The Recognition of On-Demand Platform Workers as Employees: A Case Study on Uber Drivers

by

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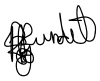
Signature of Student 

Signature of Supervisor

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Abstract

Labour protections are afforded to those workers who conform to the definition of an "employee". In 2021, society is reaching the zenith of the Fourth Industrial Revolution, where there is a strong amalgamation between physical labour and technology.

Given the concomitant rise in atypical forms of work, the courts are faced with legal challenges of recognising atypical workers as "employees" and whether or not they are entitled to basic labour protections. The ultimate purpose of labour law is to strive for economic growth, while attaining social justice.

The core elements of what constitutes an "employee" are shuddered in murky waters as atypical workers operate within both arenas of an "employee" and "independent contractor". It is of utmost importance to realign the legal framework with the Fourth Industrial Revolution, in order to protect workers who are vulnerable, especially those who operate in the grey areas of labour law. This study will evaluate the notion of an "employee" and whether or not Uber drivers should be recognised as employees in South Africa, given that Uber seems to have strong supervision and control over their Uber drivers.

This study will address the grey areas of labour law, prompted by modern business models such as Uber and address the narrow approach of interpretation adopted by the Labour Court in recent decisions involving Uber South Africa. Moreover, this study will delve into comparative research and address the lessons that can be learnt concerning Uber and their Uber drivers in the United Kingdom and United States of America. Alternatives to recognising Uber drivers as employees will be considered.

The author aspires that this research will provoke legal minds to engage more with the complex capacities of labour law and labour peace.

Total number of words: 20 454.

List of Abbreviations

BCEA	Basic Conditions of Employment Act 75 of 1997.
CCR	Constitutional Court Review.
CLLPJ	Comparative Labour Law and Policy Journal.
De Jure	De Jure.
EJCL	Electronic Journal of Comparative Law.
EEA	Employment Equity Act, 55 of 1998.
ERA	Employment Relations Act 1996.
IJFR	International Journal of Financial Research.
ILJ	Industrial Law Journal.
ILJ (UK)	Industrial Law Journal (United Kingdom).
JCRDL	Journal of Contemporary Roman-Dutch Law.

JSAL	Journal of South African Law
LRA	Labour Relations Act 66 of 1995.
NMWA	National Minimum Wage Act 9 of 2018.
SOA	Sexual Offences Act 23 of 1957.
SDA	Skills Development Act 97 of 1998.
SALJ	South African Law Journal.

CHAPTER 1: INTRODUCTION

1.1. Contextual Background

Uber Technologies Inc. ("Uber") is a global company incorporated in the United States of America ("USA"), which operates a smart phone application called Uber.[1] Uber is a platform purposefully found to connect "Uber drivers" with customers who seek transport, known as "riders".[2] Uber has evolved globally based on its intellectual property power. Uber functions in more than 890 cities and 71 countries with 3.9 million Uber drivers.[3] Uber was banned in China, Germany, and Spain to protect local and regulated transport.[4] Locally, courts are well-acquainted with the various legal challenges which comes along with Uber. Uber drivers receive payment for every completed "gig" on a freelance basis, this form of work can be perceived to exclude features of an employment relationship.[5]

Modern technologies (an example being application-based work) have transformed the workplace and are a concern because they have the potential to undermine statutory protections ordinarily guaranteed to employees. The digitalisation and globalisation of work has evolved many new species of work. These new forms of work include platform work comprising of "on-demand work" and "online crowd work", "telework" powered by

1 *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers* 2018 *ILJ* 903 (LC) ("*UberSA* (LC)") para 1.
2 *UberSA (LC)* (n 1 above) para 1.
3 CNBC "Beyond Uber: Your Guide to Ridesharing Apps around the World" 7 November 2019 https://www.cnbc.com/2019/11/08/top-ride-sharing-apps-in-europe-asia-south-america-africa-and-usa.html (accessed 27 January 2021).
4 S Van Eck & N Nemusimbori "Uber Drivers: Sad to Say, but not Employees of Uber SA" (2018) 3 *Journal of Contemporary Roman-Dutch Law* 474.
5 *UberSA (LC)* (n 1 above) para 1.

communication technologies and overall "Industry 4.0".[6] Online crowd work is open ended and the work is completed online by a crowd worker.[7] On-demand work is conducted on an external platform which is open ended for anyone who meets the criteria of work, this form of work will be discussed.[8] Platform work entails the assembly of goods and services that can create decent work as well as replace current business models.[9]

One of the main challenges presented by the emergence of gig-work is the employment status of Uber drivers in a domestic context.[10] Uber drivers are "gig-workers" who have flexibility in working hours and are not afforded standard employment protection. They are labelled as independent contractors yet are subjected to the control of Uber regarding their productivity and strict performance standards in the Deactivation Policy.[11] Standard employment protection by labour legislation is only afforded to workers who are defined as "employees".[12] The labour rights of gig-workers are in a perilous state.[13] In the circumstances, this study attempts to reconsider the employment status of Uber drivers in the context of South African labour law.

Labour legislation plays a pivotal role in employment law and the classification of work relationships. Dean and Wilkson emphasise that "without classification, the law cannot be mobilised".[14] Due to the globalisation and diversification of work in the modern market, the divide between an employee and an independent contractor has blurred working relationships.[15] The unpredictability of the application of the definition of an "employee" leads to a disjointed and inconsistent approach when determining who an "employee" is.[16] Courts look beyond the contract of employment, to reveal the true nature of the

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6 M Weiss "The Platform Economy, the Main Challenges for Labour Law" in L Méndez & A Sánchez *Regulating the Platform Economy* (2020) 11.
7 Weiss (n 6 above) 12.
8 Weiss (n 6 above) 12.
9 D Du Toit "Platform Work and Social Justice" (2019) 40 *ILJ* 2.
10 S Papadopoulos & S Van Eck "Disruptive Technologies and Taxi Rides in South Africa: What is the "Uber" Uproar About?" in I Önay & Z Ayata (eds) *Global Perspectives on Legal Challenges Posed By Ridesharing Companies: A Study On Uber* (2021) 306.
11 Van Eck (n 4 above) 476.
12 M Van Staden "Identification of the Parties to the Employment Relationship: An Appraisal of Teleological Interpretation Of Statutes" LLD thesis, University of Pretoria, 2018 1.
13 M Van Staden & S Van Eck "The Parties to the Employment Relationship: A Comparative Analysis" (2018) *Journal of South African Law* 539.
14 S Deakin & F Wilkinson *The Law Of The Labour Market: Industrialization, Employment and Legal Evolution* (2005) 4.
15 A Van Niekerk *et al Law@work* (2019) 6.
16 T Kasuso "The Definition of an 'Employee'" Under Labour Legislation: An Elusive Concept" LLD thesis, University of Pretoria, 2015 4.

relationship when deciding employment status disputes.[17] Kasuso describes that this has resulted in workers who are not employees through a contract of employment, being recognised as employees because their employment relationship reflects that of an employee in the true sense of the word and in line with labour legislation.[18]

As these new business models emerge, it is imperative to ponder whether it is coherent with our legal framework and the protection of vulnerable workers.[19] Locally, courts are grappling with the challenge of whether Uber drivers should be labelled as employees of Uber. The Commission for Conciliation, Mediation and Arbitration ("the CCMA") in *Uber SA (CCMA)*[20] held that Uber drivers are employees of UberSA. Conversely the Labour Court in *UberSA (LC)* held that Uber drivers are not employees of Uber SA. This dissertation advances arguments supporting the view that *UberSA (LC)* should have adopted a broader constitutional approach when interpreting the definition of "employee" in terms of section 213 of the LRA[21] in the achievement of social justice and dispute resolution.

In the United Kingdom ("UK"), attention was drawn for Uber drivers to be recognised as "workers" rather than independent contractors who are self-employed.[22] "Workers" are a distinct category in the middle of "employees" and "independent contractors".[23] A person undertakes to work under a contract where they personally perform services for another who is not a client nor customer of any profession is recognised as a "worker".[24] Workers enjoy certain basic statutory rights such as trade union rights, minimum wage, paid vacation leave, employer pension contributions and protection against discrimination.[25] Uber drivers in the UK persevered to be recognised as workers rather than self-employed independent contractors, in the *Aslam*[26] case where the court held that they are entitled

17 *SITA v CCMA* (2008) 7 BLLR 611 (LAC); *Murray v Minister of Defence* [2008] 6 BLLR 513 (SCA).
18 Kasuso (n 16 above) 4.
19 K Mokoena "Are Uber Drivers Employees? A Look at Emerging Business Models and Whether They Can Be Accommodated by South African Labour Law" (2016) 37 *ILJ* 1574.
20 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW and SATAWU obo Tsepo Morekure* unreported case WECT12537-16 7 July 2017 ("Uber SA (CCMA)").
21 The Labour Relations Act 66 of 1995 ("the LRA").
22 M Amaxpoulou, M Durovic & F Lech "Regulation of Uber in the UK" in I Önay & Z Ayata (eds) *Global Perspectives on Legal Challenges Posed by Ridesharing Companies: A Study On Uber* (2021) 178.
23 Section 230(b) of the Employment Rights Act 1996.
24 Amaxpoulou (n 22 above) 178.
25 Amaxpoulou (n 22 above) 178.
26 *Uber BV v Aslam* (2021) UKSC 5.

to a minimum wage.[27] This ruling was upheld after two appeals, because the performance cannot be completed by a third party, Uber establishes the terms and conditions and sends the invoices.[28]

The National Minimum Wage Act[29] ("NMWA") sets a basic minimum wage for all workers and establishes a National Minimum Wage Commission to annually review employment laws, the NMWA applies, specifically, to all "workers".[30] Similar to the UK employment minimum wage laws, the NMWA defines a worker as "any person who works for another and who receives, or is entitled to receive, any payment for that work whether in money or in kind".[31] This definition would seem to apply to employees and independent contractors, but for the definition of "wage".[32] Wage entails money paid or payable to a worker in respect of ordinary hours of work or the hours a worker ordinarily works in a day or a week, perhaps this may include the income of independent contractors who work and earn on the regular for specific work providers.[33] In reality, this would apply to vulnerable independent contractors, but the severely low national minimum wage is a limitation.[34]

In the USA, a court of appeal in California held that Uber must recognise its Uber drivers as employees, siding with *O'Connor v Uber Technologies Inc.*[35] that Uber is contravening state labour laws.[36] However the battle did not end there, Proposition 22 ("Prop 22") is a measure that allows Uber and other ride-hailing companies to recognise their drivers as independent contractors, with limited benefits, but not full employment protections. 58,6% of voters in California were in favour of Prop 22 where Uber, Lyft and DoorDash are exempt from State labour laws that compelled them to employ the drivers, provide

27 Amaxpoulou (n 22 above) 178.
28 Amaxpoulou (n 22 above) 178; E Marique & Y Marique "Uber in London: Battle Between Public and Private Regulation" in D Renders & R Noguellou (eds) *Uber and taxis—comparative law studies* (2018)163–200.
29 National Minimum Wage Act 9 of 2018.
30 D Du Toit "Independent Contractors Have Rights Too" (2019) *ILJ* 2173.
31 Section 1 of the NMWA.
32 Section 1 of the NMWA.
33 Section 1 of the NMWA.
34 Du Toit (n 30 above) 2173.
35 *O'Connor v Uber Techs., Inc* No. 14-16078 (9th Cir. 2018) (*"O'Connor"*).
36 NPR "Uber And Lyft Must Make Drivers Employees, California Court Rules https://www.npr.org/2020/10/22/926916925/uber-and-lyft-must-make-drivers-employees-california-appeals-court-rules (accessed 26 May 2021).

health care, unemployment insurance and other basic labour rights.[37] Employees are expensive compared to independent contractors because their employers could be responsible for provisional tax, medical aid, minimum wage, unemployment insurance and overtime.[38] Should Uber be burdened with overheads, it's on-demand strategy and business model might perish.

The diversity of the labour market is a result of the Fourth Industrial Revolution. There is a bewildering array of atypical forms of work that evades labour legislation.[39] Even though new forms of work have emerged; the definition of an "employee" is entrenched in the common law, and it appears to be fixed.

1.2. Importance of this Study

In terms of the libertarian approach the labour markets are perceived to be too unyielding (rigid) and labour legislation is said to inhibit economic grow and job creation.[40] If the model of labour law is substandard or counterproductive, it is implausible that the dispensation of labour law will achieve its socio-economic purpose.[41] In terms of a social justice perspective, labour law is a tool used to distribute wealth and power in society, whilst stabilising the unequal bargaining power of the employment relationship.[42]

The central aims of the LRA are the democratisation of the workplace, social justice, to bolster economic development and labour peace.[43] Labour legislation plays a significant role in the fight for socio-economic development because work is fundamental to life and esteem, as supported by the social justice perspective.[44] The core jurisprudence of labour law is to protect workers from being exploited and this is carried out by labour legislation in the form of employee rights, basic conditions of employment, and protection against unfair dismissal, and unfair labour practices.[45] Unemployment in drowning economies such as South Africa, has drastic effects for a worker and their family.[46] Work

37 New York Times "Uber and Lyft Drivers in California Will Remain Contractors" https://www.nytimes.com/2020/11/04/technology/california-uber-lyft-prop-22.html (accessed 26 May 2021).
38 J Speta "Ridesharing Regulation in the USA" in Önay, I & Ayata, Z (eds) *Global Perspectives on Legal Challenges Posed by Ridesharing Companies: A Study on Uber* (2021) 81.
39 Kasuso (n 16 above) 3.
40 Van Niekerk (n 15 above) 4-8.
41 M Vettori "Alternative Means to Regulate the Employment Relationship in the Changing World of Work" LLD thesis, University of Pretoria, 2005 21.
42 Van Niekerk (n 15 above) 11.
43 Section 1 of the LRA.
44 Van Niekerk (n 15 above) 3.
45 Papadopoulos & Van Eck (n 10 above) 306.
46 Van Niekerk (n 15 above) 3.

is necessary to maintain life and to evade poverty. Additionally, work is the primary way to conduct economic activity.

Although judicial precedent around the world has developed with the guidance of the International Labour Organisation ("ILO"), the South African judiciary has yet to dispense of dogma and formalism.[47] Vulnerable workers are, therefore, desirous of social justice. It is significant to remember that "the explicit intrusion of constitutional values into the adjudicative process signals a transition from a "formal vision of law" to a "substantive vision of law" in South Africa", where judges must employ substantive reasons through political values and morals, compared to formal reasoning which is characterised by the pre-constitutional adjudication era.[48] The hallmark of modern tech conglomerates is having independent contractors, which excludes the governance of labour law allowing for profitability.[49]

Respectfully, it is submitted, that, this value-laden study is not a rhetorical enquiry, however it is a development of the legal science, specifically the approach to employment status disputes and the alignment of labour law with the Fourth Industrial Revolution. *UberSA (CCMA)* and *UberSA (LC)* will be critiqued with the jurisprudence developed in the Code of Good Practice: Who is an employee? The narrow approach chosen by Van Niekerk J in *UberSA (LC)* will be examined and compared to decisions undertaken in the UK such as *Aslam* and the USA in *O'Connor* and Prop 22. Alternative strategies will be considered such as an intermediary form of "worker".

This study will evaluate the legitimacy of presumptions in labour law such as: the pivotal role of legislation in labour law, as well as whether a broader-constitutional approach of interpretation in employment status disputes envisages transformation and the attainment of social justice. Effectively this study aims to demonstrate why gig-workers, specifically Uber drivers should be afforded protection, and it evidences how Uber has curbed its legal obligations, through recognising Uber drivers as independent contractors instead of employees of Uber.

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47 G Penfold "Substantive Reasoning and the Concept of "Administrative Action" (2018) 136 *South African Law Journal* 86; Van Staden (n above) 4.

48 G Quinot "Substantive Reasoning in Administrative Law Adjudication" (2010) 3 *Constitutional Court Review* 111.

49 Du Toit (n 9 above) 4.

1.3 Research Questions and Research Aims

Against the foregoing background, this study will seek answers for the following research questions:

a) What is the underlying role and function labour law?
b) What lessons can be gained from international norms?
c) Is the traditional definition of "employee" appropriate for the new world of work?
d) What lessons can be gained from the United Kingdom and the USA?
e) What alternative strategies can be considered?

1.4 Structure

This dissertation consists of seven chapters. Firstly, the introductory chapter followed by the second chapter centred on a discussion of the theories of labour law, including the libertarian approach, the social justice perspective, theory of justice and theoretical developments made by Sir Otto Kahn-Freund.

Chapter three endeavours to examine the ILO's Employment Relations Recommendation 2006,[50] the Centenary Declaration for the Future of Work, and the lessons learnt through international norms.

Chapter four is focussed on the definition of employee in the context of Uber drivers, the notion of what entails an employee, and Constitution of the Republic of South Africa, 1996 ("the Constitution").

Chapter five is a comparative study of what lessons can be gained from the developments in the United Kingdom and the USA. This chapter aims to describe the legal challenges presented by Uber in local and the selected foreign jurisdictions. Chapter six is based on a discussion of alternative strategies such as having an intermediary form of "worker" to provide employment protection to Uber drivers.

This dissertation will conclude in chapter seven where I will close on the theories of labour law, gather the lessons learnt from international norms and foreign jurisdictions, and culminate an apt alternative strategy in addition to advancing social justice.

[50] Employment Relations Recommendation, 2006 (No. 198) ("the Recommendation").

1.5 Research Methodology

This study critically examines labour legislation, constitutional provisions, case law, journal articles, scholarly studies, and books. This study investigates assertions on the employment status of Uber drivers and the significant role that the judiciary can play in the development of labour law.

This study includes a comparative analysis of foreign jurisdictions to determine how other countries have handled the murky waters of how to recognise the employment status and how to regulate the employment rights of Uber drivers. Additionally, this study will offer suggestions and critique for reform of statutory interpretation and statutory reform.

1.6 Limitations

This study has three limitations. The first limitation is the application of a comparative research approach when dealing with foreign jurisdictions and legal systems without a holistic understanding and context within which they operate. The different legislations operate with different underlying objectives and socio-economic circumstances. South Africa, a young democracy is not as developed compared to the other countries deliberated in this dissertation.

The second limitation is the objectives of the ILO and local legislation because these have established basic employment norms which are outside of the extent of this study. This study aims to develop conditions of employment that are beyond these norms. The third limitation is time because this study will not consider case law and research published after the 31st of October 2021.

CHAPTER 2: THE UNDERLYING ROLE AND FUNCTION OF LABOUR LAW

2.1 Introduction

In this chapter the underlying role and function of labour law will be explored. The philosophies of Sir Otto Kahn-Freund will be discussed as well as the social justice approach and the libertarian approach, to culminate a deeper understanding of the purpose of labour law. Additionally, this research will ascertain which labour law approach is best suited for the regulation of Uber in South Africa.

2.2 The Objectives of Labour Law

The general understanding of the purpose of labour law is the regulation of the employment relationship, between the one who hires and the one who renders the service. From this, one can deduce that labour law does not rely on single concept in order to function. According to Van Jaarsveld, labour law concerns a dimension of life, the world of work within which people are engaged.[51]

Van Jaarsveld *et al* defines labour law is as:[52]

> "the totality of rules in an objective sense that regulate legal relationships between employers and employees, the latter rendering services under the authority of the former, at the collective as well as the individual level, between employers mutually, employees mutually, as well as between employers, employees, and the state."

The objectives of labour law are categorised in threefold. Firstly, it aims to find an appropriate balance of interests in the employer and employee relationship.[53] Secondly, it aims to regulate the employer, the State, and organised labour.[54] Thirdly, it aims to

51 Van Niekerk (n 15 above) 3.
52 S Van Jaarsveld *Principles and Practice of Labour Law* (2004) para 51.
53 Vettori (n 41 above) 23.
54 Vettori (n 41 above) 23.

manage market-related interests of unions, employers, employees, and society.[55] The function of labour law is dependent on the prevalent socio-economic circumstances, and it is labour legislation that carries out these objectives. The author iterates that the core jurisprudence of labour law is to protect workers from being exploited, and this is carried out by labour legislation in the form of employee rights, basic conditions of employment, protection against unfair dismissal and unfair labour practices.[56]

In South Africa, labour law persists at the centre of political and socio-economic deliberations regarding the nature of labour market regulation. There are two main models of thought regarding the role of State intervention in the labour market: the social justice perspective and the libertarian perspective.[57]

The libertarian perspective entails a "*laissez-faire*" and free-market approach where the employment contract is the component to regulate the employment relationship.[58] Hence, labour legislation is unwelcomed and viewed as a hindrance to the right to work under any working conditions. The recognised employment protection is the common law and the employment market whereby employers compete for labour by improving conditions of employment. Libertarians vouch that the abolition of labour legislation will be advantageous to employees and society as a whole.[59] The deregulation of the labour market is argued to have a link between low standards of labour and a competitive advantage in the global market, yet there is no evidence to support an increase in trade or a comparative advantage.[60] In other words, there is no empirical evidence that jurisdictions with lower labour protections have a competitive advantage in the global markets, as poor working conditions mean a lower production level and the stifling of job creation.[61] The libertarian approach may be perceived as a conception of the social justice approach, as the demands of social justice are met when people are rewarded in maintaining a contribution to society.

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55 Vettori (n 41 above) 23.

56 S Papadopoulos & S van Eck "Disruptive Technologies and Taxi Rides in South Africa: What Is the 'Uber' Uproar About?" in I Önay & Z Ayata (eds) *Global Perspectives on Legal Challenges Posed by Ridesharing Companies: A Study On Uber* 2021 306.

57 Van Niekerk (n 15 above) 11.

58 Van Niekerk (n 15 above) 9.

59 Van Niekerk (n 15 above) 9.

60 Lee "Labour Market Regulation and Economic Growth" paper presented to 11th Annual Labour Law Conference, Durban, 1998.

61 Van Niekerk (n 15 above) 10; B Hepple *Labour laws and global trade* (2005) 14–15.

South Africa leans towards a social justice perspective, given the constitutionalisation of labour law which entails that social justice be an objective. South Africa has been a member of the ILO since 1994, hence South Africa has international law standards to abide by. The role of labour law in South Africa is expressed in the primary objects of the LRA, being the democratisation of the workplace, constitutionally recognised employment rights and primarily an emphasis on collective bargaining. The primary object of labour law in South Africa manifests a social justice perspective.

A social justice perspective views labour law as a mechanism to attain social justice, which is the equitable distribution of wealth and power.[62] The use of trade unions is a primary means to the achievement of social justice. Kahn-Freund philosophised an ideology of labour law to amend the unequal bargaining power between employers and employees; whereby the objective of labour law is to practice collective bargaining to come to an equilibrium between employers and employees.[63] There is a strong link between collective bargaining and labour law. The inherent inequality of the bargaining power between the employer and employee is where Kahn-Freund coined that the relationship as one "between a bearer of power and one who is not a bearer".[64] Workers act collectively to alkalise this imbalance and to enforce their rights. Kahn-Freund states that "legal norms cannot be effective unless they are backed by the countervailing power of trade unions and of the organised workers".[65]

Employees can attempt to reach the power of their employer through collective action and enforcing their rights. Collective bargaining maintains the peace and the distribution of work, as well as maintain the stability of employment. Here, the role of the law is secondary to support and regulate collective labour, but the process of bargaining is to determined by the parties.[66]This means that the law protects the practice of collective bargaining but lays-off the process of collective bargaining to the parties for the interests of the organised labour and the employers.[67] Collective bargaining was seen as "collective laissez-faire" and the independence of this concept was fundamental.[68]

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62 H Collins "The Productive Disintegration of Labour Law" (1997) 26 *ILJ* (UK) 295.
63 Van Niekerk (n 15 above) 11.
64 D Du Toit "What is the Future of Collective Bargaining (And Labour Law) in South Africa?" (2007) 28 *ILJ* 1406.
65 Kahn-Freund "Legal Framework" in A Flanders & H Clegg (eds) *The System Of Industrial Relations in Great Britain* (1954) 20.
66 Van Niekerk (n 15 above) 11.
67 Du Toit (n 64 above) 1407.
68 Du Toit (n 67 above) 1407.

Unfortunately, the impact of collective agreement was felt by brittle economies, where the independence of collective bargaining was limited by income policies.[69]

2.3 The Constitution

This section of the research evaluates the role that the Constitution plays in the setting of labour rights in South Africa as well as with the notion of what entails an "employee".

The Constitution protects individual labour law rights such as the right to fair labour practices, as well as the rights to organised labour and the freedom of association in collective labour law. These rights are evident in the LRA, BCEA and the EEA. The efficacy of the law depends on trade unions, more than trade unions depend on the law. From here, the role of the law is to culminate a safe space for collective bargaining to operate in.

The objectives of the Constitution were placed in the preamble. The objectives include the establishment of a society based on democracy, social justice, and fundamental human rights.[70] Placed in the Bill of Rights in Chapter two of the Constitution, there are labour rights in section 23 of the Constitution which are carried out by the LRA. The purpose of the LRA is to advance economic development, labour peace and social justice.[71] In *Government of the Republic of South Africa v Grootboom*[72] it was stated that the people of South Africa are committed to attain social justice.[73]

The Constitution embraces the right of employees and employers to form and join organisations, and to engage in collective bargaining.[74] Labour law creates a platform for workers to bargain with employers, hence it can be said that the LRA provides for this through organisational rights and the right to strike. The concept of collective bargaining is relying on the powerplay between the parties and their demands, starting with the bargaining relationship.[75] South African labour law embraces Kahn-Freund's paradigm. It endorses "the effective operation of a voluntary system of collective bargaining" as well as collective bargaining on a sectoral level.[76] The overall purpose of all fundamental

69 Du Toit (n 67 above) 1407.
70 Section 1 of the Constitution.
71 Section 1 of the LRA.
72 *Government of the Republic of South Africa v Grootboom* 2000 ZACC 19.
73 *Government of the Republic of South Africa v Grootboom* (n 72 above) para 1.
74 Section 23(5) of the Constitution.
75 *In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 64.
76 Du Toit (n 64 above) 1407.

human rights is to support the values of human dignity, equality, and freedom. Labour law in South Africa has an underlying purpose to also live up to these fundamental values.

As identified by Weiss, there is a challenge to regulate digitalised work in a way that it will meet the goals of labour law to protect the interests of workers.[77] The author proposes that a social justice perspective should be adopted to regulate the working conditions and terms of employment of Uber drivers in South Africa. Given that the fundamental purpose of labour law is democratisation of the workplace and labour peace, and that Uber drivers are operating in the labour sphere, which is unregulated, the author finds the social justice perspective apt. Moreover, the social justice perspective should be adopted to meet the objectives of the LRA as well as advance collective bargaining in this grey area of labour law.

2.4 Conclusion

In on-demand platform work, there is an absence of a connection between the workers as they do not know each other and work in isolation. In order to advance collective bargaining in on-demand platform work concerning Uber drivers and to further the right to organised labour as set out in the Constitution, it is proposed that working conditions be altered and monitored by employees' representatives through consultation.[78] Weiss suggests that the first step is to overcome "worker unanimity and isolation".[79]

In this chapter the underlying role and function of labour law was discussed alongside the theories of labour law coined by Kahn-Freund. The role of the Constitution in labour law was explored alongside the objectives of the LRA. The author proposed that given these objectives, the social justice perspective is apt to regulate the working conditions of Uber drivers in South Africa.

77 M Weiss "Challenges for Labour Law and Industrial Relations" in D Kim and M Ronmar's *Global Labour and Employment Relations Experiences and Challenges* 146.
78 Weiss (n 77 above) 152.
79 Weiss (n 77 above) 152.

CHAPTER 3: THE FOURTH INDUSTRIAL REVOLUTION AND THE GIG ECONOMY

3.1 Introduction

This chapter explores the coming of the Fourth Industrial Revolution and the gig-economy and the impact thereof on the world of work. Additionally, this chapter endeavours to examine the Recommendation, the Future of Work Report, the Centenary Declaration, and international norms concerning the regulation of the work of on-demand platform workers and Uber drivers.

3.2 The Gig Economy

It is well-known that technological advancements may result in mass job losses. On the other hand, it brings about knowledge, power, and economic growth. South Africa has an unbelievably high unemployment rate, and in addressing the rise of digitisation, the South African president noted that, “we must embrace this historic confluence of human insights and engagement, artificial intelligence and technology, to rise to the challenges of poverty, unemployment and inequality”.[80] Workplace laws need to be aligned with these changes to support digital transformation in the name of social protection and welfare.

The impact of the Fourth Industrial Revolution is advent of automation and the removal manual labour. Occupations are being transformed, whereby skillsets are changing

[80] www.thepresidency.gov.za/speeches/address-president-cyril-ramaphosa-1st-south-african-digital-economy-summit%2Cgallagher (accessed 21 August 2021).

resulting in redundancies and job dislocations. Advancements are necessitating a reconstruction in the terms and conditions of employment. Artificial technology and robotics have the potential to create job opportunities, improve the quality of current jobs and the total production in the workplace. Henceforth, the human resources and management need to be reengineered to account for the efficiencies created in employment by innovative technology. Otherwise, there is a stunningly high possibility of jobs being rendered obsolete at the hands of automation. These technological advances has the potential to adversely affect the labour force of African countries.

As a result of globalisation and the gig economy, there has been a development of a "sharing economy" within which Uber operates. The sharing economy is a business model that has shown swift growth, creating opportunities for flexible employment, and new services. The sharing economy harnesses digital platforms that allow users to exchange goods or services. The heart of the sharing economy is economic efficiency and production of additional income.[81]

It is well-known that the labour market is rigid, while on the other hand the sharing economy is open to flexible working conditions; emblematic of "on-demand" platform workers. Labour law is tasked with the project to serve as a countervailing force to address the natural imbalance in the employer and employee relationship.[82] For labour law to serve its purpose and the regulations to apply, this activity or norm has to fit into the boxed definition provided for by the law. It is understood that even though the norm or the activity may change over time, the very essence of the definition remains.[83] As with the matter at hand, conglomerates in the sharing economy dispute that they fall under the categories of producers and employers, rather they claim to be "intermediaries".[84] Due to the blatant "defiance of legal definitions", the sharing economy has had a tumultuous effect on the regulatory framework.[85] The sharing economy plays a relevant role in this study as the "tipping point" of the sharing economy, is that there are more journeys travelled through car-sharing rather than in private cars.[86]

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81 Ayata (n 224 above) 33.
82 Van Niekerk (n 15 above) 4.
83 Ayata (n 224 above) 35.
84 Ayata (n 224 above) 35.
85 Ayata (n 224 above) 35.
86 I Önay "Introduction" in Z Ayata & I Önay (eds) in *Global Perspectives on Legal Challenges Posed by Ridesharing Companies: A Case Study of Uber* (2021) 17.

Even though the Constitution is silent on the regulation of technology, it does provide for the freedom of trade in section 22. Section 22 of the Constitution allows for labour market flexibility such as the freedom to change working conditions and terms of employment and the freedom to change the levels of employment quickly and/or cheaply.[87]

The purpose of the EEA[88] is to promote the achievement of equality in the workplace and to promote diversity and representativity in the workplace. This is carried out by implementing affirmative action measures to redress the disadvantages experienced by designated groups and through the elimination of unfair discrimination.[89]

The Fourth Industrial Revolution has an impact on equality as it may largen the gap of inequality and unsettle the labour market in an already very unequal country.[90] Equality is relevant in this context as the technological developments must not yield inequalities. Section 6 of the EEA prohibits unfair discrimination on arbitrary grounds, taking affirmative action measures consistent with the purpose of the EEA is not unfair discrimination nor to distinguish on the basis of an inherent requirement of a job. May employers choose artificial intelligence over manual labour based on the inherent requirements of the job? *Whitehead v Woolworths (Pty) Ltd*[91] provided clarity on the "inherent requirement of a job", in that the job must possess an "indispensable attribute".[92] The Fourth Industrial Revolution is about the amalgamation of technological advancements and physical labour, rather than the replacement of people with automation, to promote equality and the values founded in the Constitution. This revolution calls for a review of legislation to accommodate for the needs of people placed with artificial intelligence in the workplace.[93]

In the current labour sphere, there is an increase of workers being labelled as self-employed, but in reality are employees. Weiss states that these "bogus" self-employed workers should be covered by labour law, even though they are casted in a disguised employment relationship.[94] Weiss states that the difficulty in the employment status of

87 Van Staden (n 12 above) 236.
88 Section 1 of the EEA.
89 Preamble of the EEA.
90 M Xu, J David & S Kim "The Fourth Industrial Revolution: Opportunities and Challenges" (2018) 9 (2) *International Journal of Financial Research* 92.
91 *Whitehead v Woolworths (Pty) Ltd* 1999 (20) *ILJ* 2133 (LC).
92 *Whitehead v Woolworths (Pty) Ltd* (n 91 above) para 36.
93 Nxumalo (n 96 above) 23.
94 Weiss (n 6 above) 12.

these "bogus" self-employed workers can be demonstrated with the questions whether Uber drivers are employees.[95]

According to Nxumalo the rapid pace of transformation engendered by the Fourth Industrial Revolution calls for a legislative reform in order for workplaces and workers to reap opportunities.[96] It is submitted that there is an absence of an effective labour framework to regulate on-demand platform work. There is a norm for these workers to be treated rather as independent contractors and casted away from labour legislation. There has been an effort by the ILO to study and accommodate non-standard workers within labour legislation.

3.3 International Norms and the Employment Relations Recommendation

With regards to international norms, the ILO adopted the Recommendation which guides member states on the establishment of the employment relationship and uncovers the concept of a "disguised employment". This recommendation encourages member states to define the exact nature of the employment relationship rather than look at the contract of employment. The emphasis being clearly, to lean in favour of the nature of the employment relationship.

The Recommendation provides that member states should contemplate adopting indicators of an employment relationship and should provide for a statutory presumption in their domestic legislation, that an employment relationship exists when one or more of the indicators are present.[97] International norms will be considered in this study because section 233 of the Constitution provides that legislation must be interpreted on par with international law. As well as section 39(1)(b) of the Constitution which provides that international law must be considered when interpreting the Bill of Rights. In *Glenister v The President of the Republic of South Africa*[98] the Constitutional Court was emphatic that these provisions imply that international law aids with interpretation. To interpret legislation on par with international norms means that the State is honourable regarding international obligations in the form of domestic law. It is understandable that geopolitical circumstances are diverse, but the employment relationship is universal and pertinent

95 Weiss (n 6 above) 12.
96 L Nxumalo & C Nxumalo "The Impact of the Fourth Industrial Revolution on Workplace Law and Employment in South Africa" (2021) 42 *ILJ* 16.
97 Van Niekerk (n 15 above) 62.
98 *Glenister v The President of the Republic of South Africa* (2011) CC 3 SA 347 para 98.

everywhere. In any organisation there are workers without equal protection as others because they are in a precarious situation between employment and self-employment.[99]

In 2000 the ILO met with experts to consider the protection of on-demand platform workers. It was noted that the definition of employment in many countries does not "accord with the realities of working relationships", in that those workers who are rightfully entitled to protection are not afforded this protection, due to the inconsistencies in the definition of employment and the lack of regulation in the on-demand platform.[100]

The following were identified as areas in need of progress and development: guidance on employment relationships, to combat disguised employment and not to interfere with genuine commercial or independent contracting.[101] In 2003 the International Labour Conference ("ILC") compiled a committee to detail the employment relationship. The following terms were clarified "employer", "employee" and "worker" by the committee.[102] The ILC stated that the employment relationship creates a legal link between the employee and employer, to whom they provide labour or services under certain conditions in exchange for remuneration.[103]

It was proposed by the committee who researched on the employment relationship, that the ILC implement a recommendation, solely centred on the idea of disguised employment, however, difficulties were faced concerning the "adoption" of a recommendation compared to a convention.[104] The ILO adopted the Recommendation in 2006, where the preamble acknowledges that the protection of workers is the essence of the ILO and the problems in ascertaining the employment relationship and disguised employment. The Recommendation recognises that a mere contract can divest workers of employment protection which creates socio-economic problems for society and inconsistencies in the application of labour law.[105] The Recommendation guides member states on the determination of an employment relationship and explains with the concept of disguised employment. Disguised employment is a contract of work which appears

99 Van Staden (n 13 above) 540.
100 Van Staden (n 13 above) 546; International Labour Organisation "Report of the meeting of experts on workers in situations needing protection" adopted by the 279th session Governing Body (2000) 38.
101 B Creighton & S McCrystall "Who is a 'worker' in international law?" 2016 *Comparative Labour Law and Policy Journal* 711.
102 ILO "Report of the committee on the employment relationship" ILC (2003).
103 ILO report (n 101 above) 52.
104 ILO report (n 101 above) 52.
105 ILO report (n 101 above) 52.

prima facie not to be an employment relationship, but it is an employment relationship in practice.[106]

The objectives of the ILO has not lost relevance or value, rather the circumstances within which these objectives and principle function has radically changed.[107] The global labour force is undergoing a transformation concerning technology, the environmental and "institutional upheavals".[108] These changes are clearly posing legal challenges for the ILO in each area.

Furthermore, the Recommendation advises that who an employee is must be based on the facts and the practice of work, rather than the substance of the contract between parties.[109] Article 9 provides for factors that are indicative of an employment relationship such as: whether the worker is integrated into the enterprise, the work conducted is mainly beneficial to the other party, the work is carried out personally by the worker, the work is conducted during specified hours and that the work requires tools of the trade by the party who requests the work to be done.

3.4 The Future for Work Report and the Centenary Declaration for the Future of Work

This section of the research will discuss the Centenary Declaration for the Future of Work and its function in achieving the objectives of international norms in labour law as well as the Future of Work: Work for a Better Future ("Future of Work Report").

The ILO sponsored the Global Commission on the Future of Work to research in depth the changes in the work environment and to draw up a universal framework in which governments can use to regulate these changes. The future of work has the potential to improve the quality of life, however it can also cause job losses. Hence, the Future of Work Report was launched in South Africa, after the Global Commission on the Future of Work held their first meeting in 2017.[110] The Future of Report is founded on three pillars. The pillars include: investing in the skills of people, investing in the institutions of

106 Van Staden (n 13 above) 547.
107 A Supiot "The Tasks Ahead of the ILO at its Centenary" International Labour Review 159 (2020) 117.
108 Supiot (n 107 above) 117.
109 Article 9 of the Recommendation.
110 F Karolia-Hussain & K Mokoena "Lessons from the ILO's Global Commission on the Future of Work Report for South Africa" in BPS Van Eck, P Bamu & C Chungu's *Celebrating the ILO 100 Years on Reflections of Labour Law from a Southern African Perspective* 324.

work and investing in sustainable and decent work.[111] It is included in the Future of Work Report that workers' contracts, collective agreements and labour inspection systems are recognised as stepping stones for balanced societies.[112] In light of the above efforts and the pillars, the Future of Work Report pleas for a "universal labour guarantee", in that all workers enjoy adequate labour protections and humane working conditions.[113] This must be accompanies by an acceptable living wage.

Following the Future of Work Report, due to the transformation that the world of work is undergoing, the Centenary Declaration for the Future of Work was adopted in 2019, as a vision for the future. This was adopted by the ILO conference at the 108th session in June 2019.[114] The Centenary Declaration for the Future of Work in Part IV recognises that given the ILO plays a supervisory role of international standards, there is a duty on the ILO to promote an up-to-date and framework of international standards to respond to the changes in the world of work.[115] In other words, this means that the ILO is called upon to uphold a future-facing international labour standards policy and be responsive to the changes in the world of work.[116]

Here, ILO called upon member states to develop on the "human-centred approach" on the future of work.[117] This can be done through adopting policies in order to combat challenges and thrive on the opportunities of the digitisation of platform work. However, this is a slow process, and it is highly unlikely for there to be a guide before 2024.[118] Although member states are still able to address the challenges domestically. The

111 Karolia-Hussain (n 110 above) 324; ILO Global Commission on the Future of Work: Work for a Brighter Future (2019) 24.

112 Future of Work Report (n 111 above) 39.

113 Future of Work Report (n 111 above) 39.

114 ILO Future of Work Declaration, https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_711674.pdf (accessed 29 October 2021).

115 C Vargha "The International Labour Organisation and its standard-related activities: A century of achievements and challenges" in BPS Van Eck, P Bamu & C Chungu's *Celebrating the ILO 100 Years on Reflections of Labour Law from a Southern African Perspective* 13.

116 Vargha (n 115 above) 13.

117 D Du Toit, S Fredman & M Graham "Towards Legal Regulation of Platform Work: Theory and Practice" (2020) 41 *ILJ* 1501; International Labour Conference ILO Centenary Declaration for the Future of Work — adopted by the Conference at its One Hundred And Eighth Session, Geneva, 21 June 2019, s IIIC(v).

118 Du Toit (n 117 above) 1501.

Declaration supports the principles of the ILO and "to shape a future of decent work for all".[119]

The vision of the Director-General of the ILO affirmed that given the economic, social, technological, and environmental changes due to globalisation, the ILO's mandate will continue to reach out to all, especially those who are vulnerable.[120] It is well understood that the ILO's pursuit of social justice will not be fulfilled if the ILO ignores the needs of the most vulnerable, such as those operating in the unregulated arena of labour law.

International norms provide factors that one should consider in determining the employment relationship, it uncovers the concept of "disguised employment", it aspires to extend rights to all, to provide a framework of rights to protect workers of the gig-economy and has influenced legislatures in the development of the Code. The international norms and indicators defined in the Recommendation are set out in *Smit v Workmen's Compensation Commission*[121] as well as contained in the presumption of employment in section 200A of the LRA, section 83A of the BCEA and the Code of Good Practice: who is an employee?.[122]

3.5 The Code of Good Practice

In 2006 the Code was gazette almost one year after the Recommendation was adopted. The Code plays an imperative role as it contains a framework to aid those in determining who is an employee.

Item 60 of the Code includes that those must interpret to affect the objectives of the LRA, constitutional compliance and compliance with public international law. It is a requirement that labour legislation be interpreted broadly for the promotion of labour rights in section 23 of the Constitution per Item 62 of the Code. The Code serves as guidance on how to apply the presumption in favour of employment in and it advocates for the "dominant impression test" in Item 27 where all aspects of the relationship are important and not a single factor is decisive. Notably, the Code subscribes for courts to unveil the true working relationship between the parties regardless of the contents of the contract in Item 28-31.

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119 The Decent Work Agenda of the International Labour Organisation (ILO) is used as a point of departure in what follows — ILO 'Decent Work' https://www.ilo.org/global/topics/decent-work/lang--en/index.htm (accessed 2 August 2021)

120 Vargha (n 115 above) 14.

121 *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) ("*Smit*").

122 Van Staden (n 13 above) 547.

International norms provide factors one should consider in determining the employment relationship, it uncovers the concept of "disguised employment", it aspires to extend rights to all, to provide a framework of rights to protect workers of the gig-economy and has influenced legislatures in the development of the Code.

3.6 Conclusion

In this chapter international norms were discussed such as the Centenary Declaration, Future of Work Report, and the Recommendation. The Code was influenced by these international norms to provide a framework in determining who is an employee. International labour standards extends rights to all, yet platform workers are excluded from protection ordinarily guaranteed to workers performing similar work.[123] In this study it was identified by the author that the nature of the work of Uber drivers presents a challenge to traditional relationship of employment and is testing the extent of protection for workers by labour legislation.[124]

123 The Decent Work Agenda of the International Labour Organisation (ILO) is used as a point of departure in what follows — see ILO 'Decent Work' https://www.ilo.org/global/topics/decent-work/lang--en/index.htm (accessed 2 August 2021).

124 *Uber SA Technology Services (Pty) Ltd v National Union of Public Service & Allied Workers & others* (2018) 39 *ILJ* 903 (LC) para 2.

CHAPTER 4: THE NOTION OF EMPLOYEE

4.1 Introduction

This chapter of the study discusses the Constitution in relation to the notion of an "employee", the common law definition of an "employee", the statutory definition of an "employee" alongside the rebuttable presumption of employment. Thereafter this chapter will discuss the *UberSA (CCMA)* and the *UberSA (LC)* cases and whether or not Uber drivers fit into the boxed definition of an "employee".

4.2 The Constitution and the Notion of an "Employee"

It is well known in South African jurisprudence that the Constitution is the point of commencement for legal inquest; as all law shall be interpreted with the aim to effect fundamental human rights.[125] The absence of the term employee in the Constitution is notable. Section 23 of the Constitution provides for the right to fair labour practices for

[125] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd. In re: Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 (1) SA 545 (CC) para 21; Section 39(2) of the Constitution.

everyone, the right to freedom of association for workers and employers, the right to collective bargaining for trade unions and employers' organisations and the rights for workers.[126]

Using the term "worker" instead of "employee" is noteworthy since the term "worker" is has a wider scope than "employee".[127] Hence, section 23 of the Constitution indicates that this section applies to all categories of workers that are specifically excluded from the definition of an "employee", however this is untrue since it has been brought forward that not all working relationships "should attract constitutional protection".[128] The LRA, BCEA, and Skills Development Act[129] ("SDA") all contain a broad definition of an "employee" taken from pre-democratic legislation. Amendments to the LRA and BCEA established a rebuttable presumption of employment for workers asserting to be employees.[130] The term "worker" has a broader meaning than the term "employee". The NMWA defines worker as any person who works for another and receives or who is entitled to receive any payment for that work.[131]

In *South African National Defence Union v Minister of Defence*[132] the Constitutional Court held that "workers" comprise of those who have not entered into an employment contract yet are in working relationships "akin" to an employment relationship under a contract of employment.[133] Hence, the use of term "worker" may include "employee-like relationships".[134]

Labour law in South Africa, the author puts forward, is too dependent on the presupposition of an employment contract; hence the diversification of atypical forms of employment emerges with complexities. But the BCEA provides for a small pool of diversification in that a worker per section 23(1) of the Constitution includes those who appear to be in a common law employment relationship and an employer per section 213

126 Van Staden (n 12 above) 150.
127 Van Staden (n 12 above) 150; C Cooper "Labour relations" in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* (2014) 3.
128 Van Staden (n 12 above) 150; Cheadle "Labour relations" in M Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2006) 367.
129 Skills Development Act 97 of 1998.
130 Van Niekerk (n 15 above) 63.
131 Van Niekerk (n 15 above) 63.
132 *South African National Defence Union v Minister of Defence* 1999 4 SA 469 (CC).
133 *South African National Defence Union v Minister of Defence* (n 132 above) para 24.
134 Cooper (n 127 above) 5.

of the LRA includes other forms of "workers", but specifically excludes independent contractors.[135]

4.3 The Common Law Definition of an "Employee"

Is the definition of an "employee" appropriate for the modern world of work?

The answer to this question has fundamental impacts on the rights and obligations in a workplace.

To determine whether parties are in an employment relationship, the starting point of this investigation is the contract that they have entered into.

The contract of employment has been described as:[136]

> "a contract between two persons, the master (employer) and the servant (employee), for the letting and hiring of the latter's service for reward, the master being able to supervise and control the servant's work."

Initially, the courts relied on the presence of a common-law contract of employment to determine the nature and scope of an employment relationship.[137] In *Smit v Workmen's Compensation Commissioner* the court reviewed common law factors indicative of a contract of employment compared to that of an independent contractor.[138]

Van Niekerk states that the courts have restricted the scope of the definition of "employee" by applying measures of the common-law, in determining what the fundamentals of an employment relationship are.[139] The courts developed various tests used to characterise employees and independent contractors. The most prevalent tests, are, the supervision-and-control test, the integration test, and the economic-dependency test.[140] These tests will be discussed in this chapter in relation to the role of interpretation in determining what entails an "employee".

4.4 The Statutory Definition and the Presumption of Employment

Section 213 of the LRA defines an employee in two parts:

> "a) any person, excluding an independent contractor, who works for another or for the State and who receives, or is entitled to receive, any remuneration, and

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135 R Le Roux "The Meaning of 'Worker' and the Road Towards Diversification: Reflecting on *Discovery*, *Sita* and *'Kylie'*" (2009) 30 *ILJ* 49.
136 Grogan (n 147 above) 14.
137 *State Information Technology Agency (Pty) Limited v CCMA* 2008 (29) *ILJ* 2234 (LAC) ("*SITA*") para 7.
138 Van Niekerk (n 15 above) 61.
139 Van Niekerk (n 15 above) 64.
140 Van Niekerk (n 15 above) 64.

b) any other person who in any manner assists in carrying on or conducting the business of an employer."

This definition in section 213 of the LRA has caused many controversies, as the courts have grappled with the peculiarities amongst independent contractors, those "entitled to receive remuneration" or those who "assist in conducting the business of an employer". The author notes that the requirement of a contract of employment is conspicuously missing from this definition, but the contract has been traditionally regarded as a *sine qua non* for an employment relationship.[141]

Subsection a) of the definition seems to be rooted in the common-law contract of employment while subsection b) postulates that the worker may help to conduct one's business. This definition seems to be clear-cut and comprehensive, but it contains a complicated debate on the recognition of an independent contractor compared to that of an employee.[142] Kasuso states that subsection b) of the definition denotes an intention to broaden the definition beyond common-law employees, yet it is interpreted strictly.[143] This definition and the tests applied in the determination of who an employee is, has failed to sufficiently seize the diversity of the labour playing fields.[144]

Van Niekerk states that an ordinary and traditional employee was recognised the full-time worker, male, who worked normal working hours from Monday to Friday.[145] The conundrum concerning the definitional elements of employment is not new, it dates back to the 2nd century in the Laws of Manu, a Sanskrit legal code on the Common Era.[146] The reason that the above-mentioned question is fundamental is: the distinction between the *locatio conductio operarum* and other contracts entails different legal consequences.[147] It is only employees who have rights to approach statutory tribunals for remedial help and are entitled certain social security benefits.

Due to notable increase in non-standard employment independent contracting has risen.[148] The definition of an employee is quintessential in labour law as it determines the scope of the labour legislation. The definition of "employee" was taken from the apartheid-

141 *Niselow v Liberty Life Association of Africa Ltd* (1998) 19 *ILJ* 752 (SCA) paras 753J–754A.
142 Kasuso (n 171 above)3.
143 Kasuso (n 142 above) 3.
144 Kasuso (n 142 above) 3.
145 Van Niekerk (n 15 above) 60.
146 Van Staden (n 13 above) 38.
147 J Grogan *Workplace law* 13 ed 2021 13.
148 P Benjamin "South African Labour Law: A Twenty-Year Assessment" R4D Working Paper 2016/6 27.

era and remains unchanged.[149] The use of disguised employment by employers heightened, where stipulations in contracts were used purely to circumvent employment obligations.

The rebuttable presumption of employment was introduced in 2002 in section 200A of the LRA and section 83A of the BCEA. The purpose of the presumption is to support and enhance the employee rights of vulnerable workers earning below the BCEA threshold, as well as attempt to aid the courts by providing a deeming provision. Should a person allege that they are an employee, they are presumed to be an employee if they perform services to another and one of the seven factors are present.[150] The presumption serves an indication which turns the onus of proof when one of the seven factors are present onto the alleged employer. If the alleged employer is unable to dismiss the onus and satisfy the court or arbitrator that the individual is NOT an "employee", the court or arbitrator shall be destined to find that the individual is an employee per the section 213 definition in the LRA.[151]

These two sections create a presumption that irrespective of the type of contract, one who earns below the prescribed threshold[152] shall be an "employee", should they be subject to control of another, or has worked for more than an average of 40 hours per month in the prior 3 months, or forms an integral part of the employer's organisation, or if the employer provides them with the tools of the trade, or if they only work for the one other person.[153] The Recommendation has influenced the presumption as this Recommendation held that the focus lies in the execution of the work, rather than the contents of the contract. Notwithstanding the Recommendation it was held in *Universal Church of the Kingdom of God v Myeni*[154] that a contract of employment must exist before these factors can apply. Here, the Labour Appeal Court established that a prerequisite to the presence of an employment relationship, is a contract of employment. In turn, first a contractual relationship should be established, thereafter should other tests be applicable at such as the section 200A LRA presumption. The Labour Appeal Court missed an opportune time to give effect to the inchoate jurisprudence that a contract of

149 Benjamin (148 above) 28.
150 Van Niekerk (n 15 above) 67.
151 Van Niekerk (n 15 above) 67.
152 Currently R211 596,30 per year (GNR 77 in GG 44137 of 8 February 2021).
153 Grogan (n 147 above) 15.
154 *Universal Church of the Kingdom of God v Myeni* 2015 (9) BLLR 918 (LAC).

employment is rather optional in establishing an employment relationship in *Universal Church of the Kingdom of God v Myeni*.

This presumption of employment places prominence on the duty of the court to question the working reality of an employment relationship, rather than assessing the contract of employment *prima facie* as the presumption applies unrelatedly to the model of employment. Should the worker satisfy the one of the seven factors contained in the presumption, the onus shifts to the employer to prove the nature of the employment relationship and to demonstrate that the worker is not an employee. Additionally, the presumption applies even if the individual earns above as the factors listed serve as a guide to determine if the person is in an employment relationship.[155]

4.5 The Role of Interpretation and the Definition of an "Employee"

The interpretation of statues would not be effective if the method of interpretation did not pass constitutional muster when interpreting the term "employee". Van Niekerk holds that courts appear to be willing to deviate from the narrow interpretation of the word "employee" and interpret inclusively and purposively.[156] It is therefore an imperative, that the definition of "employee" is the starting point in determining the scope of protection afforded by labour legislation to a worker.[157] The definition of an employee contained in the LRA unequivocally excludes independent contractors. Hence, a contract of employment and an independent-contractor agreement are separate and distinct. The distinction between an independent contractor and an employee is emphasised and lies in the Codes to the LRA. The Code states that an employee is one who "makes over his or her capacity to produce to another", compared to an independent contractor "whose commitment is the production of a given result".[158]

The *Smit* case affirmed that when determining who is an employee the dominant impression test must be applied.[159] *Smit* emphasised that there is no primary consideration that irrefutably establishes the presence of an employment relationship.[160] A court must, therefore, reflect and evaluate all aspects of the employment relationship

155 Regulation 20 of the Code of Good Practice: Who is an Employee.
156 Van Niekerk (n 15 above) 63.
157 Van Niekerk (n 15 above) 64.
158 Item 34 of the Code. This description was cited *in Niselow v Liberty Life Association of Africa Ltd* (1998) 19 *ILJ* 752 (SCA) at 753J–754A.
159 Van Niekerk (n 15 above) 64.
160 Van Niekerk (n 15 above) 64.

to arrive at the dominant impression which the relationship creates.[161] In simpler words, the court will assess the following: is the impression left by the contract together with the relationship between the two parties as a whole, be one of an employment relationship or like something else?

The considerations in *Smit* must be accounted for in conjunction with the Code when determining who an employee is. Item 45 of the Code states that regularly receiving a fixed payment at intervals can be indicative of the presence of an employment relationship.[162] In *State Information Technology Agency (SITA) (Pty) Ltd*[163] the Labour Appeal Court stressed that the focus in employment status disputes has shifted from a formal contract of employment to the actual existence of an employment relationship.[164] Here, the court did not stress on the subsistence of a contract of employment, but probed into the actual existence of an employment relationship and established measures for the employment relationship. Additionally, the LAC was emphatic that there are three indicators of primary importance for the founding of an employment relationship: supervision and control of the employer, whether the employee is an integral part of the organisation and whether the employee is economically dependent on the employer.[165]

The ILO recognises the importance of interpretation, in determining whether or not an employment relationship exists, in the Preamble of the Recommendation.[166] The definition of an "employee" was open to wide interpretation, however the courts adopted a strict approach and used a single conclusive factor to recognise the employment relationship.[167] For this reason legal scholars support a call for a new approach when defining an "employee".[168] A purposive interpretation is said to generate a broad interpretation an "employee", give effect to the Constitution and the purpose of the relevant statutory provisions.[169] The interpretation that best gives effect to the Constitution must be applied.[170] Kasuso emphasises that the courts are yet to advance

161 Van Niekerk (n 15 above) 65.
162 Van Niekerk (n 15 above) 65.
163 *SITA* (n 137 above) para 12.
164 *SITA* (n 137 above) para 12.
165 *SITA* (n 137 above) para 14.
166 Van Staden (n 12 above) 19.
167 Van Staden (n 12 above) 19.
168 Van Staden (n 12 above) 19.
169 Van Staden (n 12 above) 19.
170 *Discovery Health Ltd v Commission for Conciliation, Mediation and Arbitration* 2008 (29) *ILJ* 1480 (LC) para 37.

an approach that is focused on policy when dealing with the "efficacy of employment legislations".[171]

4.6 Judicial Precedent Concerning the Notion of "Employee"

An Argentinian national referred an unfair dismissal dispute to the CCMA, where his employer, *Discovery*, claimed that he was not an employee since section 38 of the Immigration Act[172] prohibits a person from employing a foreigner without the required permit. *Discovery* claimed that the contract between *Discovery* and the employee was spoilt with illegality and invalid since the definition of an employee enunciates a valid employment contract.[173] The court held that the employment contract was valid irrespective of the permit and irregular migrants shall be classified as employees for social protection.[174] The court affirmed that a formal contract of employee is not a prerequisite to be considered an "employee".

Additionally, these atypical workers fells under the protection of section 23(1) of the Constitution relating to the right to fair labour practices.[175] The *Kylie*[176] case in South African labour law, also paved the way for a progressive jurisprudence, this matter explored if a sex-worker may claim an unfair dismissal per the LRA.[177] The Labour Appeal Court held that Kylie was entitled to the LRA protections for an unfair dismissal despite there being no valid employment contract. The court explained that this was justified per section 23(1) in the Constitution as "everyone" has a right to fair labour practices.[178] Hence, Kylie, being a sex worker in a country where prostitution is a crime per section 20(1A) of the Sexual Offences Act,[179] is regarded as an employee who has been unfairly dismissed. Clearly after the *Kylie* case and the *Discovery* case, there is an inclination to broaden the jurisprudence and the scope of application of labour protections to workers in the cloudy area of non-standard employment.

After observing the emerging jurisprudence where the courts recognise that the identity of a worker shall be determined in accordance with a broad notion of the employment

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171 T Kasuso "The definition of an 'employee' under labour legislation: an elusive concept" LLD thesis, University of Pretoria, 2015 4.
172 Immigration Act 13 of 2002
173 Le Roux (n 135 above) 55.
174 Van Eck (n 4 above) 482.
175 Van Eck (n 4 above) 482.
176 *"Kylie" v CCMA* 2010 BLLR 705 (LAC) ("*Kylie*").
177 Le Roux (n 135 above) 58.
178 *Kylie* (n 176 above) para 22.
179 Sexual Offences Act 23 of 1957.

relationship. It is clear that the current definition of employee is too boxed for modern forms of work. The authors puts forward that there is an assortment of modern and non-standard employment, thus a framework is in need for labour lawyers to tackle modern forms of work.

4.7 The *UberSA (CCMA)* Case

In the *UberSA (CCMA)* matter, the commissioner was called to rule on whether the "deactivation" of the driver profiles of numerous drivers constituted an unfair dismissal; whereby the CCMA had to rule on the employment status of Uber drivers.[180] It was found that Uber drivers are employees.

The court dove into the conflation of the two bodies: UberSA and Uber B.V, though it seems unnecessary to differentiate between these two bodies, it was imperative to. UberSA rejected that it has contractual relations with the Uber drivers as these relations exist with Uber B.V, hence UberSA should not be party to the matter. After conciliation, an application was lodged for the joinder of parent company, Uber B.V for arbitration.[181] However, per the *NUMSA v Intervalve (Pty) Ltd* [182] matter, employers who were not referred to in conciliation, cannot be joined in Labour Court proceedings, hence it is improbable for Uber B.V to be join as a second employer.[183] It was held by the commissioner that Uber drivers in South Africa are employees of UberSA for the purposes of section 213 of the LRA.[184] Hence, the CCMA possessed the jurisdiction to arbitrate the unfair dismissal claims from the Uber drivers.[185] Taking into account the nature of the review proceedings, where there is a jurisdictional verdict at issue, it was in the hands of the Labour Court whether the commissioner's ruling was bad in law; this was dependent on whether or not Uber drivers are in fact employees of UberSA.[186]

UberSA is the subsidiary of Uber B.V and it assists Uber drivers in South Africa to attain their license to work and has authority to approve of the vehicle used to conduct business. On the other hand, Uber B.V is the international parent company that provides the

180 Van Eck (n 4 above) 475.
181 Van Eck (n 4 above) 475.
182 *NUMSA v Intervalve (Pty) Ltd* 2015 (3) BLLR 205 (CC).
183 *Uber SA (CCMA)* (n 20 above) para 4.
184 Van Eck (n 4 above) 474.
185 *UberSA (LC)* (n 1 above) para 3.
186 *UberSA (LC)* (n 1 above) para 65.

contracts, the access to the application platform and handles the payments of the Uber drivers.

UberSA focused on five elements whereby it clearly distinguished that UberSA is not an employer at the CCMA. Firstly, no obligation exists for the Uber driver to make use of the Uber application to perform their duties per the Uber BV Services Agreement.[187] Secondly, the right to instruct a driver to drive their vehicle does not exist as the driver may choose the location to drive in and the passengers to transport.[188] Thirdly, drivers have independence in that an Uber driver may employ another to drive.[189] Fourthly, Uber drivers have the liberty to choose when to work, as well as work for other app-based transportation services.[190] Fifthly, Uber contended that the "partner-driver" and not Uber itself, is required to source a vehicle and to incur related expenses.[191]

In opposition to UberSA, the drivers challenged that they are employees of Uber. The drivers put forward that Uber has sufficient supervision and control of the drivers in terms of their performance (the star rating system), the fixed fare to be charged, how to perform their duties (dress code and vehicles allowed to be used), the limited access to riders only through the application, location to operate in and the power to deactivate the Drivers App, which lies with UberSA.[192]

The commissioner welcomed a broad interpretation of section 213 of the LRA, in that Uber drivers fall under part b of section 213, as explained in Chapter 4. Moreover, the commissioner looked into section 200A of the LRA and the Code and concluded that understandably there is no absolute supervision and control over the Uber drivers, Uber exercises control through the application, hence there is a high level of economic dependency. The commissioner concluded that Uber drivers form an integral part of Uber.[193]

187 Van Eck (n 4 above) 476.
188 Van Eck (n 4 above) 476.
189 Van Eck (n 4 above) 476.
190 Van Eck (n 4 above) 476.
191 Van Eck (n 4 above) 476.
192 Van Eck (n 4 above) 476.
193 Van Eck (n 4 above) 479.

4.8 The *UberSA (LC)* Case

In *UberSA (LC)*, a review application was considered on the employment status of Uber drivers as employees.

The commissioner's ruling was overturned by Van Niekerk J, contrary to the recent progressive developments in labour law such as *Kylie* and *Discovery*. As identified by Van Eck, *UberSA (LC)* criticized the CCMA's decision on three major points. Firstly, the court relied on a very contentious matter, *Universal Church*, where the Labour Appeal Court held that a contract of employment is an essential prerequisite to establish an employment relationship before the section 200A of the LRA (the presumption) should apply.[194]

Secondly, applying the reality test to UberSA and Uber B.V as one fused or conflated legal entity, of Uber, is bad in law.[195] The Labour Court stated that UberSA was the appropriate legal entity for the test.[196] The Labour Court declared that should the commissioner not have conflated UberSA and Uber B.V, it would be more likely that she conclude that Uber drivers failed to discharge the onus of establishing a relationship of employment.[197]

The failure to account for the interpretation clause in the Constitution and to adopt a "broader-constitutional approach" are the two identified faults in the Labour Court's judgment, as this would have been in line with current judicial precent and international judicial precedent.[198] Without a doubt, international judicial precedent would have provided a deeper understanding of the regulation of Uber drivers. Section 39 of the Constitution provides that a court must consider international law and foreign law in the interpretation of the Bill of Rights.[199] Hence, it is worrisome that Van Niekerk J did not espouse a broader-constitutional approach. In *K v Minister of Safety and Security*[200] the Constitutional Court stated that the approaches adopted by other legal system remain of relevance and it would be arbitrary to not consider the developments in other legal system facing similar.[201]

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194 Van Eck (n 4 above) 476.
195 *Uber SA (LC)* (n 1 above) para 86.
196 Van Eck (n 4 above) 476.
197 *UberSA (LC)* (n 1 above) para 98.
198 Van Eck (n 4 above) 477.
199 Van Eck (n 4 above) 478.
200 *K v Minister of Safety and Security* 2005 6 SA 419 (CC).
201 *K v Minister of Safety and Security (*n 200 above) para 35.

From the judicial precedent presented in Chapter 4, the author puts forward that the dominant impression test evidences to be unrealistic and inept as the difference between an employee and an independent contractor has evolved to be less distinguished and less demarcated, due to the surge in atypical work. The downfall of the test is that it heavily relies on the element of cogency or persuasion of a commissioner or judge, who may bear in mind or be influenced by the cases presented to them.[202]

The author is of the opinion that *UberSA (LC)* missed an opportunity to contribute to the development of labour law and the opportunity to acknowledge that the boxed definition of what constitutes an employee is no longer applicable in an environment where there is a concomitant rise in on-demand platform workers and app-based workers. Given that Uber B.V is the parent company and the main chord in a spiderweb of subsidiaries all over the globe, it is quite trite to assume that legal developments would provide clarity in grey areas.

4.9 Do Uber Drivers Fit into the Boxed Definition of an "Employee"?

Given the controversial jurisprudence in South Africa regarding non-standard forms of workers, can Uber drivers fit into the boxed definition of an "employee"?

Uber maintains that it does not have their drivers in employ, rather Uber "partners" with "transportation providers".[203] Even though there are two types of drivers, those with vehicles and those without, the author puts forward that both of these drivers are employees of Uber and are eligible to all employment rights and protections per labour law.

If the driver is the owner of the vehicle then they are in a direct relationship with Uber, not another third party. The drivers are employees of Uber through the section 200A presumption of employment, should they earn below the threshold. In *Parliament of the RSA v Charlton*[204] the Labour Appeal Court looked into the importance of the degree of control.[205] Here the court explained that the degree of control is a low threshold to establish an employment relationship.[206] Uber supervises the performance of the drivers in that the prices of trips are pre-set, and Uber has the control to suspend drivers from

202 J Van Jaarsveld & BPS Van Eck *Principles of Labour Law* (2002) 51.
203 Mokoena (n 19 above) 1576.
204 *Parliament of the RSA v Charlton* 2010 (31) *ILJ* 2353 (LAC).
205 Mokoena (n 19 above) 1580.
206 Mokoena (n 19 above) 1580.

the platform depending on misdemeanours in the performance of their duties.[207] The Uber drivers have to abide by the rules in terms of how to provide the service, and they are monitored at least to some degree through the app. There is a star rating system whereby the riders rate the drivers based on their performance, this is a tool used by Uber to control the driver who relies on the feedback of the rider.[208]

Additionally, it is put forward that the drivers are integrated in the organisation of Uber since their services are provided on the behalf of Uber to the riders. These factors point to a high degree of control because inadequate service provided by the Uber driver has the potential to harm Uber's reputation and business by the customers, since they are not the customers of the drivers, but Uber.[209]

Item 18(b) of the Code of Good Practice holds that the factor relating to the control of working hours is evident if the employer determines the working hours. It is true that drivers have an increased freedom to choose the amount of work to do and when to work. Uber drivers may decline transport requests, but this comes with a consequence as should drivers decline often, it may result in the driver being suspended from the platform.[210] In terms of the Uber driver forming an integral part of the organisation, Mokoena argues that Uber drivers do not surpass this criterion.[211] Should an Uber driver work for 40 hours per month for three months has to be an inquiry on a case-by-case basis.[212] Notable to the issue at hand, the Labour Court in *NUCCAWU v Transnet Ltd*[213] held that workers who work by the demand of the employer only, fall within the scope of employees.[214]

In terms of the dominant impression test, the following factors apply to Uber drivers: the rendering of personal services, these services are performed by the drivers personally, this service is done per the request of the alleged employer (Uber) and the lawful instructions of the alleged employer must be followed, and lastly, the contract will terminate at the death of the employee. Hence, these Uber drivers are to be presumed as employees of Uber, in the absence of evidence proving otherwise.

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207 Mokoena (n 19 above) 1580.
208 G Davidov "The Status of Uber Drivers: A Purposive Approach" (2017) 8.
209 Davidov (n 208 above) 8.
210 Mokoena (n 19 above) 1580.
211 Mokoena (n 19 above) 1580.
212 Mokoena (n 19 above) 1580.
213 *NUCCAWU v Transnet Ltd* 2000 (21) *ILJ* 2288 (LC).
214 *NUCCAWU v Transnet Ltd* (n 213 above) para 6.

A temporary employment service ("TES") network exists where the hiring and dismissal operations are conducted by an outsourced company.[215] A TES relationship is likely in the Uber industry as persons or transport companies hire the drivers and purchase the vehicles, where their clear function is to drive for Uber. Here, the owner of the vehicle is the TES, and the client is Uber. In terms of the Uber drivers who are supplied these vehicles, essentially, these drivers are employed by the TES. But through section 198A of the LRA, these workers are deemed employees of Uber after three months.[216]

Uber exercises supervision and control of the work conducted by the drivers, without the expenses connected to the employment relationship. Recent amendments to the LRA has resulted in a change of the employer from the TES to the client (Uber), due to the recognised vulnerability of the drivers. Section 198(3)(a) of the LRA explains that a TES agreement shall not be more than three months in order for it to genuinely constitute temporary employment. Should the employee work for the client for more than three months, the employee shall be deemed to be an employee of the client. This is subject to the employee earning below the BCEA threshold.

The author believes that drivers who are employed by third parties but drive predominately for Uber (in line with the dominant impression test) for a period exceeding three months are deemed, by the operation of s 198A(3)(a) to be the employees of Uber. The longstanding question of who an employee is has resurrected in the Fourth Industrial Revolution. It is suggested that should the courts return to "technical-legalistic" tests in determining the employment status of on-demand platform workers, this poses an "insurmountable challenge".[217]

4.10 Conclusion

This chapter discussed the Constitution in relation to what entails an "employee", the common law definition an employee, the statutory definition of an employee and the presumption of employment in the LRA. Additionally, the *UberSA (CCMA)* and the *UberSA (LC)* cases were thoroughly discussed whereafter the question whether or not Uber drivers should be recognised as "employees" in South Africa was answered in the positive.

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215 P Benjamin "Decent Work and Nonstandard Employees: Options for Legislative Reform in South Africa: A Discussion Document" (2010) 31 *ILJ* 845, 847.
216 Mokoena (n 19 above) 1582.
217 Davidov (n 208 above) 11.

In conclusion of this chapter, judicial precedent in labour law have shown to steer away from the common-law and the importance of a contract of employment, such as in *SANDU v Minister of Defence*, whereby soldiers were held to be "akin" to employees. Thereafter, the presumption of employment was established in section 200A of the LRA due to the externalisation of work.[218]

The *Discovery* case looked beyond the validity of the contract of employment, in that a worker can remain an "employee".[219] And, most importantly, the *SITA* case where it was held that the primal focus has shifted from the formal contract of employment, to the presence of a relationship of employment and where the indicative factors of employment were set to be: supervision and control, if the employee plays an integral role in the organisation and economic dependency of the employee on the employer.[220] Lastly, in *Kylie*, the LAC held that irrespective of the validity of the contract of employment, the employee had the right to unfair dismissal protections under the LRA, and that *Kylie* was in an employment relationship despite the absence of a valid employment contract.[221]

It is stark from the developments in labour law that there is an inclination towards increasing the labour protections for vulnerable employees who are not in a formal employment relationship. Hence, the outcomes of *Universal Church* and *UberSA (LC)* were inconsistent with current developments and international judicial precedent. Van Eck asserts that Uber should be seen for what it truly is, a company that provides transportation services and the conglomerate should not be allowed to escape its obligations as an employer due to its complex structure.[222]

218 Theron "Employment is not what it used to be" 2003 *ILJ* 1247 1271; Van Niekerk (n 15 above) 65.
219 Van Eck (n 4 above) 482.
220 *SITA* (n 17 above) para 12.
221 Van Eck (n 4 above) 482.
222 Van Eck (n 4 above) 483.

CHAPTER 5: COMPARATIVE STUDY OF THE LEGAL CHALLENGES PRESENTED BY UBER

5.1 Introduction

This chapter aims to discuss what lessons can be gained from the UK and the USA concerning the litigious issue of whether Uber drivers should be recognised as "employees" or self-employed independent contractors.[223] Additionally this chapter includes a comparative study of the *Aslam*, *O'Connor* and *UberSA* cases.

5.2 The United Kingdom and the *Aslam* Case

This chapter aims to discuss what lessons can be gained from the UK and the USA concerning the litigious issue of whether Uber drivers should be recognised as "employees" or self-employed independent contractors.[224] Additionally this chapter includes a comparative study of the *Aslam*, *O'Connor* and *UberSA* cases.

The *Aslam* case is well-known to the employment law and gig-economy spheres. The *Aslam* case involves the litigation of Uber drivers with the aim to have re-classified them as "workers" instead of "independent contractors".[225] Interestingly, UK law has a category of "worker", an in-between category of "employees" and "independent contractors" in section 230(b) of the Employment Rights Act[226]. Per section 230(b) of the Employment Rights Act, a worker entails someone who undertakes to perform work personally and whose employment status is not by virtue of the contract, not of a client or customer of

223 Z Ayata "A Conceptual Overview of Legal Challenges Posed by Uber" in Önay, I & Ayata, Z (editors) *Global perspectives on legal challenges posed by ridesharing companies a study on Uber* (2021) 24.
224 Ayata (n 223) 24.
225 Amaxopoulou (n 22 above) 177.
226 The Employment Rights Act, 1996.

any profession. A "worker" is entitled to less protection compared to an "employee". Particularly, a "worker" is entitled to trade union membership and collective rights, minimum wage, paid annual leave, statutory employer contributions and the protection against discrimination.[227]

Two Uber drivers, Farrar and Aslam brought forward a claim to the Employment Tribunal against Uber, they persisted that they were not independent contractors, but rather "workers".[228] Irrespective of the contentions posed by Uber, the court concluded that the Uber drivers are entitled to minimum wage and granted their claims.[229] According to the Employment Tribunal's analysis of "worker", this focused on whether the individual is has an independent profession or business operations.[230] The judges explained that the idea of Uber drivers operating independently would mean a labyrinth of 30 000 small businesses operating in London linked through the platform Uber is "faintly ridiculous".[231] The Employment Tribunal denounced Uber as a transportation service company with magnanimous control over their drivers, Uber does not sell their software services, simply put it sells rides.[232] There are six factors that were highlighted by the Employment Tribunal which are listed below, based on the finding that Uber is a transportation service, rather than a software application:[233]

1. Uber BV fixes the fare, and the driver cannot implement a higher sum with the passenger.
2. Uber imposes working conditions such as acceptable vehicles to use.
3. Uber has a star rating system, emblematic of a performance rating system or a disciplinary procedure.
4. Uber sets the default route and should the driver deviate from it, would result in peril.
5. Uber reserves the authority to unilaterally amend the drivers' terms of work.
6. In the case of fraud, Uber bares the risk of loss if the drivers were genuinely in business on their own account.

227 https://www.gov.uk/employment-status (accessed 02 October 2021).
228 Amaxpoulou (n 22 above)178.
229 Amaxpoulou (n 22 above) 178.
230 Amaxpoulou (n 22 above)178.
231 *Aslam* (n 26 above) para 90.
232 Amaxpoulou (n 22 above)178.
233 *Aslam* (n 26 above) para 92.

The ruling was considered a "landmark ruling" and was upheld after two appeals.[234] The reasons why this ruling was upheld was: the contract cannot be transferred to a third party to complete as the terms and conditions are set by Uber, Uber manages and arranges the invoices/payments, additionally there is a burden Uber bares when an individual uses the app fraudulently.[235] This outcome was celebrated by trade unions in the UK as European courts have viewed gig-economy service-providers as independent contractors. Moreover, the Supreme Court dismissed the conglomerate's appeal against the decision of the Employment Tribunal, the Employment Appeal Tribunal, and the Court of Appeal.[236] The Supreme Court placed emphasis on the degree of control possessed by Uber and focussed on the six factors highlighted by the Tribunal. The consequence of this decision means that the drivers are entitled to national minimum wage, statutory holiday pay, and rights under discrimination legislation and whistleblowing legislation.[237] It was indicated that Uber drivers are workers from the time they log onto the app to illustrate that they are available to work, until they log off from the app.[238]

From this matter, the author puts forward those businesses which operate within the gig-economy through the modem of an application must review their operations to protect against future employment status claims. Businesses in the gig-economy have to decide between flexibility in work and lower costs of the "gig-model" of work and the stronger control, but a higher cost of work due to operating based on a "worker" business model.[239]

In *O'Connor* a federal District Court in California considered Uber's standing that it is a technology company, rather than a transportation service or employer, since it provides "leads" for their "partners".[240] Judge Chen in *O'Connor* brought forward the "substance of what the firm does" is transportation services.[241] Furthermore, Uber poses itself as the "best transportation service in San Francisco".[242] Uber does not sell its technology, it

234 H Osborne "Uber loses right to classify UK drivers as self-employed" *The Guardian* 2016 https://www.theguardian.com/technology/2016/oct/28/uber-uk-tribunal-self-employed-status (accessed 02 Oct 2021).
235 Osbourne (n 234 above).
236 Osbourne (n 234 above).
237 https://www.hcrlaw.com/blog/uber-v-aslam-the-implications/ (accessed 02 Oct 2021).
238 https://www.hcrlaw.com/blog/uber-v-aslam-the-implications/ (accessed 02 Oct 2021).
239 https://www.hcrlaw.com/blog/uber-v-aslam-the-implications/ (accessed 02 Oct 2021).
240 *O'Connor* (n 35 above) para 42.
241 *O'Connor* (n 35 above) para 10.
242 *O'Connor* (n 35 above) para 42.

harnesses the developed application and labour of the drivers to provide quick and on-demand transport services.

5.3 The United States of America and the *O'Connor* Case

Similar to *Aslam* and *UberSA (LC)*, the primary question in *O'Connor* is the level of control that Uber has over the Uber drivers. Uber was emphatic about the fact that it does not prescribe or regulate when drivers can log into the platform to work, in an attempt to prove the lack of control Uber has over the drivers.[243] There is a requirement, however, proving flexibility in work, that Uber drivers must complete one ride every 180 days.[244] This aspect, was recognised in *O'Connor*, that it might weigh in favour of Uber drivers being independent contractors, but the more appropriate inquiry is the control that Uber has over the drivers as they are on duty performing their work for Uber.[245] On this point, the court explained that the scheduling is merely one factor to be considered in the employment relationship inquiry based on control.[246]

Uber contended that the Uber drivers have independence in rejecting the leads provided to them while they are on duty. However, this seems to be the reverse, as the Uber driver's handbook prescribes that the Uber drivers are expected to accept the "leads" provided to them, and a "follow-up" is expected for those "leads" rejected.[247] In determining the control of pay, it was established that Uber maintains control in that they solely controls the compensation received by the Uber drivers. The price is set solely by Uber, who withholds a fee per ride of approximately 20% of the invoice.[248] The court questioned whether Uber drivers enjoy the promised liberty of participating in the gig-economy. It was noted by the court that Uber observes a performance control where the Uber drivers are required to clothe professionally, send the rider a message, the radio should off or play soft jazz and open the doors for riders.[249] Uber enforces these measures as their "partners" are loomed with possible deactivation from the platform.[250]

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243 *O'Connor* (n 35 above) para 38.
244 *O'Connor* (n 35 above) para 27
245 *O'Connor* (n 35 above) para 38.
246 T Maloka "Towards Unmasking The True Employee in South Africa's Contemporary Work Environment: The Perennial Problem of Labour Law" LLD thesis, University of Fort Hare, 2018 257.
247 *O'Connor* (n 35 above) para 39.
248 *O'Connor* (n 35 above) para 42.
249 *O'Connor* (n 35 above) paras 49-50.
250 *O'Connor* (n 35 above) paras 50.

Uber reigns successfully in that it reserves the right to suspend, prohibit and limit the driver from accessing and/or using the Driver App, and the conglomerate regularly terminates the bottommost five percent of the driver pool.[251] The feedback and star ratings provided by riders-based Uber drivers' performance were considered by the court as a performance valuation, as the deactivations were based on these reviews. Through the star ratings, Uber was able to monitor the Uber driver's performance on duty, thereby giving Uber magnanimous control over the "manner and means" of the "partners'" performance.[252] Even though sufficient factors gravitated to Uber drivers being employees of Uber, the United States Court of Appeals for the Ninth Circuit reversed the certification of 160 000 Uber drivers as well as denials of motions to compel arbitration in class action litigation filed by Uber drivers.[253]

In August 2021, Judge Frank Roesch ruled that Prop 22 was unconstitutional.[254] The judge struck down the ballot measure which exempted Uber from the state law which required Uber drivers to be classified as employees eligible for employment protections. Prop 22 sheltered Uber from labour law which advocates for drivers to be treated as employees with benefits of paid sick leave and unemployment insurance.

This matter was important as California voters in November 2020 supported Prop 22 to ensure that gig-companies such as Uber, are not required to recognise their drivers as employees.[255] Gig-companies such as Uber and Lyft lauded over $200 million to support Prop 22 in return for benefits such as funds for health insurance for their drivers. Judge Frank Roesch said the following regarding the impact of Prop 22: "it limits the power of a future legislature to define app-based drivers as workers subject to workers' compensation law".[256] Hence, the entire measure shall be unenforceable.[257] According to the court, the measure conflicted with California's Constitution to grant absolute power

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251 *O'Connor* (n 35 above) paras 43-50.
252 *O'Connor* (n 35 above) paras 50-52.
253 https://www.paynefears.com/insights/ninth-circuit-reverses-grant-class-certification-and-denial-motions-compel-arbitration (accessed 02 October 2021).
254 https://www.paynefears.com/insights/ninth-circuit-reverses-grant-class-certification-and-denial-motions-compel-arbitration (accessed 02 October 2021).
255 https://www.paynefears.com/insights/ninth-circuit-reverses-grant-class-certification-and-denial-motions-compel-arbitration (accessed 02 October 2021).
256 https://www.axios.com/california-prop-22-gig-companies-uber-lyft-aba2824e-1111-4c70-a0d3-e96c5e56cebe.html (accessed 02 October 2021).
257 https://www.axios.com/california-prop-22-gig-companies-uber-lyft-aba2824e-1111-4c70-a0d3-e96c5e56cebe.html (accessed 02 October 2021).

to state legislature to create a workers' compensation system.[258] Additionally, Prop 22 prohibited a passing of legislation allowing app-based drivers to bargain collectively with rideshare conglomerates.[259]

It has been expressed by Uber and Lyft that they have the intention to appeal this decision before the State's High Court.[260]

5.4 Comparative Study

In this section of the chapter, a comparative study will be conducted with local judicial precedent and foreign judicial precedent concerning Uber. Comparative studies are valuable as it can enrichen the legal reformers' creativity as what could be done in their jurisdiction, as well as alternatives which can be considered.[261]

Additionally, only through comparison with similar functions or frameworks in other legal systems can open one's mind to certain strengths and weaknesses in one's own legal system. Possessing knowledge of the operations in other legal systems provides a new insights of the possibility in one's own legal system, and places into context the experiences of elsewhere.[262] Weiss puts forward that this is the only way to really identify the uniqueness of one's own legal system.[263]

Fredman and Du Toit state that the decision by the Court of Appeal in *Aslam* is welcomed.[264] UK courts have made vital strides towards improving the conditions of employment for atypical workers.[265] Additionally Fredman and Du Toit state that this decision will be valuable to Uber drivers in other jurisdictions.[266] In the UK there was a Taylor Report proposal concerning a presumption of employment which seems to have promise, similar to section 200A of the LRA.[267] The Taylor Report includes that an

258 https://www.nortonrosefulbright.com/en-us/knowledge/publications/fb487c48/californias-proposition-22-is-ruled-unconstitutional (accessed 02 October 2021)
259 https://www.nortonrosefulbright.com/en-us/knowledge/publications/fb487c48/californias-proposition-22-is-ruled-unconstitutional (accessed 02 October 2021).
260 https://www.nortonrosefulbright.com/en-us/knowledge/publications/fb487c48/californias-proposition-22-is-ruled-unconstitutional (accessed on 02 October 2021).
261 M Weiss "The Future of Comparative Labor Law as an Academic Discipline and as a Practical Tool" 25 *Comparative Labour Law Policy Journal* (2003) 178.
262 Weiss (n 261 above) 177-178.
263 Weiss (n 261 above) 177-178.
264 S Fredman & D Du Toit "One Small Step Towards Decent Work: Uber v Aslam in the Court of Appeal" 48 *ILJ UK* (2019) 273.
265 Fredman (n 264 above) 273.
266 Fredman (n 264 above) 273.
267 Fredman (n 264 above) 273.

employment relationship will be presumed "regardless of the form of the contract" and the onus will shift to the employer to prove otherwise.[268] Although, a contract must be present before the presumption can apply.[269] These complexities must be considered when legislative reform is looked into.[270]

From the developments in *Aslam* and *O'Connor* it is evident that the courts in the USA and the UK do not rely on the dogma and the nonsensical importance attached to the prerequisite of a contract of employment. Rather, the courts delved into the real relationship experienced between the Uber driver and the Uber subsidiary as well as the level of control of the Uber subsidiary over the Uber driver. Given that the current generation is renowned for gizmos and gadgets, it is unfathomable to have the existence of a contract of employment, as a prerequisite for employment.

Uber thwarts the costs of insurance and security of the drivers when it disputes being the employers of the drivers. The evasion of regulations entails the evasion of responsibilities and costs. This conundrum lies is at the crux of the legal controversies concerning the Uber; the *Aslam*, *O'Connor*, *UberSA (CCMA)* and *UberSA (LC)*.

In determining the employment status of Uber drivers, the author puts forward that labour law as it stands does not adequately tackle the challenges posed by the new modes of work. It is proposed that modern and new protections are a must for on-demand platform workers and workers engaged in the gig-work, who are unable to secure current employment protections Nevertheless, drivers with their personal vehicle and drivers provided with a vehicle shall be assessed on a case-by-case basis.

5.5 Conclusion

From the research conducted in the above-mentioned case law, the author identified are two characteristics that distinguish Uber drivers from "ordinary" employees: the freedom to choose the hours to work and when to work and the possible ownership of the vehicle used to provide the service.

The author puts forward that none of the characteristics are unique to on-demand platform work, this might create an impression of the drivers being independent contractors. More so, having a deeper look at the characteristics of employment and

268 Fredman (n 264 above) 274.
269 Fredman (n 264 above) 274.
270 Fredman (n 264 above) 274.

using the dominant impression test, it prevails that the number of hours factor is inapt and immaterial, and the ownership of vehicle is outweighed by the other indicators.[271]

271 Davidov (n 208 above) 10.

CHAPTER 6: ALTERNATIVE STRATEGIES AVAILABLE TO ON-DEMAND PLATFORM WORKERS

6.1 Introduction

This chapter will delve into alternative strategies to provide labour protections to on-demand platform workers such as Uber drivers. A possible alternative could be reconceptualising the notion of an employee and widening the scope of application of labour law. Another is introducing an intermediary category of employment, as well as develop special regulations for those involved in on-demand platform work. Each of these alternatives come with serious difficulties, as distinguishable lines must be drawn between what entails an "employee" and an independent contractor. Moreover, another question is what type of protection is due to these workers.

6.2 Basic Conditions of Employment for Atypical Workers

This chapter will delve into alternative strategies to provide labour protections to on-demand platform workers such as Uber drivers. A possible alternative could be reconceptualising the notion of an employee and widening the scope of application of labour law. Another is introducing an intermediary category of employment, as well as develop special regulations for those involved in on-demand platform work. Each of these alternatives come with serious difficulties, as distinguishable lines must be drawn between what entails an "employee" and an independent contractor. Moreover, another question is what type of protection is due to these workers.

Firstly, a lesson learnt from the UK in *Aslam* is the intermediary category of employment, one that is in-between an independent contractor a formal employment relationship, a "worker". And, secondly, a development on the definition of employee after the

Dynamex[272] judgment will be looked at as an alternative and establishing a basic floor of rights for atypical employees.

Platform workers extremely are vulnerable as no protections are afforded to them in the grey area that they operate. They are without the right to bargain collectively, hence they are exposed unfair practices such as including scavenging low pay, unreasonable working hours, discrimination, and unsafe working conditions.[273] The author puts forward that founding minimum working conditions for atypical workers can be challenging yet rewarding in that the contents of the standards will have to be tailored to the particularities of the form of atypical work, given the plethora of atypical work.

South Africa has noted that there is a duty on the state to extend fair labour practices to all workers and established the Presidential Commission on the Fourth Industrial Revolution which is tasked with "skills development and future of work".[274] The author puts forward that the definition of "worker" can be simply put and the need for the labour protection is found in this definition. The need for labour protection derives from the state of affairs: a person is working for or is in engaged in conducting the business operations of another.[275] There is a level of economic dependency due to the element of control. On the other side of the spectrum, independent contractors have complete liberty to conduct their business operations. This definition and the test of what constitutes a "worker" is applicable to self-employed workers engaged in conducting the business of another.[276]

6.3 An Atypical "Worker" and the *Dynamex* Judgment

As explained in chapter 5, the Employment Rights Act contains that definition of a "worker" which includes an individual (not in a formal contract of employment), who provides services that are personally performed for another, who is not a client or customer.[277] However, the strict application of definitions are notorious for arbitrarily denying those labour protections. In *R. (on the application of the Independent Workers Union of Great Britain) v Central Arbitration Committee*[278] *Deliveroo* drivers were denied

272 *Dynamex Operations West Inc. v. Superior Court* (2018) 4 Cal. 5th 903.
273 M Graham 'The Fairwork Foundation: Strategies for improving platform work in a global context' (2020) *Geoforum*.
274 Du Toit (n 117 above)1502.
275 Du Toit (n 117 above) 1502.
276 Du Toit (n 117 above) 1502.
277 Du Toit (n 117 above)1502.
278 *R. (on the application of the Independent Workers Union of Great Britain) v Central Arbitration Committee* (2018) ewhc 3342 (Admin) 5 December 2018 the High Court.

rights to engage in collective bargaining since their contracts did not obligate them to work personally, as it permitted others to work on their behalf.[279]

In order to circumvent technical exclusions, the concept of working for another person should be interpreted broadly and understood as the individual is frequently responsible for conducting the work in person. A new statutory definition of "employee" was embraced in California, after the *Dynamex*[280] judgment which founds a presumption that all workers are employees unless the hiring company can establish that:[281]

(a) the worker is free from control in performance of duties the work; AND

(b) the duties are performed outside of the hiring company's business; AND

(c) the worker is engaged in an independently established trade, occupation, or business of the same nature as the work that he or she has performed for the hiring entity.

A platform worker would be presumed to be a worker if:[282]

a) The individual is not free from control in the performance of their duties; AND
b) The individual is not performing the work outside of the course of the platform's business; AND
c) The individual is not in the business on their own account.

On this basis, Uber drivers are the "workers" of Uber and should be entitled to basic labour protections of a worker. The author asserts that the only probable way, that on-demand platform workers would designate as independent contractors, is if the platform functions only as an intermediary for contact and enables workers to operate independently. But this is not the case with Uber and Uber drivers due to the soaring level of supervision and control over the Uber drivers.

The identified problem in implementing an intermediary category of "worker" is that all employees could meet the standards of what constitutes a "worker".[283] Moreover atypical workers are more vulnerable in the working populace, and this does not necessitate less labour protections given that they work for mostly tech conglomerates. A more realistic and appropriate measure, would be to establish basic rights for workers in different

279 Du Toit (n 117 above) 1502.
280 *Dynamex Operations West Inc. v. Superior Court* (n 272 above).
281 Du Toit (n 117 above) 1504.
282 Du Toit (n 117 above) 1503.
283 Du Toit (n 117 above) 1504.

platforms of the employment, as touched on in the ILO Conventions and the Constitution.[284] These rights must be capable of addressing the evolving working conditions and the different category of workers.

6.4 Conclusion

This chapter critically analysed alternative strategies available to on-demand platform workers to gain labour protections. Even though the industry within which on-demand platform workers operate, is definitely a first of its kind, there is nothing new in labour law in terms of the basic floor of rights regulating the conditions and different industries within which atypical employees work.[285] Collective agreements and sectoral determinations operate in particular sectors and industries of work. The author puts forward that a basic conditions of employment for gig-workers would be a feasible solution.

284 Du Toit (n 117 above) 1505.
285 Du Toit (n 117 above) 1505.

CHAPTER 7: CONCLUSION

7.1 Conclusion

In this study, the underlying role and function of labour law was critically analysed alongside Kahn-Freund's theories of labour law, to gauge the ultimate purpose of labour law. International norms were looked into such as the Recommendation, the Future of Work Report, the Centenary Declaration, and ILO standards to fathom South Africa's international law obligations and what lessons can be learnt from the international norms. Thereafter, the Constitution the notion of employee and was looked into, in order to gauge whether Uber drivers in South Africa could be considered employees for the purposes of section 213 of the LRA.

A comparative study of what lessons can be gained from the developments in the UK and the USA was conducted. Lastly, this research presented alternative strategies available to provide labour protections to on-demand platform workers, other than recognising them as employees.

The essence of this research lies in answering the question whether Uber drivers should be considered as "employees" of Uber in South African, hence are they entitled to labour protections. The aim of this research is to establish whether South African labour laws in South Africa provide sufficient labour protection to atypical workers such as Uber drivers in the on-demand platform economy.

Given the "on-demand" nature of the work of Uber drivers, it has been put forward that Uber drivers do not squarely fit into the category of an "employee" per section 213 of the LRA, nor do these vulnerable workers fit into the definition of "independent contractor".

The tests applied to determine the employment relationship fall short of protecting these workers, hence it is suggested that these tests are not in line with the changes in the labour environment brought by the Fourth Industrial Revolution. Due to this grey area in the law, Uber drivers are exposed to exploitive working conditions and are unregulated in South Africa.

After observing the conundrums experienced in the UK and the USA with Uber drivers questioning their employment status, it is noted that other jurisdictions are also in need

to develop their evaluation criteria for what is to determine an employment relationship. Labour law is in a crucial need of a "software update".

The author's intention of this study is to demonstrate that the traditional concepts of labour cannot acclimatise the striking features of the platform economy. The Fourth Industrial Revolution has shown to be a confrontation for the traditional understanding of labour law. Additionally, the author intends to strike debate and challenge the international community of labour law to amplify regulation for this "new phenomenon".[286] It is a tough encounter for the community of labour law to contribute to this development, in order to make sure that on-demand platform workers have a fighting chance to work in decent working conditions.[287]

It is clear that the developments in atypical work create job opportunities and boost the economy, but this is at the cost of unregulated and exploitive work. This can be addressed by creating a basic working condition for these employees through legislation recognising these workers and bestowing basic labour protections for them. Given that Uber drivers are operating in a dangerous grey area in the labour environment, it is definitely an option for the legislature to consider implementing. Perhaps the labour environment is not ready to recognise on-demand platform workers, specifically Uber drivers as employees, yet, due to the outdated evaluation criteria, definition of "employee" and applicable judicial tests, but a floor of basic working rights is without a doubt a decent solution to protect these workers.

286 Weiss (n 6 above) 20.
287 Weiss (n 6 above) 20.

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