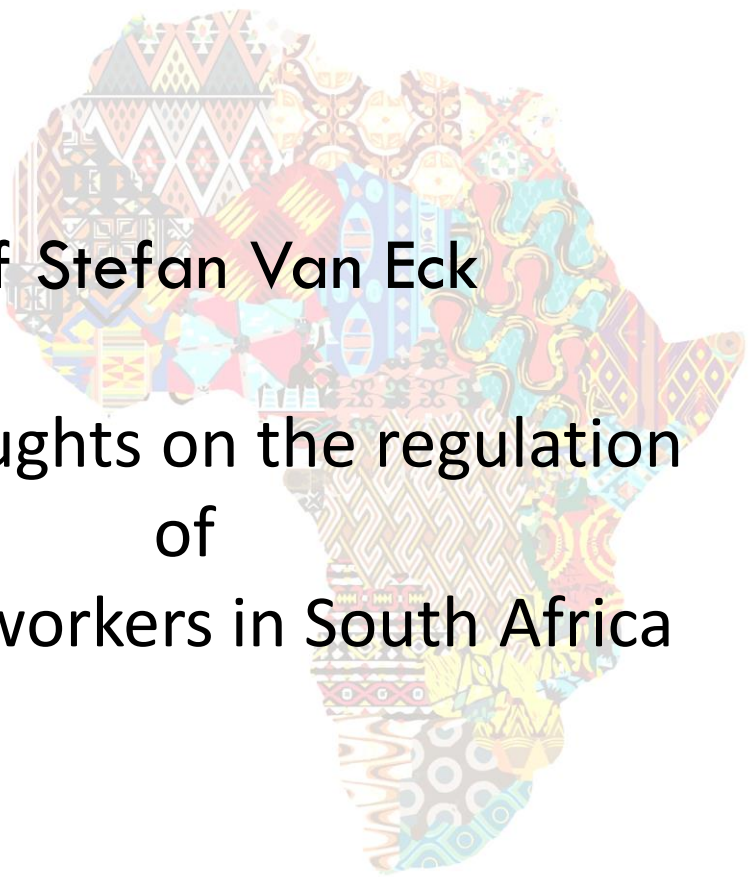




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Some thoughts on the regulation  
of  
platform workers in South Africa

# Some thoughts on the regulation of platform workers in South Africa

## 1. Introduction

- SA's Labour Laws were modernized shortly after the dawn of democracy in 1996.
- A modern Constitution was enacted with wonderful labour rights included in it:
  - ❖ Everyone has the right to fair labour practices;
  - ❖ The right to strike.
- New Labour Laws (LRA; the BCEA; the EEA).
- After this SA experienced significant growth of non-standard work.
- SA introduced a presumption “who is an employee” closely adhering to the ILO recommendation in 2002.

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- Added to this, SA introduced significant improvements to the regulation of labour broker workers, fixed-term workers and temporary employees in 2017.
- Since then, things once again changed. Uber, Bolt, Swift and SweepSouth have established new forms of gig workers in SA.
- There can be no doubt. Policy makers and academics in SA need to grapple with the issue of the regulation of gig-workers.
- One of our fellow presenters on the position in SA covers the nitty gritty in his excellent paper that follows.
- In an attempt not to overlap too much – I will focus more on conceptual and theoretical questions rather going into the details of the SA situation.

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## 2. Questions:

- Should we reinvent the discipline of labour law?
- What can be gained from comparative labour law?
- Does the answer lie in the extension of the definition of labour law / or in collective bargaining?

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## 3. Should we reinvent the discipline of labour law?

- Before we answer this question, we should first recognize that “labour law” means different things to different countries.
  - USA – mainly collective aspects;
  - UK, SA and most of Central Europe – both individual and collective labour law issues.
- SA – basic conditions; unfair dismissal law; and collective bargaining aspects.

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## 3. Reinventing labour law?

- At its heart, though, labour law recognises that employees are in a weaker social position than employers and they need protective measures to respond to their vulnerability.
- As alluded to by Kahn-Freund, labour law seeks to protect employees in as far as it serves as a “countervailing force” against employers’ superior economic and social powers.
- Should this change?

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## 3. Reinventing labour law?

- Labour law is not unique by protecting a particular segment of society.
- Family law protects children and weaker parties in situations of divorce and death.
- Company law regulates the relations between shareholders, the directors of companies and stakeholders such as creditors.
- However, for Professor Manfred Weiss, one of the former Presidents of ILERA, labour law has at its heart the recognition that unbridled competition between employees would lead to “a race to the bottom”.
- In an ideal world, this must be countered and overcome. The question remains, though, whether labour law should be reinvented to remain relevant during the digital era.

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## 3. Reinventing labour law?

As alluded to by the same Prof Weiss, long before Kahn-Freund, in the late 1920s, the foresighted German author, Hugo Sinzheimer, referred to labour law's four pillars.

- a. The object of transaction is not a product, but the human being as such. Much later, in the ILO's the Philadelphia Declaration emphasised that "labour is not a commodity".
- b. It seeks to protect those employees who are personally dependent on employers.
- c. Human dignity may be undermined by dependant relationships.
- d. Labour law should ideally also cover risks in an employee's life. This includes job opportunities and what comes after termination. It includes social security law in its broadest sense.

Only later towards 2000 did the ILO recognize the decent agenda approach.

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## 3. Reinventing labour law?

- There is no doubt that the underpinnings of labour law remain relevant.
- As long as the rendering of services by some human beings to others remains a dimension of life, so the need for the existence of this subject field will remain relevant.
- There can, however, be no doubt that adaptation will always remain a given. So, for example, in the South African context, the need was identified to protect TES, fixed-term and part-time employees and regulations were strengthened in 2015.
- If similar needs are identified for categories of digital workers, labour law will have to play “catch-up” to continue to fulfil its main purposes.

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## 4. What can be gained from comparative labour law?

- This paper argues that there is no doubt that countries can gain from comparative studies. The reasons:
  - Capital flows over borders;
  - MNE's dominate decision making.
  - Technology applies across borders.
- According to the ILO, “the 200 largest MNEs have sales equivalent to almost 30% of the world's GDP and approximately 80 per cent of global trade activities are within global value chains of MNEs”.
- All of these principles apply to the likes of Uber.

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## 4. What can be gained from comparative labour law?

The mentioned features of globalisation made it clear that labour law has increasingly become an international phenomenon.

- The ILO has been involved in international norm setting for just more than 100 years.
- Government, labour and business representatives of the 187 ILO member countries interact to formulate conventions, recommendations and declarations with a view to establishing universal minimum standards.
- It is clear that the information base of comparative labour law has grown significantly.

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## What can be gained from comparative labour law?

- The ILO is acutely aware of the fact that the forces associated with the fourth industrial revolution are transforming the world of work. The ILO published the ILO Future of Work Report in 2019 which contains three main pillars:
  - Member states should increase investment in a universal entitlement to lifelong learning. Trade unions should place more emphasis on demanding the setting aside of facilities and financial resources for learning commitments.
  - The institutions of work must be strengthened. Workers' contracts, collective agreements and labour inspection systems should be bolstered.
  - States should engage in transformative investments that are aligned to the UN's 2030 Agenda for Sustainable Development. Companies should be incentivised to invest in the care economy, the green economy and the rural economy.
- Guy Rider, the Director-general of the ILO, describes it as a "roadmap" for the ILO.

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## What can be gained from comparative labour law?

- What value does this have for SA and India in practical terms? We have been aware of a decent work approach for many years. Detractors may argue that ILO principles have no binding effect.
- This paper argues it is not the correct approach.
  - Comparative labour offers policy makers a better understanding of their own legal framework.
  - Member states can use principles contained in international instruments as a tool for legal reform.
  - It enriches the reformers' imaginations. So, for example, a South African scholar could consider the effects of the inclusion of "worker" rather than the definition of "employee" in more pieces of labour legislation by considering the definitions as well as the outcomes of other countries such as England and Germany.

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## 5 Should the definition of “employee” be extended?

- Weiss is critical regarding the potential of extending the traditional definition of employee. If it is extended to cover all instances where one person becomes economically dependent on another, it could ultimately render the subject area of labour law meaningless.
- He says the answer lies in the decentralisation of the regulation of platforms. Employers and employee representatives will have to agree on the rules regarding digital workers. It must be done through co-determination and collective bargaining. The legislature will not be able to keep up with the rapid changes.
- However, many countries have already introduced a 3<sup>rd</sup> category of worker.

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## 5 Should the definition of “employee” be extended?

- Weiss has strong arguments, but I do not fully agree. There are some haphazard positive signs under an in-between definition of "worker".
- So, for example, there are three categories of employment status in the UK where there are "self-employed", "worker" and "employee" categories.
- Self-employed individuals do not have the same protection as workers and employees. They are, for example, not entitled to receive paid leave and the national minimum wage.
- In a significant development, in *Uber BV v Aslam* the UK Supreme Court recently held that Uber drivers are workers within the meaning of the Employment Rights Act 1996, the National Minimum Wage Act 1998 and the Working Time Regulations.

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## 6. The Way Forward

- Social dialogue, collective bargaining and co-determination will undoubtedly be the ideal approaches of regulating new forms of work in the long run. However, it is debatable whether these strategies will be achieved in South Africa in the short term.
- SA's main labour instruments, namely, the LRA, the BCEA and the EEA do not contain an intermediary category of workers that lies somewhere between employees and the self-employed.
- There also is considerable doubt as to whether Uber drivers will become entitled to labour law protection under these legislative measures and 2015 protection of atypical workers not extended.

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## 6. The Way Forward

- In a significant development SA's recently enacted National Minimum Wage Act included an in-between definition of "worker" that does not exclude "independent contractors" as the definitions of the LRA, BCEA and the EEA do.
- Added to this, workers who earn less than the threshold amount, and only work one or two hours per day, also receive protection.
- It is suggested that policy makers should in the interim give serious consideration of introducing a 3<sup>rd</sup> category of "employee" into the other key pieces of legislation.