement of targeted research and the advocacy of such programmes in an attempt to provide vulnerable workers with improved protection.¹³²

8 CONCLUSION

Although trade unions are being faced with significant challenges in the modern world of work, it is submitted that organised labour could still play a meaningful role in shaping people's working lives in southern Africa. They will, however, not succeed in their quest to improve conditions of work for new groups of vulnerable workers if they do not adapt their strategies. Trade unions should embrace, rather than

¹²⁹ *ibid* 39. In her LLD thesis, 'Finding Innovative Solutions to Extend Labour Law and Social Protection to Vulnerable Workers in the Informal Economy' (North-West University 2018) 366–424, E Fourie considered strategies to unite vulnerable groups, such as waste pickers, domestic workers and informal traders. Among others, she suggests the following methods aimed at the collectivisation of workers' efforts to gain a stronger voice in society: the formation of cooperatives that can play a role in the extension of social protection measures to women workers; self-organisation with the aim of improving social inclusion in the farming community to decrease their vulnerability; and the formation of community-based health insurance schemes specifically for vulnerable women workers in the informal economy.

¹³⁰ D McCleod 'Uber South Africa faces class-action lawsuit over driver pay, perks' <https://techcentral.co.za/uber-south-africa-faces-class-action-lawsuit-over-driver-pay-perks/105236/>; K Challenor 'Uber drivers in South Africa: Employees or independent contractors?' <https://techcentral.co.za/uber-drivers-in-south-africa-employees-or-independent-contractors/105416/>.

¹³¹ See Du Toit et al n 54 above 1439–1523; D du Toit, S Fredman, G Bhatia, A Cherupara-Vaddekethil & A Osiki *Code of Good Practice for the Regulation of Platform Work in South Africa* The Fairwork Project (October 2020) https://fair.work/wp-content/uploads/sites/97/2020/11/South-Africa_Code-of-Good-Practice_Full.pdf.

¹³² Klerck n 14 above 114.

continue to resist, changes at the workplace. There is clearly a need for unions to move beyond the neat dichotomy of 'traditional' versus 'new' in accounting for the variety of trade union responses to the casualisation of work. Unions can adopt varying approaches to non-standard workers and new forms of work. They can ignore non-standard and digitalised workers or they can recruit them as members and integrate them into their future plans and encourage policy reforms that would improve their working conditions.¹³³

This contribution argues that any compartmentalised union response would fail in addressing systemic change. The implication that unions simply 'choose' a particular orientation or approach ignores the structural determination of viable options and downplays the contradictions that may arise between structure and strategy. The objective of this article has been to urge trade unions to rethink their policy strategies and to adapt to change. The coming decades promise to be challenging for the trade union movement. Nonetheless, how trade unions respond to the challenges and opportunities over the next few years will be crucial in determining their future level of influence in the world of work.

Regrettably there are few indications that trade unions in southern Africa are currently succeeding in adapting their approaches to the digital era. As things stand, the best chance for success for gig workers will arguably be not to seek security through trade unions. Their best chance of improving their working conditions will be through state intervention and law reform. As in the case of TES employees, fixed-term employees and part-time employees, policy makers will at some stage have to address issues that emerge during the fourth industrial revolution. The power of the state, rather than the power of collective bargaining, may yet be the best way of improving the situation of workers involved in new forms of work. The broadening of the scope of application of national minimum wage legislation to all 'workers' may yet open the way for digital workers to secure improved conditions of service.