The International Labour Standards on Outsourcing Triangular Employment Relationships: Implications for Kenya

Melissa W. Muindi*, Elizabeth W. Muli†, Njaramba E. Gichuki‡

Corresponding Author’s Contact Details:
Melissa Wanjiku Muindi
P.O. Box 21059-00505 Nairobi, Kenya
melissamuindi@gmail.com
0720 973844

Declaration of originality
I, Melissa Wanjiku Muindi, declare that this manuscript is my own original work. To the best of my knowledge and belief, this manuscript contains no material previously published or written by another person except where due reference is made.

Statement regarding publication
I, Melissa Wanjiku Muindi, confirm that this manuscript has not been previously published or tendered for publication in any other journal.

Statement on consent
I, Melissa Wanjiku Muindi, consent to the publication of the manuscript by the National Council for Law Reporting.

* Post Graduate Student, University of Nairobi, School of Law; Doctoral Fellow, Strathmore Law School; Advocate of the High Court of Kenya.
† Senior Lecturer, University of Nairobi, School of Law; Advocate of the High Court of Kenya.
‡ Senior Lecturer, University of Nairobi, School of Law; Advocate of the High Court of Kenya.
Abstract

All workers deserve employment protection and internationally, this has been effected through the International Labour standards (ILS). However, due to the nature of the triangular employment relationship (TER), questions arise as to whether these labour standards apply to outsourced workers, in the same way that they apply to the standard employment relationship (SER). Some of the challenges that workers face within the outsourcing TER relate to the employment status of outsourced workers, access to equitable pay and employment benefits, and job security. The main objective of this paper is to study the international labour standards that regulate outsourcing triangular employment relationships with a view to assess the implications for Kenya’s labour laws to enhance the protection of outsourced workers. The paper begins with an overview of the main employment-related challenges faced by outsourced workers in Kenya due to the peculiarities of outsourcing TERs. It then highlights the operation system of the International Labour Organizations (ILO) in which it is noted that one of ILO’s aims is the protection of workers who fall outside the SER. The paper further identifies the key ILO conventions that regulate outsourcing TERs and how they address the challenges faced by outsourced workers. The ILO’s proposed Convention concerning Contract Labour would have been a useful guide, but it was never adopted. The paper then assesses Kenya’s labour laws vis-à-vis the ILS regulating outsourcing TERs to find out whether they are sufficient to protect the rights of outsourced workers in order to identify possible interventions that can enhance the protection of outsourced workers. The author concludes that though the ILO itself is still grappling with the protection of outsourced workers and other contract workers, the progressive realization of the ILS would be beneficial to improve the plight of outsourced workers in Kenya. However, bearing in mind the economic interests of both two authority figures that the outsourced workers relate with, namely the outsourcing company and client enterprise, it should also be borne in mind that the measures taken should not be so rigid as to curb the flexibility offered by outsourcing TERs.

Key words: international labour standards, outsourced workers, triangular employment relationships
1. INTRODUCTION

International labour standards (ILS) apply to all employees. However, due to the nature of the triangular employment relationship (TER), questions arise as to whether these labour standards apply to workers in non-standard forms of work (NSW) in the same way that they apply to the standard employment relationship (SER). There are four broad NSW categories namely temporary employment, part-time work, disguised employment and triangular employment relationships. The International Labour Organization (ILO) acknowledges that NSWs have increased significantly in the past two decades. This increase has led to a decrease in employment protections because NSWs are associated with atypical, precarious employment relationships. Further, the different labour and economic structures, as well as the differential development of various countries’ legal systems can lead into different advantages and disadvantages being experienced by atypical workers, such as outsourced workers. Inasmuch as ILS apply to all workers, the ILO has sought to enhance the protection of atypical workers through conventions that address these NSW categories directly. For example the Part-Time Work Convention, 1994 (No. 175) addresses part-time work. One of the instruments that protects workers in disguised employment is the Home Work Convention, 1996 (No. 177).

This main aim of this paper is to explore study the ILS that regulate outsourcing TERs with a view to assess the implications for Kenya’s labour laws to enhance the protection of outsourced workers.

---


6 ibid 7.

It contains results that were part of a study that analyzed the legal regulation of outsourcing TERs in Kenya. The paper discusses the peculiarities of outsourcing TERs and highlights the main employment-related challenges faced by outsourced workers in Kenya. It then briefly discusses ILO’s operation system. It identifies the key ILO conventions that regulate outsourcing TERs and the extent to which they address the challenges faced by outsourced workers. Finally, it assesses Kenya’s labour laws vis-à-vis the ILS regulating outsourcing TERs.

2. PECULIARITIES OF OUTSOURCING TERs

Outsourcing, as an employment model, consists of a relationship between three categories of persons - an outsourced worker, an outsourcing company and a client enterprise – which creates a triangular employment relationship (TER).8 TERs are work relationships involving an intermediary between the worker and the organization; the worker is not directly engaged by the organization where he or she provides services.9 In outsourcing TERs, there is an employment contract between the outsourcing company and outsourced worker. In addition, there exists a service contract between the outsourcing company and the client enterprise pursuant to which it avails the services of the outsourced workers to the client enterprise. The legal relationship between the outsourced workers and the client enterprise is, however, unclear since there is no formal contractual relationship between them. This relationship is illustrated in Figure 1.

---

9 ILO, Non-Standard Employment around the World (n 2) 87; Private Employment Agencies Convention (ILO C181) 1997 art. 1.
As illustrated in Figure 1, outsourced workers relate with two authority figures who have varied levels of control over them. The outsourcing company exercises legal control over the workers because of the employment contract whereas the client enterprise exercises ‘day-to-day’ control over them as they carry out their duties.\(^{10}\) This splitting and sharing of employer functions between the authority figures often obscures the employment rights of the outsourced workers which may lead to increased precariousness of this category of atypical workers.\(^{11}\) This section highlights the main employment-related challenges experienced by outsourced workers in Kenya due to the peculiarities of outsourcing TERs.

### 2.1 Outsourced worker’s employment status

Outsourced workers relate with two authority figures who have varied levels of control over them. On one end of the spectrum, the outsourcing company’s roles are extensive and include the

---


\(^{11}\) Van Eck (n 5); Claudia Weinkopf, ‘Precarious Employment and the Rise of Minijobs’ in Leah F Vosko, Martha MacDonald and Iain Campbell (eds), Gender and the Contours of Precarious Employment (Routledge 2009).
supervision and training of the workers, in addition to payroll management.\footnote{Joseph Otieno Ogutu & 24 others v Allied Wharfage Ltd & another [2016] ELRC 396 of 2013, eKLR.} In such instances, the stable relationship that the outsourced worker have is with the outsourcing company and the workers may be assigned to various client enterprises on short-term, temporary bases. On the other end of the spectrum are outsourced workers who are assigned to a particular client enterprise on a long-term basis and who perform their work just as any other employee of the client enterprise.\footnote{Jonathan Karanja Thuo & 6 others v Bata Shoe Company Ltd & another [2014] eKLR (ELRC).} In such instances the stable, long-term relationship is mostly with the client enterprise. The outsourcing company is not involved in the allocation and supervision of outsourced workers’ tasks, and only plays minimal roles such as ‘payrolling.’ The outsourcing company receives payment from the client enterprise every month. Such payment include the wages of the outsourced workers and its commission for the payroll management service. It then makes the necessary statutory deductions, pays the outsourced workers and keeps its commission. In addition, a few outsourced workers initially worked with the client enterprise before being outsourced.\footnote{Harrison Karani & 19 others v Insight Management Consultants Limited [2016] eKLR (Industrial Court); Nyamawi Gambo v Mombasa Maize Millers Limited & Another [2016] eKLR (ELRC).} It was found that this change of guard caused confusion as to their employment status, especially where they continued with the same roles.

Outsourced workers’ perceptions of which authority figure was their employer varied, as depicted in Figure 2. Though all written employment contracts bore the name of the outsourcing company as employer, only 33% felt that the outsourcing company was indeed their employer. 18% were unsure about who their employer really was. They knew that they had to interact with two authority figures and that each played different functions. However, they were unclear as to which functions...
took precedence and warranted employer status. Finally, 49% percent identified with the client enterprise as their real employer despite what their contracts stated.

![Diagram: Perceptions of Who Employer Is]

**Figure 2: Outsourced workers’ perception of who their employer is**

The challenges experienced in the delineation of employment status may be due to the fact that the employment framework was developed against the backdrop of the SER, which presupposes a linear relationship between two parties: a single employer and employee. On the other hand, outsourced workers relate with two authority figures. Despite their perceptions, Kenyan case law classifies outsourced workers as employees of the outsourcing company. There is, however, no guidance as to the nature of the relationship between the outsourced workers and the client enterprise, which is not an ideal situation.

---

2.2 Access to equitable pay and employment benefits

An added layer to the challenges surrounding outsourced workers’ employment status is the uncertainty on their entitlement to employment protections.\(^\text{17}\) Employment rights are premised on the SER, which often poses problems to outsourced workers since they are engaged under TERs.\(^\text{18}\) It is true that, as employees of the outsourcing company, outsourced workers are entitled to an array of employment rights as provided for under the employment laws.\(^\text{19}\) However, it was found that 67% of the outsourced workers lamented over the inadequacy of their employment rights as compared to the directly employed workers of the client enterprise. They complained of unequal treatment with respect to salaries and allowances, access to loan facilities, access to medical insurance cover, access to training opportunities, the management styles for outsourced workers as compared to SER workers, and lack of unionization.

2.3 Job security

The traditional conception of job security is premised on the SER which involves the assumption that employment is permanent and direct with a single employer-figure.\(^\text{20}\) For outsourced workers, their conceptions of job security relate to both their security within their current roles with the current client enterprise, together with future employment prospects through the outsourcing company. The traditional model may be too narrow to cater for outsourced workers’ job security perceptions. It may be useful to expand the definitions of subdivide outsourced workers’ job security into outsourcing company security and client enterprise security so as to fully incorporate

\(^{17}\) See generally ILO, *Non-Standard Employment around the World* (n 2) 186–217.
\(^{18}\) Cappelli and Keller (n 12) 585.
the outsourced workers’ perceptions of job security. Notwithstanding the high levels of client enterprise insecurity that outsourced workers faced because they were not permanently attached to the client enterprise, it was found that 67% of the professionally-skilled outsourced workers perceived relatively high levels of outsourcing company security. They were generally confident that upon leaving their positions with their current client enterprise, they would get another placement through the outsourcing company, without having to endure long periods of unemployment. Even though contractually they had no guarantee of work, their perceptions of job security were based on employability and not tied to specific engagements with the various client enterprises. In this sense their ‘outsourcing company job security’ may be viewed as the probability of continuing to work in the same field and having consistency in relation to the available opportunities.\(^{21}\) All the outsourced workers identified client enterprise insecurity as a disadvantage of outsourcing TERs. They were acutely aware of the fact that they had no permanent ties to the client enterprise and that it could easily replace them.

3. **OVERVIEW OF ILO’S OPERATION SYSTEM**

The ILO’s operation system can be broken down into three main parts. The first part relates to the creation of ILS.\(^{22}\) The ILO creates an international framework through which workers can have their employment rights safeguarded and through which these obligations can be enforced against employers.\(^{23}\) Through the international framework of labour conventions and recommendations, these labour rights and obligations can be enforced in several countries and can be viewed as

\(^{21}\) ibid 22.


international bare minimums. In that sense, the ILO may be seen as a global labour law regulator.\textsuperscript{24} The ILO aims at preventing unfair competition which promotes social justice.\textsuperscript{25} Social justice includes the commitment by the world community to maintaining good relations between countries; an added dimension is the world community playing an active role in ensuring the wellbeing of its economically-active citizens.\textsuperscript{26} Reducing unfair competition also avoids a ‘race to the bottom’ mentality.\textsuperscript{27}

ILS may be considered a measuring stick against which countries evaluate their progress in addressing labour matters.\textsuperscript{28} These ILS have been developed through the combined efforts of several bodies including various national governments, trade unions and employers.\textsuperscript{29} Their main purpose is to guarantee workers’ rights and to promote decent conditions of work among the ILO member states. The ILS set a floor in that they are bare minimum entitlements.\textsuperscript{30} Member states, however, have control over their formulation and implementation in that they can apply their own methods of protection in the ratification of the labour standards. Though these standards are universal, they are usually worded in a manner that grants them the flexibility to adapt to whichever legal system each member country has. Their universality is evidenced in the fact that the legal approaches are not so high that the developing countries cannot adopt them; neither are they too low such as to be of no use to the developed nations\textsuperscript{31}

\begin{thebibliography}{9}
\item ILO, \textit{Rules of the Game} (n 19) 15.
\item In \textit{Aviation and Allied Workers Union v Kenya Airways Limited & 3 others} [2012] eKLR (Industrial Court) Justice Rika described the practice of outsourcing as embodying part of a ‘race to the bottom’.
\item Daele, Garcia and Goethem (n 23) 12.
\item Standing (n 20) 307.
\item Baccini and Koenig-Archipugi (n 22) 447; Daele, Garcia and Goethem (n 23) 9.
\item ILO, \textit{Rules of the Game} (n 19) 19.
\end{thebibliography}
The second part of the ILO’s operation system may be viewed as the executive part; this comprises tracking the implementation of ILS within member states.\textsuperscript{32} Upon ratification of an ILO convention, it becomes binding upon the member state and that member state has the obligation to incorporate the provisions of the convention in its legislation.\textsuperscript{33} Though there is no political obligation for ILO member states to ratify its conventions, the ILO seeks to achieve universal ratification of eight fundamental conventions.\textsuperscript{34} These eight conventions cover the fundamental employment rights and obligations, namely the freedom of association and its constituent right to collective bargaining; the freedom from forced labour; the elimination of child labour; and the freedom from employment discrimination. By ratifying these conventions, a member state may be deemed to be publicly endorsing these universally accepted expressions of human dignity.\textsuperscript{35} However, even where a country has not ratified these fundamental conventions, it may have obligations to respect, realize and promote the principles they espouse, merely by virtue of being an ILO member.\textsuperscript{36}

It is acknowledged that the ILO does not have a judicial body and it may seem not to have concrete enforcement mechanisms, which may lead to a disparity between the ratification of the ILO instruments and their implementation within the member states.\textsuperscript{37} In addition, offending member states do not receive sanctions that go beyond moral censure when they do not incorporate the principles of the ratified conventions into their national legislation. Nonetheless, even without

\textsuperscript{32} ibid 100–119.  
\textsuperscript{33} Baccini and Koenig-Archipugi (n 22) 447.  
\textsuperscript{34} Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87); Right to Organize and Collective Bargaining Convention, 1949 (No. 98); Forced Labour Convention, 1930 (No. 29); Abolition of Forced Labour Convention, 1957 (No. 105); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182); Equal Remuneration Convention, 1951 (No. 100); and Discrimination (Employment and Occupation) Convention, 1958 (No. 111).  
\textsuperscript{35} Baccini and Koenig-Archipugi (n 22) 448.  
\textsuperscript{36} ILO Declaration on Fundamental Principles and Rights at Work 1998 art 2.  
\textsuperscript{37} Daele, Garcia and Goethem (n 23) 462.
direct enforcement mechanisms, ILO’s operation system is highly effective. The ILO is viewed as having ‘soft power’ which rests on its ability to shape the preferences of others and tends to be associated with intangible assets such as an attractive personality, culture, political values and institutions, and policies that are seen as legitimate or having moral authority.\textsuperscript{38}

The third part of the ILO’s operation system involves the availing of special programmes to member states.\textsuperscript{39} The purpose of these programmes is to assist member states in technical aspects to meet their executive and judicial needs. These special programmes, which provide guidance to member states as they work towards implementing the instruments, ease their understanding of what is expected of them. An example is the Strategies and Tools against Social Exclusion and Poverty (STEP) programme which protects excluded workers.\textsuperscript{40}

4. INTERNATIONAL LABOUR STANDARDS REGULATING OUTSOURCING TERs

The ILO generally distinguishes between three types of persons who perform work: employees, workers and self-employed persons.\textsuperscript{41} The significant distinction is between workers and self-employed persons due to the differences in socio-economic dependence and autonomy. Workers are dependent on those who provide work, both in terms of formal dependence and socio-economic dependence, whereas self-employed persons are independent.\textsuperscript{42} On the other hand, the distinction between employees and workers may be considered negligible since most ILO instruments cater to the needs of both. Employees are wage earners employed under a contract of service. The SER

\textsuperscript{38} ibid 474.
\textsuperscript{39} Ugo Panizza, Christophe Gironde and Gilles Carbonnier (eds), The ILO@ 100: Addressing the Past and Future of Work and Social Protection (Brill 2019).
\textsuperscript{40} Jordi Estivill, Concepts and Strategies for Combating Social Exclusion: An Overview (International Labour Office 2003) 34.
\textsuperscript{42} ibid.
focuses on this category of wage earners. On the other hand, workers form a broader category that include both employees and atypical workers.

Since ILS apply to all workers, it may be contended that the sporadic use of the term ‘employee’ is unwarranted. Consider, for example, the first set of ILO conventions that were adopted in 1919. The first ILO convention has a wide scope of application; it applies to “persons employed in any public or private industrial undertaking or in any branch thereof.” The second ILO convention also seeks to protect workers in general by reducing unemployment. Though the third ILO convention does not make reference to workers, it also takes a wide approach in that it seeks to protect all women. The fourth ILO convention also takes a similar wide scope of application. Though the preferred option is towards protecting workers rather than employees, it is noted though that some ILO conventions narrow the scope of their application to employees. Unfortunately, this narrower scope has the effect of excluding NSWs.

Though most ILO conventions apply to all workers generally, due to a lack of ratification or implementation, protection of atypical workers is sometimes inadequate. In addition, some countries’ developmental levels may be quite low such that they face challenges with fulfilling their ILO obligations. This poses a great disadvantage to atypical workers who do not benefit from the protection that they deserve. For example, the ILO has noted that atypical workers are often the first to be laid off work when the corporate entities that they work for experience financial problems. This undermines their security of service and leaves them vulnerable. For example

43 Hours of Work (Industry) Convention (ILO C001) 1919 art. 2.
44 Unemployment Convention (ILO C002) 1919.
45 Maternity Protection Convention (ILO C003) 1919.
46 Night Work (Women) Convention (ILO C004) 1919.
47 For example the Holidays with Pay Convention (Revised) (ILO C132) 1970.
48 Countouris (n 38) 150.
49 ILO, Non-Standard Employment around the World (n 2) 240.
outsourced workers may be the first to lose their jobs because they are usually form part of the periphery job functions and perform non-core tasks. In addition, the client enterprise would not incur employment liability for the termination where it involves a termination of the service contract with the outsourcing company. Therefore, the ILO has progressively made efforts towards enhancing the protection of workers who fall outside the SER.\textsuperscript{50} There are now ILO conventions and recommendations that specifically cater for various categories of atypical workers such as gig economy workers, homeworkers, and agency workers, among others.\textsuperscript{51}

The ILO has taken different multi-faceted measures to address the plight of atypical workers.\textsuperscript{52} First, the ILO seeks to extend the labour protections that are ordinarily granted to SER employees to cover atypical workers. In this way there is equality of treatment which has the added advantage of reducing the incentives to use NSWs as a cheaper alternative to the SER. Another aspect of the ILO measures has been towards addressing employee misclassification.\textsuperscript{53} Other ILO measures have been aimed at limiting the use of NSWs. Inasmuch as it is useful to improve the working conditions of atypical workers, it may also be useful to limit the unnecessary replacement of the SER.\textsuperscript{54} This section discusses the ILS that protect outsourced workers with a focus on the three main thematic areas that were highlighted by the outsourced workers in Kenya, namely, employment status, equitable pay and employment benefits, and job security. It then discusses the proposed ILO Convention concerning Contract Labour.

\textsuperscript{50} ibid 250–281.
\textsuperscript{51} These include the Fee-Charging Employment Agencies Convention (Revised) (ILO C096) 1949; Employment Promotion and Protection against Unemployment Convention (ILO C168) 1988; Part-Time Work Convention (ILO C175) 1994; Home Work Convention (ILO C177) 1996; Private Employment Agencies Convention; Domestic Workers Convention (ILO C189) 2011.
\textsuperscript{52} ILO, \textit{Non-Standard Employment around the World} (n 2) 250.
\textsuperscript{54} ILO, \textit{Non-Standard Employment around the World} (n 2) 266.
4.1 Employment status

One of the significant measures that the ILO has taken with respect to extending protections to outsourced workers has been towards addressing employee misclassification. This has mainly been done through the Employment Relationship Recommendation, 2006 (No. 198). This Recommendation acknowledges that national labour rights are often linked to the establishment of an employment relationship.\(^{55}\) However, there are often situations whereby it is difficult to establish an employment relationship because the parties’ obligations may not be clear, or it is disguised employment, or there are inadequacies in the existing legal frameworks, and this may lead to depriving workers of rights where they are indeed due.\(^{56}\)

The Recommendation provides that the national policies of member states should ensure that the labour standards apply to all contractual arrangements, including TERs.\(^{57}\) The ultimate goal is to ensure that all workers are granted the labour rights due to them; and this includes outsourced workers. In addition, article 5 of the Recommendation urges member states to ensure that workers who are uncertain as to their employment status are adequately protected. These protections should be applicable to *inter alia* TERs and should establish who has the obligation to meet those protections.\(^{58}\) In line with the Recommendation, it would be beneficial to delineate the obligations that the two authority figures have in terms of guaranteeing outsourced workers’ employment protections.

The Recommendation sets the basis for protection of workers who may be uncertain as to their employment status. Though the Recommendation explicitly mentions contractual arrangements

---

\(^{55}\) Employment Relationship Recommendation (ILO R198) 2006 preamble.
\(^{56}\) ibid preamble.
\(^{57}\) ibid art. 4(c).
\(^{58}\) ibid art 4.
involving multiple parties, the ILO acknowledges that TERs are not adequately addressed through this instrument.\textsuperscript{59} Aspects such as the impact of the peculiarities of outsourcing TERs on the three parties may require explanation or clarification at the national level.

### 4.2 Equality of treatment

Ensuring equality of treatment between outsourced workers and SER workers is one of the aims of anti-discrimination labour standards.\textsuperscript{60} This helps promote fairness by eliminating discrimination on the basis of occupational status. It also helps reduce the use of NSWs as a means of acquiring cheaper labour. Two fundamental ILO conventions uphold this labour standard. The Equal Remuneration Convention, 1951 (No. 100) provides for equal pay for work of equal value. In addition, the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) prohibits discrimination on several grounds. Though they do not address outsourcing directly, these conventions offer protection to outsourced workers because they protect all workers.

When applied at the national levels, the ILO standards that promote equality of treatment would benefit outsourced workers in that they provide for non-discrimination between employees and atypical workers. This would include equal treatment before judicial bodies, which would be effective in terms of removing some of the legal barriers that outsourced workers face. It has also been noted that though the labour standards on equality of treatment are useful, what is often more effective is situations where laws provide for specific NSWs.\textsuperscript{61}

\textsuperscript{59} Countouris (n 38) 161.
\textsuperscript{60} Equal Remuneration Convention, 1951 (No. 100); Discrimination (Employment and Occupation) Convention, 1958 (No. 111); Employment Policy Convention, 1964 (No. 122); Employment Policy (Supplementary Provisions) Recommendation, 1984 (No. 169).
\textsuperscript{61} ILO, \textit{Non-Standard Employment around the World} (n 2) 255.
The TER that has received the most regulatory recognition is agency work. The ILO protects agency workers through the Private Employment Agencies Convention, 1997 (No. 181). It aims to regulate private employment agencies and also protect agency workers. Despite its extensive protections, it has been argued that it is quite narrow in its scope of application and this creates regulatory lacunae.\(^{62}\) The Convention only applies to workers who are employed by private employment agencies or whom the agencies provide placement services. It excludes outsourced workers from its scope of protection.

An important instrument regulating outsourcing TERs is the Occupational Safety and Health Convention, 1981 (No. 155). It provides for collaboration in the application of its provisions between entities that engage in activities simultaneously within one workplace.\(^{63}\) This provision is important for TERs because the outsourcing company may not have effective control over the client enterprise’s premises in which the outsourced workers provide their services and it may not be able to ensure compliance with occupational safety and health rights. A possible challenge in its application, though, is the argument that though the outsourcing company provides personnel, it is questionable whether this counts as engaging in activities simultaneously.

To enhance the equality of treatment of outsourced workers and SER workers, one suggested option that the ILO could adopt is the attachment of rights to the person directly, rather than through the employment relationship.\(^{64}\) Though it may not be feasible for all employment rights to bypass the employment relationship, this may be possible in the case of occupational safety and

\(^{62}\) Countouris (n 38) 158.
\(^{63}\) Occupational Safety and Health Convention (ILO C155) 1981 art. 17.
health, access to vocational training and development, and access to some of the individual rights such as freedom of association and social protection.

4.3 Job security

Termination of employment is regulated primarily by the Termination of Employment Convention, 1982 (No. 158), and the supporting Termination of Employment Recommendation, 1982 (No. 166). The Termination of Employment Convention, 1982 (No. 158) requires that “adequate safeguards... be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention”65 Similarly, the Termination of Employment Recommendation, 1982 (No. 166) limits the use of fixed-term contracts to situations where open-ended contracts would not be feasible because of the nature of the work or the workers’ interests.66 Though these provisions are directed more towards fixed-term contract, they may be useful in regulating outsourcing TERs because most of them are indeed fixed-term contracts.

In addition, these two instruments provide for substantive and procedural fairness in the termination of employment relationships of all workers. Substantive fairness relates to valid reasons justifying the termination, and these should be related to the worker’s conduct or capacity, or on the employer’s operational requirements.67 On the other hand, procedural fairness includes adherence to the relevant notice periods, the worker’s right to defend himself before being terminated, the right to appeal against the termination, the provision for severance pay and other

65 Termination of Employment Convention (ILO C158) 1982 art. 3.
66 Termination of Employment Recommendation (ILO R166) 1982 art. 3.
67 Termination of Employment Convention (ILO C158) arts. 4-6; Termination of Employment Recommendation (ILO R166) arts. 5 and 6.
separation benefits, and the right to a certificate of employment.68 For redundancies, the requirement is that employers consults with the relevant workers’ representatives and notify the relevant competent authority of the terminations before they are effected.69

These two ILO instruments provide for termination of employment where it is initiated by the employer. For outsourced workers this provides a unique challenge in that the workers relate with two authority figures, who may both potentially terminate the relationship. Since the outsourced worker’s employer is deemed to be the outsourcing company, there is a regulatory gap in terms of the termination by the client enterprise. None of the ILO instruments provide for this.

4.4 The 1998 ILO proposed Convention concerning Contract Labour

The main international instrument that relates specifically to outsourced workers is the 1998 ILO proposed Convention concerning Contract Labour. It defines contract labour as:

“work performed for a natural or legal person (referred to as a “user enterprise”) by a person (referred to as a “contract worker”) where the work is performed by the contract worker personally under actual conditions of dependency on or subordination to the user enterprise and these conditions are similar to those that characterize an employment relationship under national law and practice and where either: the work is performed pursuant to a direct contractual arrangement other than a contract of employment between the contract worker and the user enterprise; or, the contract worker is provided for the user enterprise by a subcontractor or an intermediary.”70

68 Termination of Employment Convention (ILO C158) arts. 7-12; Termination of Employment Recommendation (ILO R166) arts. 7-18.
Contract workers provide services to the user enterprise under conditions of dependency that would meet the requirements of the common law control test.\(^1\) However, this provision of services is not a direct contractual employment relationship, but rather it is based on the contractual agreement between the intermediary and the user organization. In this sense, outsourced workers are contract workers.

The proposed Convention then defines an intermediary as a natural or legal person who makes contract workers available to a user enterprise without becoming formally the employer of these workers.\(^2\) From this definition, one there is no clarity on whether the intention was that the client enterprise, rather than the outsourcing company, be deemed the outsourced workers’ legal employer. Such a description suits entities such as agencies, since they engage workers and place them with organizations without being employers.\(^3\) However, article 2 is clear in its exclusion of private employment agencies from the proposed Convention’s scope. Perhaps, if the proposed Convention were ever to be adopted, further clarification would be needed on its definition of an intermediary. Despite this uncertainty, the other provisions of the proposed Convention are worth discussing since they may form useful guidelines towards enhancing the employment protections of outsourced workers.

To protect the health and safety of contract workers, the proposed Convention urges member states to adopt measures that prevent accidents and health injuries to contract workers as they perform

---

\(^1\) *Yewens v Noakes* (1880) 6 QBD 530 (Court of Appeal); *Christine Adot Lopeyio v Wycliffe Mwathi Pere* [2013] eKLR (Industrial Court).

\(^2\) Proposed Convention concerning Contract Labour art. 1.

\(^3\) Private Employment Agencies Convention art. 1 defines a private employment agency as any natural or legal person, independent of the public authorities, which provides… services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom.
their work.\textsuperscript{74} Further, contract workers should be compensated where they sustain occupational injuries or diseases during the performance of their contract labour. Since the jural correlative of a right is a duty, in domesticating this provision it would be useful for member states to specify which authority figure would be required to meet these health and safety duties.\textsuperscript{75}

Article 4 highlights the right to adequate remuneration and to social insurance contributions. It requires member states to take measures to ensure that the obligations to fulfil these financial responsibilities are clearly delineated. This is commendable because it provides an opportunity for member states to ensure the delineation of obligations between the two authority figures that the outsourced workers relate to. In addition, the proposed Convention calls for the equal treatment of contract workers and other workers who perform work which is essentially similar under similar conditions.\textsuperscript{76} It requires equality in terms of freedom of association, anti-discrimination, remuneration, social security, maternity protection, working time and other working conditions, and OSH.\textsuperscript{77} The proposed Convention would allow for equality of treatment between outsourced workers and permanent workers of the client enterprise who perform similar work.

Unfortunately, the proposed Convention drew so much criticism that it was eventually withdrawn.\textsuperscript{78} Nevertheless, the ILO has not stopped its efforts to protect outsourced workers and other contract workers. Due to the controversy caused by the proposed Convention, the Committee on Contract Labour dropped the term contract labour but still made provision for them in the

\begin{flushright}
\textsuperscript{74} Proposed Convention concerning Contract Labour art. 3.  \\
\textsuperscript{75} Nikolai Lazarev, ‘Hohfeld’s Analysis of Rights: An Essential Approach to a Conceptual and Practical Understanding of the Nature of Rights’ (2005) 12 Murdoch University Electronic Journal of Law.  \\
\textsuperscript{76} Proposed Convention concerning Contract Labour art. 5.  \\
\textsuperscript{77} ibid art. 6.  \\
\textsuperscript{78} Countouris (n 38) 161.
\end{flushright}
workers it identified as being in need of protection. To be precise, the ILO identified those in need of protection to include persons who,

“perform work personally under actual conditions of dependency on or subordination to the user enterprise and these conditions are similar to those that characterize an employment relationship under national law and practice but where the person who performs this work does not have a recognized employment relationship with the user enterprise.”  

This definition includes outsourced workers since they may be considered to have relationships of dependence with the client enterprise yet they do not have an employment contract with the client enterprise.

5. KENYA’S LABOUR LAWS VIS-À-VIS THE INTERNATIONAL LABOUR STANDARDS REGULATING OUTSOURCING TERs

Kenya became an ILO member state on 13th January 1964. Thus far, Kenya has ratified 50 ILO conventions, 7 of which are fundamental conventions. It is worth noting that even though Kenya has not ratified the Freedom of Association and Protection of the Right to Organize Convention, 1948 (ILO C087), it has adopted the convention’s requirements in its national laws. Kenya seems to have a clean record with the ILO in that the government provides the necessary reports, and it reports overall compliance with ILS. Kenya has attached great importance to the ILS. One

81 See Labour Relations Act 2007.
illustration of this is the entrenching of the ILO labour standards in the Constitution of Kenya, 2010. Article 41 provides for the right to adequate compensation, the right to reasonable working conditions and the freedom of association. Other ILO labour standards guaranteed by the Constitution include the protection from forced labour and inhuman treatment, the right to strike, and economic and social rights. Freedom of association is also guaranteed under article 36 of the Constitution of Kenya, 2010.

The Kenyan labour law framework generally aims to comply with the ILS as much as possible. The Kenyan government considers itself strictly bound by the conventions it has ratified and strives to fulfil the obligations arising therefrom.\textsuperscript{83} Though articles 2(6) of the Constitution of Kenya, 2010 provides that ratified conventions form part of Kenya’s law, it is argued that this does not convert Kenya into a monist state because this article should not be looked at in isolation.\textsuperscript{84}

Several provisions of the Constitution vest Parliament with legislative authority to enable it meet its international obligations, and these depict the dualist practice.\textsuperscript{85} The practice is that ratification of treaties is essential to incorporate international law into Kenya. This section highlights the laws in Kenya that have domesticated the ILO standards that protect outsourced workers, as well as the resultant shortfalls.

5.1 The outsourcing company as employer

The Employment Relationship Recommendation, 2006 (No. 198) encourages member states to formulate national policies and to clarify on the scope of national laws so that all workers who are engaged in arrangements akin to employment relationships, including workers engaged under

\textsuperscript{83} Constitution of Kenya 2010 art 2(6).

\textsuperscript{84} Joseph Ndirangu, ‘Do Articles 2 (5) and 2 (6) of the Constitution of Kenya 2010 Transform Kenya into a Monist State?’ [2013] Available at SSRN 2516706 13.

\textsuperscript{85} Constitution of Kenya arts. 21(4), 51(3)(b) and 94(5).
TERs, are effectively protected.\textsuperscript{86} Kenya is yet to provide clarity in its legislation on the employment status of outsourced workers. Though case law has classified outsourced workers as employees of the outsourcing company, the normative question on who should be bear employer status in outsourcing TERs has not been conclusively addressed. Since the client enterprise exercises day-to-day control over the outsourced workers, ensuring adequate protection of the outsourced workers would ideally also include placing employment obligations on the client enterprise as well.

The definition of intermediary under the 1998 proposed Convention concerning Contract Labour specifies that the intermediary makes the workers available to the client enterprise without being considered to be an employer. In Kenya, the law classifies the outsourcing company as the outsourced worker’s legal employer.\textsuperscript{87} Within the TER, the outsourcing company is seen as the entity that can offer the outsourced workers a sense of stability. However, this attribution of employer status may potentially open up the door for abuse especially where the outsourcing TER may be used as a means to alter employees’ terms and conditions of employment.\textsuperscript{88}

To address these shortfalls, the law could still preserve the role of the outsourcing company but also put up barriers to prevent abuse through the use of TERs. For example, the law may restrict the use of intermediaries and the roles that they play within the TER. It may restrict the length of outsourcing contracts to ensure that outsourced workers are not placed with client enterprises for longer durations of time so that they do not have a semblance of permanence. This is the position adopted in France, where the length of temporary contracts is restricted to 18 months.\textsuperscript{89}

\textsuperscript{86} Employment Relationship Recommendation art 1.
\textsuperscript{87} Abyssinia v KEWU (n 13); AAWU v Kenya Airways (n 24).
\textsuperscript{88} See e.g. Harrison Karani v Insight Management (n 11); Nyamawi Gambo v MMM (n 11).
\textsuperscript{89} Code du Travail (France) 1910, art. L1242-8-1.
It may also restrict the reasons for an employer engaging workers through an intermediary. This would be similar to the position adopted in Belgium where the law limits the nature of tasks performed under such contracts to temporary work, such as, responding to a temporary increase in workload, undertaking work that is of an exceptional nature or engaging the workers for a duration of up to six months after which they are directly hired by the client enterprise.\textsuperscript{90}

5.2. Equality of treatment of outsourced workers and SER workers

The ILO ensures equality of treatment primarily through the Equal Remuneration Convention, 1951 (No. 100) which provides for equal pay for work of equal value, and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) which prohibits discrimination on several grounds. Kenya ratified these two conventions on 7\textsuperscript{th} May 2001. Though Kenya’s labour law framework prohibits discrimination, it does not specifically provide measures to ensure parity in the remuneration and working conditions of outsourced workers and directly employed workers of the client enterprises.

It was noted that in Kenya, most outsourced workers experienced dissatisfaction because they felt they received a lower salary than the permanent employees of the client enterprise. Only 22\% reported that they earned comparable salaries to the permanent employees of the client enterprise. To prove discrimination, the expectation is that the comparator is another worker engaged in a similar position by the same employer. Outsourced workers are classified as employees of the outsourcing company and they have a different employer from the directly employed workers of

\textsuperscript{90} Belgian Law of 24 July 1987 on Temporary Work, art 2.
the client enterprise. Consequently, there would be challenges in proving discrimination, despite the outsourced workers’ perceptions.

**5.3 Job security of outsourced workers**

Kenya has not ratified the Termination of Employment Convention, 1982 (No. 158). Nonetheless, the requirements of substantive and procedural fairness have been adopted in Kenya’s national laws. In relation to outsourcing TERs, there is however a lack of clarity as to the termination of employment at the behest of the client enterprise. In Kenya, by virtue of being the employer, the outsourcing company bears the responsibility of ensuring that the outsourced workers’ termination of employment is fair. To cater for this, outsourcing companies incorporate termination clauses into the employment contracts with the outsourced workers.

It is worth distinguishing between two types of termination clauses that are often used. The first is a fixed-term contract, in which the outsourcing company indicates that the relationship will end after a specific pre-determined duration or after the specific project for which the outsourced worker has been engaged is completed. This complies with the requirements of the employment laws. However, a second type of termination clause is sometimes adopted, in which the outsourced workers’ employment relationship is pegged on the existence of the service contract between the two authority figures. Such a situation is essentially termination of workers’ employment contract by way of legal action that does not amount to dismissal. This mode of

---

91 *Abyssinia v KEWU* (n 13).
92 Employment Act 2007 part VI.
93 ibid 45.
94 ibid 35 and 36.
95 *Kenya Hotels and Allied Workers Union v Platinum Outsourcing Logistices (EA) Ltd & another* [2015] eKLR (ELRC).
termination of employment may be considered to be against public policy. Unfortunately, this matter is not provided for under Kenya’s labour laws and is yet to be decided upon by the courts.

6. CONCLUSION

This paper studied the ILS that regulate outsourcing TERs with a view to assess the implications for Kenya’s labour laws to enhance the protection of outsourced workers. ILS must be maintained in order to achieve uniformity in the rights guaranteed to all workers and avoid a ‘race to the bottom’ mentality. 96 Though all workers’ rights deserve protection, sometimes some categories of workers such as outsourced workers do not receive adequate protection. Therefore, the ILO has progressively developed conventions and recommendations that establish labour standards specific to NSWs.

In Kenya, the main employment-related challenges due to the peculiarities of outsourcing TERs relate to the employment status of outsourced workers, access to equitable pay and employment benefits, and job security of outsourced workers. To improve the working conditions of outsourced workers, it would be beneficial to regulate the outsourcing TER through legislative interventions that reflect the ILS. 97 However, bearing in mind the economic interests of the two authority figures that that the outsourced workers relate with, the measures taken should not be so rigid as to curb the flexibility offered by NSWs, as this would be akin to being against NSWs.

Kenya does not have any specific legislation focused on outsourcing TERs with the aim of protecting outsourced workers. This may partly be due to the fact that the ILO itself is also grappling with the protection of outsourced workers and other contract workers. The ILO’s

96 In AAWU v Kenya Airways (n 24) Justice Rika described the practice of outsourcing as embodying part of a ‘race to the bottom’.

proposed Convention concerning contract labour would have been a useful guide for the country, but the proposed Convention was never adopted. Nonetheless, the country has, through case law made significant steps towards extending employment protection of outsourced workers in Kenya.\textsuperscript{98}

To improve Kenya’s employment framework regulating outsourcing TERs, this paper recommends the adoption of joint and several liability between the outsourcing company and the client enterprise. In this way, when the client enterprise and the outsourcing company attempt to disguise the nature of the employment relationship so as to escape their employment obligations, they can be held jointly and severally liable for it. This would comply with the Employment Relationship Recommendation, 2006.\textsuperscript{99}

In Kenya, there are no minimum requirements as to the wages of outsourced workers and there is no provision for equal terms and conditions. This has a direct impact on the outsourced workers’ rights to fair labour practices and their right to equal treatment, especially where outsourced workers perform tasks similar to the directly employed workers but experience differential treatment at the workplace. To embrace the ideals of the Equal Remuneration Convention, 1951 (No. 100) and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), it is recommended that outsourced workers’ wages and employment benefits should be the same as those that they would receive if they were directly employed workers of the client enterprise.

Finally, it is recommended that joint and several liability be established between the outsourcing company and client enterprises to ensure fair dismissal of outsourced workers. This would, to some

\textsuperscript{98} Abyssinia v KEWU (n 13); Harrison Karani v Insight Management (n 11); AAWU v Kenya Airways (n 24).

\textsuperscript{99} Employment Relationship Recommendation art 1.
extent, alleviate the burden placed on outsourcing companies. In addition, by placing fair dismissal responsibilities on the client enterprise, this may reduce instances where the client enterprise returns outsourced workers to the outsourcing company for no good reason and contrary to the substantive fairness requirements.