ARTICLES

NON-STANDARD EMPLOYMENT IN THE BRICS COUNTRIES

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Non-standardization of employment has become the main trend of the labour markets in the globalized economy. Attempting to enhance the flexibility of employment relations the legislators in BRICS countries are also the part of this trend. The forms of the non-standard employment are numerous, the present paper concentrates upon the following ones: temporary employment, part-time and multi-party employment relationship. The authors review the experience of four BRICS countries in regulating non-standard forms of

employment and determine what were the specific reasons for adopting them in Russia, China, Brazil, and South Africa. The national parts are introduced by the consideration of the international standards of protection of employees working under non-standard contracts. It is argued that even though these four states did not ratify the ILO Convention No. 181 Private Employment Agencies Convention (1997) and only Russia ratified ILO Part-Time Work Convention (No. 175), the ILO approach has influenced the development of national regulations. Though the equal treatment of all workers is lacking in many aspects of employment relations. In the national parts the authors trace the changes in employment law which reflect the pursuit of flexibilization of the labour market and, as in Brazil, the need to formalize employment relations.

Keywords: non-standard employment; part-time work; temporary agency work; short-term employment; formalization of employment; BRICS.

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Introduction

It has been generally accepted that globalization and the reinforced competition are the key reasons for the constant rise of non-standard forms of employment.[1] Both developing and developed countries[2] demonstrate the significant growth of such

[1] Olusegun Oladeinde, *Global Capitalism and the Rise of Non-Standard Employment: Challenges to Industrial Relations* in *The Global Labour Market: From Globalization to Flexicurity* 53 (R. Blanpain (ed.), Austin: Wolters Kluwer Law & Business; Alphen aan de Rijn: Kluwer Law International, 2008); *Non-Standard Employment Around the World: Understanding Challenges, Shaping Prospects* 2 (Geneva: International Labour Office, 2016) (Aug. 15, 2020), also available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_534326.pdf.

[2] *See, e.g.*, Katherine V.W. Stone, *The Decline in the Standard Employment Contract: Evidence from Ten Advanced Industrial Countries*, UCLA School of Law, Law and Economics Research Paper No. 12-19 (2013) (Aug. 15, 2020), available at https://ssrn.com/abstract=2181082.

contracts. In some countries the spread of non-standard forms is so significant that it becomes worth questioning which employment has become a "standard."[3]

To determine the notion of the non-standard employment we should start with the understanding of the standard form. Throughout the 20th century the standard was perceived as work under a permanent employment contract for a full-time job. Industrialization needed workers for the whole day and the main concern of both national and international labour law was to impose limits to working time. The struggle for the better working conditions lead to the establishment by the end of World War II of a set of rights and guarantees which should be provided to the worker.[4] From the end of the 80s of the 20th century a number of political, economic and technological factors brought changes to the labour market and the rise of non-standard employment. As such we can mention the defeat of communism in Western Europe and the collapse of the Soviet Union, the general weakening of trade unions, globalization and the mobility of business, the development of technologies and a number of world economic crises which lead to unemployment growth.

Non-standard employment in this context meant an opportunity to provide work without the provision of the whole set of right and guarantees elaborated by labour law and to have a more flexible human resources management.

The forms of the non-standard employment differ. The International Labour Organization (ILO) in its report divided them into temporary employment, part-time and on-call work and multi-party employment relationship.[5] It also pointed disguised employment/dependent self-employment as a non-standard form, however, it is outside the scope of employment contract.

In the present paper we will research the experience of four BRICS countries in regulating non-standard forms of employment and will try to determine what were the reasons for introducing of the new types of employment in Russia, China, Brazil, and South Africa.

In the first part of the paper we will consider the international standards of protection of employees working under non-standard contracts. The following four parts will be dedicated to the national experience of regulation. Each national part will include the definition of standard employment and the analysis of the reasons for the emergence of non-standard forms of employment. We will consider the legal regulations, the relevant case law and statistics.

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[3] In Bangladesh and India according to the ILO nearly two-thirds of wage employment is casual. *See Non-Standard Employment Around the World*, *supra* note 1.

[4] *See, e.g.*, Bob Hepple, *The Making of Labour Law in Europe: A Comparative Study of Nine Countries up to 1945* 285 (London: Mansell, 1986).

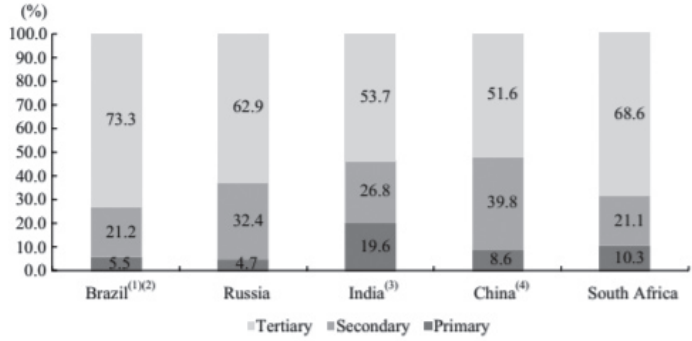
[5] *Non-Standard Employment Around the World*, *supra* note 1, at 21.

1. Non-Standard Employment and International Labour Standards

There is no official classification at the international level of standard and non-standard from of employment. As we mentioned above ILO in its research pointed such non-standard forms as temporary employment, part-time and on-call work and multi-party employment relationship.[6] The fluctuation from traditional two-subject employment relation for full time and indefinite term are the main features of these types of employment.

ILO noted that in general the expansion of the services sectors, particularly retail trade and hotels and tourism, is associated with greater use of part-time employment arrangements and fixed-term contracts. The rise of tertiary sector in BRICS economics is clearly demonstrated in the graphic below, which represents the share of GDP in different sectors in 2016.[7]

Graph 4.3 Share of GDP in Different Sectors, 2016



The BRICS Joint Statistical Publication 2017 also revealed that the percent of tertiary sector in all the countries is steadily rising since 2007. It is not surprising that in the same time we can clearly see the rise of non-standard forms of employment in all the 4 countries (*see* figure below).[8]

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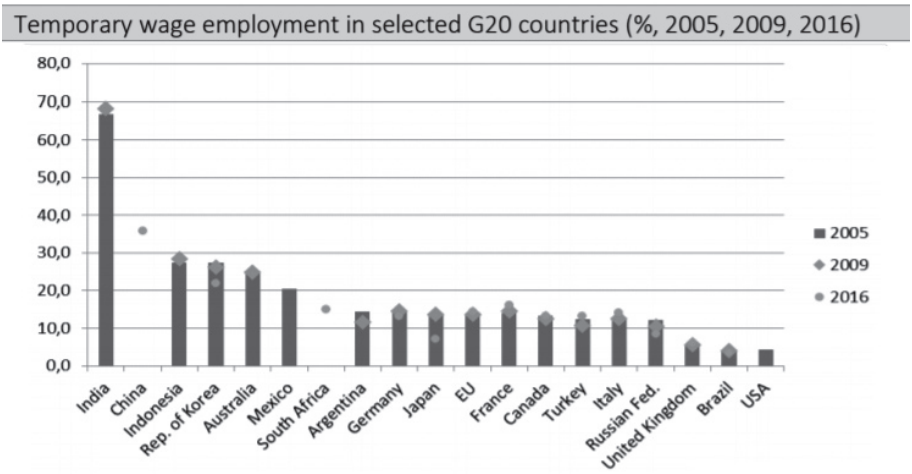
6 *Non-Standard Employment Around the World*, *supra* note 1, at 21.

7 BRICS Joint Statistical Publication 2017 (Aug. 15, 2020), available at https://www.gks.ru/free_doc/doc_2017/JSP-2017.pdf.

8 ILO, Informality and Non-Standard Forms of Employment (2018) (Aug. 15, 2020), available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_646040.pdf.



In the recent Declaration of the 11th BRICS Summit adopted on 14 November 2019, where the presidents underline that "labour markets need to become more adaptable and inclusive."[9] We suppose that both words "adaptable" and "inclusive" have relevance to non-standard forms of employment, because at the one hand, the emergence and the rise of these forms are the signs of the adaptation of the state policy for the need of business. On the other hand, the diversification of employment contracts makes it easier to provide jobs for some more vulnerable groups of workers as people with family responsibilities, disabled people or migrant workers. In addition, non-standard forms of employment can provide flexibility to both enterprises and workers, especially when part-time work is chosen voluntarily. However, there should be limits for the "adaptability" of labour markets and labour regulations. These limits are established in the international labour law and will be considered below.

The International Covenant on Economic, Social and Cultural Rights is the only relevant international instrument ratified by all the BRICS members. It provides the right to just and favorable conditions of work (Art. 7), prohibition of discrimination (Art. 2), the freedom of association and the right to strike (Art. 8). Article 7 established the key rights which should be guaranteed at work, such as fair wages and equal remuneration, safe and healthy working conditions, rest and leisure. The Committee on economic, social and cultural rights has underlined in its General Comment No. 23 that the national policy should cover all branches of economic activity, including the formal and informal sectors, and all categories of workers, including non-standard workers. Therefore, the rights set in Article 8 of the ECESCR should be equally guaranteed to workers both in standard and non-standard employment.

[9] BRICS Brasilia Declaration, Declaration of the 11th BRICS Summit, 14 November 2019 (Aug. 15, 2020), available at http://en.kremlin.ru/supplement/5458.

The same idea may be traced in the ILO Recommendation No. 198. Though the document is aimed at establishing clear criteria of employment relations it also provides a recommendation for the states to ensure standards applicable to all forms of contractual arrangements, including those involving multiple parties, so that employed workers have the protection they are due.

In order to determine what is meant by the "due protection" rule we should first of all refer to the ILO fundamental principles. It is evident that all workers, both standard and non-standard, should be protected from forced labour, from discrimination and work, from child labour and should enjoy the freedom of association.[10] All the eight fundamental conventions do not provide any distinction in regulation of non-standard work. Brazil has ratified 7 out of 8 conventions (except for No. 87), Russia and South Africa has ratified all, China did not ratify conventions on forced labour and on freedom of association and the right to bargain collectively.[11] Thus having ratified these conventions Russia, South Africa and Brazil at least took an obligation to ensure the freedom of association for non-standards employees and their protection from discrimination. Another source of understanding the scope of "due protection" for non-standards workers are the special ILO Convention – Convention No. 181 Private Employment Agencies Convention (1997) and Part-Time Work Convention No. 175 (1994). Though Russia is the only BRICS country which ratified at least the latter convention, the brief review of the relevant standards is an important part of our paper. These conventions, in our view, provide a certain benchmark, the standards which will be used for the analysis of the national approaches to non-standard employment.

The ILO Part-Time Work Convention (No. 175) was adopted in 1994. At the time of writing it was ratified only by 18 out of 187 ILO members. Scholars note that in spite of the low level of ratifications it has influenced, directly or indirectly, the development of national or regional laws, regulations, and policies on the topic.[12] The confirmation of this argument we will see below considering the national regulations of part time work.

The acknowledgment of the states' obligation to ensure that part-time workers receive the same protection as that accorded to comparable full-time workers is the main achievement of the convention. Article 4 provides that the same treatment should be guaranteed in respect of the right to organize, the right to bargain collectively and the right to act as workers' representatives, to occupational safety

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[10] The ILO Declaration on Fundamental Principles and Rights at Work (1998) (Aug. 15, 2020), available at https://www.ilo.org/declaration/lang--en/index.htm.

[11] Ratifications of Fundamental Conventions by Country, ILO (Aug. 15, 2020), available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:10011:0::NO::P10011_DISPLAY_BY,P10011_CONVENTION_TYPE_CODE:1,F.

[12] Işik Urla Zeytinoğlu, *International Policymaking: The ILO Standards on Changing Work Relationships* in *Changing Work Relationships in Industrialized Economies* 219, 225 (I.U. Zeytinoğlu (ed.), Amsterdam: John Benjamins, 1999).

and health and to protection from discrimination in employment. ILO though left the flexibility clause in Article 3, providing that the states may, after consulting the representative organizations of employers and workers concerned, exclude wholly or partly from its scope particular categories of workers or of establishments when its application to them would raise particular problems of a substantial nature. However even the inclusion of this flexibility clause did not convince the majority of ILO Member States to ratify the instrument.

Another convention on non-standard employment – about regulation of private employment agency work – has a very interesting history. Initially the aspirations of the ILO Member States were directed towards the prohibition of Fee-Charging Employment Agencies. It was reflected in the first convention dedicated to this topic – ILO Convention No. 34, adopted in 1936. It had only 11 ratifications and prohibited the fee-charging employment agencies which act as an intermediary for the purpose of procuring employment for a worker or supplying a worker for an employer with a view to deriving either directly or indirectly any pecuniary or other material advantage from either employer or worker.

The revised convention on Fee-Charging Employment Agencies was adopted after World War II in 1949. It is structured in a way to make the countries choose either they abolish such agencies (part II) or they create conditions for thorough supervision of their activities (part III). This convention had 42 ratifications. The last convention on Private Employment Agencies (PAA) was adopted in 1997 (No. 181). Up to date it was ratified by 32 countries, though none of the BRICS members ratify it.

This revised edition for the first time specifies the type of the employment agency which is created for employing workers with a view to making them available to a third party which assigns their tasks and supervises the execution of these tasks. The revision was necessary in the opinion of the ILO Conference as this type of the employment agencies has become widespread in the world and the rights of workers should have been protected against the abuses.

The key points of this convention are the following:

– necessity to take into account the opinion of social partners while determining the legal status of private employment agencies (Art. 3);

– need to ensure that private employment agencies treat workers without discrimination (Art. 5);

– emphasis on granting collective rights to PAA's employees (Arts. 11, 4);

– rule on free services for employees (possible exceptions, Art. 7).

A number of important issues were left behind by the drafters: the convention does not deal with ensuring the equality of PAA's workers with the rights of the third party's workers at least as far as remuneration is concerned, it does not deal with the responsibilities of the third party, to whom the workers were provided, and does not provide the obligations of the third party in respect of provided workers.

As we will see below the regulation of private agency work in some BRICS states goes far beyond the ILO standards.

2. BRICS Countries' Regulations Relating to Non-Standard Employment

2.1. Brazil

For the determining the non-standard forms of employment in Brazil we suppose it necessary to start with the notion of standard employment. According to Article 2º of the Labour Law Consolidation, an employer (the company, individual or collective), assuming the risks of the economic activity, admits, hires and directs the employees rendering service, and an employee is an individual who provides services of a non-contingent nature under the employer's dependence and with a salary (Art. 3).

In this scenario, a typical employment contract, that means, full-time employment without contract term limitation, will be registered by the employer in employee Work and Social Security Card (CTPS) allowing only the worker to do the job, providing his service, performing it in person prohibiting replacing him by another person, since it's a (i) personal contract with (ii) habitually, since the work performed must be provided continuously and permanently, which does not constitute an occasional job, as in the case of freelancers, (iii) legal subordination, which consist in the provision of the service by the worker under the direction and management of the employer, which determines the dynamics of the work execution and (iv) onerosity that consists in the payment received by the employee arising from the work performed because of the contract agreed between the parties.

An employee in a typical employment contract will have the guarantee of a minimum wage of R$1.045,00 effective on 1 February 2020, that is equivalent to U$ 250,0 for a maximum weekly schedule of 44 (forty-four) hours, annual paid vacation of 30 (thirty) days with a $^{1}/_{3}$ (one third) bonus on the payment, that can be divided in 03 (three periods) over the year, being one period longer than 14 days and the other two periods with a minimum of five days each. The employee vacation cannot begin on the two days preceding a holiday or on weekly rest days. The worker also has the rights of a 13th-month salary, one day off per week, preferably on Sundays, Length of Service Guarantee Fund (FGTS)[13] with an additional fine if dismissed without cause and the right of unemployment insurance (established originally in 1986). Workers still have the right to a night shift after 10 pm of at least 25% of the hourly wages and a hazardous, unhealthy and painful premium. Maternity leave of 120 (one hundred and twenty) days and paternity leave of 5 (five) days are also granted by law.

On 11 November 2019, the Brazilian government launched Green and Yellow Employment Contracts via Provisional Measure No. 905/2019 effectiveness for 60 (sixty) days with one extendable period of more 60 (sixty) days with the objective of generate

[13] Accordingly to Sychenko *et al.* in the FGTS system, employers are required to deposit in a bank account managed by a Federal Government Institution an amount of 8% (eight percent) of an employee's monthly compensation, owning each employee private access to the account. Elena Sychenko et al., *Dismissal Protection in the BRICS Countries in Light of ILO Convention No. 158*, 6(4) BRICS Law Journal 34, 42 (2019).

a favourable environment for the reactivation of the Brazilian labour market and the creation of job vacancies for young people between 18 (eighteen) and 29 (twenty-nine) years old, without previous job registration[14] in CTPS. Its continued effectiveness is conditioned on its conversion into law by the Legislative Branch.

Green and Yellow Employment Contracts apply to new hiring of employees limited up to 20% (twenty) of the organization's employees, not replacements, with a maximum salary of 1.5 minimum wage in a contract with a 24 (twenty-four) months duration determined that can be converted in a regular contract after the term. In this type of contract still is necessary a personal contract with habitually, legal subordination and onerosity (a salary payment), but some labour rights are attenuated such the FGTS penalty that is reduced from 40% (forty) to 20% (twenty), and without the 10% of social contribution, also the monthly FGTS employers payment is reduced from 8% (eight) to 2% (two).

In the case of exposure of the worker due to hazardous work, the company will pay 5% of the base salary and not 30%, as stated by law in other types of contracts.

The company that contracts by Green and Yellow Employment Contracts are exempt from the payment of some social taxes that can reduce the tax burden around 28% (twenty-eight).

Data regarding if Green and Yellow Employment Contracts reduced unemployment between young workers until now are not available since it was enforced in last November, but Brazilian formal labour market, that is, employees with job registration on CTPS shrank between 2014 and the first half of 2019 from 45% to 40.4% while in the same period the share of those working in the informal sector went from 37.4% to 40.9% of the total of Brazilian workforce[15] (IBGE/PNAD, 2019).

The Brazilian labour legislation needed to be updated in many aspects, which has been occurring since 2017, mainly due to the economic crisis that the country suffered between 2014 and 2017, with a sharp recession in the years 2015 and 2016, which generated a current liability of 12.1% of the unemployed workforce.

The solution found so far by the Brazilian government has been the creation of new forms of employment contracts, aiming to give greater dynamism to the economy, reducing the costs of Brazilian labour by changing rights, with a speech from the currently President of the Republic in December 2018, that Brazilian workers must choose between a little fewer rights and more jobs or all rights and no jobs.

The tax reform, the readjustment of the national infrastructure and the revision of Brazilian state structural, which are essential to make the country more competitive, remain projects in progress at the national congress. What is perceived so far is

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[14] Accordingly to Article 1 of Provisional Measure No. 905/2019 for characterization as first job, the following employment relationships will not be considered: I – minor apprentice; II – experience contract; III – intermittent work.

[15] Other 12.1% are unemployed and 6.6% low-spirited workers, which means that they are unemployed and lost their faith in finding a job.

a great incentive to increase pejotization and the growth of informality, especially in the face of work through passenger transport or delivery applications, in which workers are considered as self-employed and it has no labour rights. "Pejotization" has been used by jurisprudence to refer to the contracting of personal services, exercised by individuals, in a subordinate, non-eventual and costly manner, carried out by means of a legal entity constituted especially for this purpose, in an attempt to disguise any relationships.

In general, non-standard employment contracts may be classified into a fixed-term employment contract, temporary contracts, daily employment, part-time work, intermittent employment contract.

As per the Labour Law Consolidation, fixed-term employment agreements are only allowed for up to 2 (two) years or an initial 45 (forty-five) days extend once for equal period, totalizing 90 (ninety) days for probation employment period (trial experience).

In the case of early termination of a contract for a fixed term without dismissal cause, the employer is obligated to pay half of the salary due for the remaining period to the employee and the employee will have the right to access the unemployment insurance and receive the additional FGTS fine.

A fixed-term employment contract that, tacitly or expressly, is extended more than 2 (two) years will, or in the case of trial experience more than 90 (ninety) days, be converted into a standard employment contract.

In fixed-term contracts, employees maintain all obligations and rights that are fixed in standard employment contracts, with the exception, in case of regular termination, of the additional fine of 40% (forty percent)[16] of the balances of individual accounts in his FGTS during the time of his employment relations with the company and the access to the unemployment insurance.

Temporary agency work is regulated by Law 6,019/74, with legislative modifications by Law 13,429/17 and originally predicted that temporary work is provided by a natural person to a company when the business activities have a temporary extraordinary increase in services or the temporary nature of the service justifies a pre-established term.

With the amendments made by Law 13,429/17, the criteria for hiring temporary workers changed with the substitution of "extraordinary increase in services" by "complementary demand for services." By this last expression, it is understood that it comes from factors (i) unpredictable, which means business situations that cannot be known in advance and (ii) predictable, business situations, which are likely to be anticipated within the exercise company's economic activity such season events (Christmas, New Year's Eve, Valentine's Day, Carnival, etc.) or maternity leave.

[16] This fine can be reduced to 20% upon agreement between employer and employee in dismissal without cause.

Temporary workers may be hired for up to 180 (one hundred and eighty) days, which can be postponed by 90 (ninety) days[17] if the maintenance of the conditions that gave rise to it has been proven. After the maximum period of 270 (two hundred and seventy) days, whether consecutive or not (180 days + 90 days), the temporary worker may only be placed at the disposal of the same borrower, in a new temporary contract, after 90 (ninety) days of the end of the previous contract.

These workers cannot be contracted to replace workers on strike, and they will be employed by an agency (manpower company) that is authorized by the Ministry of Labour to render this type of service. When temporary employees perform services on the contracting company, it's his responsibility to ensure the health and occupational safety conditions and to provide the same meals and medical facilities that are granted to the contracting company's own employees.

The agency is responsible for paying salaries to the temporary workers, with subsidiary responsibility for the contracting company. Temporary workers are entitled to receive the same wages and other contractual rights granted to the employees of the contracting company in standard employment contracts. At the end of the temporary contract or in case of early termination without cause, the additional fine of 40% (forty percent)[18] of the balances of individual accounts in his FGTS during the time of his employment relations, it's not due, and the employee will not have access to the unemployment insurance.

In daily employment, workers do not have an employment contract, except if they perform their services more than 2 (two) days per week for the same contractor. Without an employment contract they are not entitled to received paid annual leave, 13th-month salary, one day off per week, Length of Service Guarantee Fund (FGTS) and other rights fixed in the Labour Law Consolidation, but their contractor must observe the maximum hours limit per day that daily employee can work and the meal break.[19]

On 13 July 2017, Brazilian Congress approved the Labour Modernization reform (Law 13467/17) which changed more than 100 articles of the Labour Law Consolidation (CLT) and created the intermittent contract of employment amending the rules of the part-time employment contract.

In the intermittent employment contracts, workers will be able to alternate between periods of work and inactivity, which means that individuals are engaged under an employment relationship to render services under a non-continuous basis. The employee will have alternate periods of inactivity, when the employee may provide services to third parties, and work that may be determined by months, days or hours, regardless, with some exceptions, of the activities of the employer or the employee.

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17 Before the amendments, the temporary work would be provided for a maximum period of 3 months, which could only be extended to the maximum period of 9 months upon specific authorization from the Ministry of Labour.

18 This fine can be reduced to 20% upon agreement between employer and employee in dismissal without cause.

19 One hour of duration in general that can be reduced to 30 (thirty) minutes upon agreement.

The worker must be called for duty with at least 3 (three) days in advance and will have 1 (one) business day to respond. If the employee does not answer or refuses the call, the refusal does not amount to the violation of subordination.

Under this arrangement the employer will be required to pay, at the end of each period of work: (i) pending hourly salary that can't be lower than the minimum hourly wage or than the hourly salary of other employees in the same position of the same company (ii) proportional vacation and additional $^{1}/_{3}$ payments; (iii) proportional 13th salary; (iv) paid weekly rest; and (v) FGTS. Employers are required to collect employment charges and social security contributions on the amounts paid to intermittent employees monthly. If the intermittent contract is terminated by agreement the worker cannot receive payments for the Unemployment Insurance Program.

Since the approval of the Labour Modernization reform (Law 13467/17) until November 2019, 1.124 million formal jobs were created, being 11.8% of these jobs intermittent contracts.

Under part-time employment contracts, employers can hire workers under a part-time regime if the employee works for up to 30 (thirty) hours per week, without the option of overtime or 26 (twenty-six) hours or fewer hours per week, with the possibility of up to 6 (six) overtime hours per week with an additional of 50% (fifty) wage hourly payment. Hour's payments in part-time work contracts cannot be lower than the minimum hourly wage or the hourly salary of other employees in the same position of the same company.

Vacation period for part-time workers is 30 (thirty) days and one-third of that time can be converted into money.

Although the ILO Recommendations and non-ratified ILO Conventions have no binding character, they are intended to be widely applied and contain symbolic and political commitments made by Member States, such Brazil, aimed to make a transition from the informal to the formal economy, removing legal and practical barriers to the exercise of essential labour rights. However, the solutions adopted by Brazil are currently on a collision course not only with the provisions of ILO Recommendation No. 198 but also with the ICESCR, as far as the right for just and favourable conditions of work for all is concerned. We suppose that the right course should be in finding the balance between labour rights and formal employment creation, maintaining a minimum social security net protection for all workers.

2.2. Russia

The Law of the Russian Federation "On Employment of the Population in the Russian Federation" defines employment as the activities of citizens related to the satisfaction of personal and social needs, which are not contradicting the legislation of the Russian Federation and usually bringing them earnings.[20] These activities are

[20] Закон Российской Федерации от 19 апреля 1991 г. № 1032-1 «О занятости населения в Российской Федерации» // Бюллетень нормативных актов РСФСР. 1992. № 1. С. 4–18 [Law of the Russian

not divided into standard or non-standard employment. Nevertheless, statistics are kept on certain forms of non-standard and informal employment.[21]

The understanding of standard and non-standard employment is closely linked to the features of typical and non-typical labour relations.

Article 20 of the Labour Code of the Russian Federation defines that an employee is an individual entering labour relations with an employer, while an employer is an individual, or a legal entity (organisation) entering labour relations with an employee.[22] Special importance is attached to the fact that there is an labour relationship.

The definition of labour relations is contained in Article 15 of the Labour Code of the Russian Federation.

Labour relations shall be the relations based:

– on an agreement between an employee and an employer;

– on the personal performance by the employee of a work function for payment (work in a position in accordance with the staff schedule, profession, specialty, specifying the qualification; specific type of work assigned to the employee);

– under the management and control of the employer;

– on the employee's compliance with the internal working regulations;

– with the employer providing the working conditions stipulated by the labour law, collective contract, agreements, employment contract.

This definition and the conclusion of the Supreme Court of the Russian Federation allow highlighting the signs of typical labour relations:

– the employee and the employer have agreed on the use of labour;

– the relations are stable;

– the employee gets paid. This payment is provided periodically and is the employee's sole and/or main source of income;

– the labour is considered to be dependent. The employee performs duties in the interests, under the employer's control and management. The employee follows the internal working regulations and the work schedule of the employer;

– the employee is included in the employer's organizational structure;

– the employer provides working conditions and tools, materials and mechanisms for work;

– the employee gets the guarantees in accordance with labour law.[23]

Federation No. 1032-1 of 19 April 1991. On Employment of the Population in the Russian Federation, Bulletin of Normative Acts of the RSFSR, 1992, No. 1, p. 4].

[21] Федеральная служба государственной статистики Российской Федерации [Federal State Statistics Service of the Russian Federation] (Aug. 15, 2020), available at https://rosstat.gov.ru/labour_market_employment_salaries.

[22] Трудовой кодекс Российской Федерации от 30 декабря 2001 г. № 197-ФЗ // Собрание законодательства РФ. 2002. № 1 (ч. 1). Ст. 3 [Labour Code of the Russian Federation No. 197-FZ of 30 December 2001, Legislation Bulletin of the Russian Federation, 2002, No. 1 (part 1), Art. 3].

[23] Постановление Пленума Верховного Суда Российской Федерации от 29 мая 2018 г. № 15 «О применении судами законодательства, регулирующего труд работников, работающих у работодателей –

The absence of any classic signs of labour relations[24] make it possible to characterise it as non-typical. Thus, that the employment will be considered as non-standard.[25]

Non-typical labour relations include the labour relations under a fix-term employment contract, temporary employment, distant (remote) work, part-time work and work through Private Employment Agencies under the contract for the provision of an employee.

Labour relations must be formalised by employment contract. Persons who work without employment contract or under a civil contract are not protected under labour law unless they can prove that their work corresponds to the features of subordinate labour.

Article 56 of the Labour Code of the Russian Federation gives the concept of an employment contract and highlights the signs of labour relations.

The employment contract shall be an agreement between the employer and the employee in accordance with which the employer shall undertake to provide the job to the employee with the work function agreed upon, to ensure the working conditions as stipulated by Labour Code, laws and other normative legal acts, the collective contract, agreement, the local normative acts containing the labour law norms and this agreement, to pay wages to the employee timely and in full, while the employee shall undertake to perform the certain work function determined by such agreement under the management and control of the employer, comply with the internal working regulations in the organisation.

The work under an employment contract entitles to basic labour guarantees:

– of the provision of work that is conditional on the employment contract. If the employer is unable to provide work, he/she must pay for downtime;

– of the working time no more than 40 hours a week;

– of their right to work in conditions that meet workplace safety requirements;

– of the timely and complete payment of wages in accordance with his/her qualification, the job complexity, the quantity and quality of the work performed not less than the minimum wage established at the national level;

– of the rest in the form of weekly rest days, paid public holidays, paid annual leave of at least 28 calendar days;

физических лиц и у работодателей – субъектов малого предпринимательства, которые отнесены к микропредприятиям» // Бюллетень Верховного Суда РФ. 2018. № 7 [Plenary Ruling of the Supreme Court of the Russian Federation No. 15 of 29 May 2018. On Selected Issues of the Application by Courts of Legislation Regulating the Labour of Employees Working for Employers – Individuals and Employers – Small Businesses That Are Classified as Microenterprises, Bulletin of the Supreme Court of the Russian Federation, 2018, No. 7].

[24] L. Tal is the founder of the study of classical features of the labour contract and labour relations. *Таль Л.С.* Трудовой договор: цивилистическое исследование [Lev S. Tal, *Employment Contract: Civil Law Study*] 632 (Yaroslavl: Printing House of the Provincial Government, 1913).

[25] *Лушникова М.В., Лушников А.М.* Очерки теории трудового права [Marina V. Lushnikova & Anatoly M. Lushnikov, *Essays on the Theory of Labour Law*] 940 (Saint Petersburg: Iuridicheskii tsentr Press, 2006).

– of the right of forming and joining to trade unions for the protection of their labour rights, freedom and legitimate interests;

– of the participation in the management of the organization in the forms prescribed by the Labour Code and the collective agreement;

– of the collective bargaining, concluding collective contracts and agreements, obtaining additional guarantees provided for in the collective agreement and contract;

– of the protection of their labour rights, freedom and legitimate interests by all means not prohibited by law;

– of the resolution of individual and collective labour disputes, including the right to strike;

– of the compensation for harm caused to the employee's life or health while performing his job duties;

– of the compulsory social insurance. Only persons working under an employment contract are entitled to sickness or quarantine benefits.

Labour legislation of the Russian Federation regulates the rule of recognition of relations under a civil law contract as labour relations. However, this requires the establishment by a Court, State Labour Inspectorate or employer of features of labour relations.[26]

According to the Labour Code of the Russian Federation an employment contract concluded for an indefinite term is a general rule.

In 2008, the Government of the Russian Federation accepted the Concept of long-term social and economic development of the Russian Federation for the period up to 2020. This Concept assumes that a new wave of technological changes will enhance the role of innovations in socio-economic development and will result in creating a new technological base of economic systems, based on using the latest developments in biotechnology, information technology and nanotechnology. This will require high professional and territorial labour mobility. A flexible and well-functioning labour market is an essential component of an innovative economy.[27]

Transformation processes taking place in Russia's economy, intensive development of information and communication technologies, the use of robotics, and the increase of population's education level have led to changes in production

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[26] *Зайцева Л.В., Курсова О.А.* Отказ в признании трудовых отношений: о некоторых недостатках в конструкции юридической фикции // Журнал российского права. 2016. № 3(231). С. 80–87 [Larisa V. Zaytseva & Oksana A. Kursova, *Private Employment Agencies and Contingent Labor in the Russian Federation: Comparative Law Research*, 3(231) Journal of Russian Law 87 (2016)].

[27] Распоряжение Правительства Российской Федерации от 17 ноября 2008 г. № 1662-р «О Концепции долгосрочного социально-экономического развития Российской Федерации на период до 2020 года» // Собрание законодательства РФ. 2008. № 47. Ст. 5489 [Order of the Government of the Russian Federation No. 1662-r of 17 November 2008. On the Concept of Long-Term Socio-Economic Development of the Russian Federation for the Period up to 2020, Legislation Bulletin of the Russian Federation, 2008, No. 47, Art. 5489].

and labour organisation. The new labour market needs influence labour relations development, making them more flexible to reduce employer's production costs and to retain qualified staff. A ratio between typical and atypical labour relations is rapidly changing in favour of the latter by increasing the volume of non-standard employment in the Russian Federation.

The sociological research shows that there is a significant increase in non-standard forms of employment in the Russian labour market: the number of part-time employees increases to 100,000 people per year, on average, and remote employees by 200–300,000 people per year. Moreover, some of them work without official employment papers. Non-standard forms of employment have a steady upward trend.[28]

As we have mentioned before the contract concluded for an indefinite term is a general rule. Therefore, we can refer to the fix term contract as to the first form of a non-standard employment. Such agreements might be made only if there are reasons for that (these reasons are to the large extent listed in Article 59 of the Labour Code). The duration cannot be more than five years. If the term of employment contract was omitted and the employee proceeds with the work – such contract shall be deemed to be transformed to indefinite term.

The fix term employment contract shall be concluded in the cases when the labour relations cannot be established for an indefinite term taking into consideration the nature of the impending job or conditions of its performance, unless otherwise set by Labour Code or other Federal Laws:

– with persons entering a job in an organisation established for a certain period of time or to perform a certain job;

– for the duration of an absent employee's duties, who, according to labour law, retains his place of work;

– for the duration of temporary (up to two months) work;

– to perform seasonal work, when due to natural conditions work can only be performed during a certain period (season);

– with persons assigned to work abroad;

– with persons entering a job in an organization established for a certain period of time or to perform a certain job;

– with persons who are accepted to perform certain work in cases where its completion cannot be determined by a specific date. The Constitutional Court of the Russian Federation in the Resolution of 19 May 2020 No. 25-P "In the Case of Checking the Constitutionality of the Eighth Paragraph of the First Part of Article 59 of the Labour Code of the Russian Federation in Connection with the Complaint of a Citizen I.A. Sysoev" determined the inadmissibility of multiple conclusion of fix term

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[28] *Мусаев Б.А.* Нестандартные формы в современной структуре занятости // Экономика труда. 2017. Т. 4. № 4. С. 413–422 [Batal A. Musaev, *Non-Standard Forms in the Modern Structure of Employment*, 4(4) Labour Economics 412 (2017)].

employment contract to perform work in the same position (profession, specialty).[29] This underscores the importance of constitutional review of employment law;

– for jobs directly connected with practical training and professional training of the employee;[30]

– in other cases stipulated by federal laws.

The fix term employment contract can be concluded by agreement between an employee and an employer also on the grounds provided for in part two of Article 59 of the Labour Code of the Russian Federation:

– with persons enrolling in small business organisations with the staff numbering up to 35 persons (up to 20 persons in the trading and consumer services organisations as well as working for individual employers);

– with old-age pensioners as well as with the persons to whom temporary work is only allowed due to their health in accordance with a medical opinion;

– with persons enrolling in the organisations located in the Polar North areas or in the localities equated with them, if in case of relocating;

– for performing urgent work on preventing accidents, incidents, catastrophes, epidemics, epizootics as well as for liquidating consequences of the abovementioned and other emergency situations;

– with creative personnel in mass media, movie industry, theatre, theatrical and concert organizations, circuses, and with other persons participating in creation and/or performance of art works, professional sportspeople in accordance with the lists of professions approved by the Russian Federation Government with account for the opinion of the Russian tripartite commission for regulating socio-labour relations;

– with researchers, teachers and lecturers, with other personnel concluding employment contracts for a definite term as a result of the competition held in the manner set by the law or another normative legal act of a state authority or a local self-government body;

– with heads, deputy heads and chief accountants of organisation;

– with persons working for the organisation part-time;

– with crews of ships and riverboats;[31]

– in other cases stipulated by federal laws.

Working under a term employment contract does not affect the scope of rights and guarantees of employees.

At the same time, the employees who concluded an employment contract for the period of two months are granted leaves of absence or compensation payments

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[29] Постановление Конституционного Суда Российской Федерации от 19 мая 2020 г. № 25-П // Собрание законодательства РФ. 2020. № 21. Ст. 3375 [Ruling of the Constitutional Court of the Russian Federation No. 25 of 19 May 2020, Legislation Bulletin of the Russian Federation, 2020, No. 21, Art. 3375].

[30] Art. 59.1 of the Labour Code of the Russian Federation.

[31] *Id.*

in the amount of two workdays per month. These employees are not paid any dismissal payments unless federal laws, collective or individual contracts stipulate other procedures.[32]

Chapter 12 of the Labour Code of the Russian Federation regulates specifics in the regulation of certain categories of employees and of certain job-positions. These rules partially limit the application of general rules or provide additional rules for certain categories of employees.

Work at home and distant work have a significant amount of labour regulation features. These labour relations are also considered as non-typical, and employment is non-standard.[33]

A distinctive feature of distant work is that an employee using public information and telecommunications-networks, including the Internet. A distant employee may set the working and rest hours regime independently unless otherwise provided by the employment contract.[34]

If workers perform duties at home without using information and telecommunication networks, they are called home workers. Chapter 49 of the Russian Labour Code regulates this work.[35]

The advantage of the distant work and home work is that the worker has the flexibility to regulate working hours, to save travel time and to reduce transport costs. The employer gets an opportunity not only to save on the organisations of the workplace and rental of office space, utilities, but also to increase the intensity and efficiency of work and, as a result, increase productivity. But the Russian Labour Code does not regulate online and offline working time. It increases the intensity of work and blurs the boundaries between working time and time of rest of distant employees.

Another non-typical form of employment is the work for the private employment agencies (literary translation would be "work under the agreement on the provision of labour concluded with the private employment agency"). This form is actively applied in IT technologies, support of accounting programmes, consulting, legal and security services and in other areas where it is economically viable.

Article 56.1 of the Labour Code of the Russian Federation prohibits borrowed labour.

The provision of a worker is allowed only under the rules of Chapter 53.1 of the Russian Labour Code and the Law of the Russian Federation "On Employment of the Population in the Russian Federation":

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[32] Art. 59.1 of the Labour Code of the Russian Federation.

[33] *Лютов Н.Л.* Дистанционный труд: опыт Европейского Союза и проблемы правового регулирования в России // Lex Russica. 2018. № 10(143). С. 30–39 [Nikita L. Lyutov, *Remote Work: The Experience of the European Union and the Problematic Aspects of Its Legal Status in Russia*, 10(143) Lex Russica 30 (2018)].

[34] Ch. 49.1 of the Labour Code of the Russian Federation.

[35] *Id.* Ch. 49.

– the employer (hereinafter – sending party) sends its employees temporarily, with their consent, to a natural person or legal entity (hereinafter – receiving party) that is not the employer of these employees;

– the employee (hereinafter – provided employee) performs his or her work for the benefit, management and control of the receiving party.

Activities on providing of employees shall be entitled to exercise:

– Private Employment Agencies;

– other legal entities.

Private Employment Agencies are legal entities that are registered in the Russian Federation and are accredited to perform this type of activity.[36]

The number of employees engaged under the contract for the provision of labour to employees must not exceed 10 percent of the number of employees of the receiving party. Employees can only be engaged in temporary work for a period of no more than nine months.[37]

The Labour Code specifies the list of entities that can be a receiving party and the purpose of sending employees. A Private Employment Agencies may only temporarily send its employees:

– to an individual entrepreneur or a legal entity for temporary performance of duties of temporarily absent employees;

– to an individual entrepreneur or a legal entity to carry out work related to a knowingly temporary (i.e. up to nine months) expansion of production or scope of services;

– to a natural person who is not an individual entrepreneur, for the purpose of personal service, assistance in running a household.

Private Employment Agencies have the right to conclude employment contracts with certain categories of persons for the purpose of their temporary employment, to send them to the receiving party and in other cases. These cases include the grounds for concluding a term employment contract in accordance with Article 59 of the Russian Labour Code or other Federal Laws of the Russian Federation.

The aims and grounds for the temporary provision of workers have been expanded for certain categories of persons in need of enhanced social protection. These persons include:

– full-time students;

– single parents and parents of large families raising children under 18 years old;

– persons released from establishments executing a punishment in the form of imprisonment.

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[36] *Зайцева Л.В., Чукреев А.А.* Частные агентства занятости и заемный труд в России: сравнительно-правовое исследование // Вестник Пермского университета. Юридические науки. 2017. Вып. 1(35). С. 94 [Larisa V. Zaitseva & Andrey A. Chukreev, *Private Employment Agencies and Contingent Labour in the Russian Federation: Comparative Law Research*, 1(35) Perm University Herald. Juridical Sciences 84, 94 (2017)].

[37] Art. 18.1 of the Law of the Russian Federation "On Employment of the Population in the Russian Federation."

The provided employee is in an employment relationship with a Private Employment Agency. The labour relations between an employee and a Private Employment Agency do not terminate. Labour relations between the provided employee and the receiving party do not arise. Private Employment Agency and the provided employee enter into an additional agreement to the employment contract, which specifies information about the receiving party as well as the number and term of the agreement on the provision of work to employees.

The agreement may provide that:

– the receiving party has the right to demand from the provided employee that he or she performs his or her work duties, that he or she treats the property of the receiving party and the property of the receiving party's employees with care, and that he or she observes the internal labour regulations of the receiving party. Also, it can suspend an employee from work or keep him/her away from work, for example, for the appearance of an employee in the condition of alcoholic, narcotic or other toxic intoxication at his/her workplace. The receiving party is required to notify the employer of these cases immediately;

– the receiving party is obliged to provide the provided employee with the equipment, tools, technical documentation and other means necessary for the performance of his or her work duties, the household needs of the sent worker related to the performance of his or her work duties, and compensation for work in harmful and/or dangerous working conditions.

Terms of payment for the provided employee must be no worse than those of the receiving party workers performing the same work functions and having the same qualifications.

A Private Employment Agency is obliged to monitor the compliance of the receiving party's actual use of the labour functions of the provided employee with the labour functions defined in their employment contracts, as well as the receiving party's compliance with labour law standards. The receiving party may not prevent a Private Employment Agency from exercising the said control.

Other legal entities, including foreign legal entities and their affiliated person (except for individuals) may carry out activities to provide employees only under conditions and in accordance with the procedure established by Federal law. For example, in cases when employees are temporarily assigned to a legal entity that is affiliated with the sending party, as well as to a legal entity that is a party to a shareholder agreement with the sending party.[38]

The Law of the Russian Federation "On Employment of the Population in the Russian Federation" prohibits sending employees to work for a receiving party under a contract on the provision of labour to employees for purposes:

– of replacement of employees participating in the strike of the receiving party;

[38] Art. 341.2 of the Labour Code of the Russian Federation.

– performance of work in the case of downtime (that is a temporary suspension of work by a receiving party), bankruptcy proceedings by the receiving party, part-time work by the receiving party in order to preserve jobs in the event of the threat of mass dismissals of receiving party workers;

– performance of works at facilities classified as dangerous production facilities of I and II hazard classes;

– performing work at workplaces where working conditions are classified as harmful working conditions of 3 or 4 degrees or dangerous working conditions, as well as in other cases stipulated by the Law of the Russian Federation "On Employment of the Population in the Russian Federation."[39]

The collective agreement of the receiving party does not apply to the provided workers, because they are not its employees.

In conclusion, it should be noted that the flexible labour market and the mobility of labour resources make it possible to respond promptly to economic challenges, which is a crucial component of the country's economy. Employers use flexible forms of employment as a factor to optimize production costs and increase productivity, as well as a way to keep staff in crisis conditions. According to the research centre of portal Superjob.ru, 21% of companies that have transferred employees to remote work during quarantine on Covid-19, after the completion of the regime of self-insulation will leave some staff to work from home.[40] Large Russian companies have introduced a four-day working week to reduce personnel costs and retain staff;[41] many companies have reduced the number and staff of employees, which led to an increase in the number of unemployed.

Non-standard forms of employment give employees more flexibility in their time management. However, distant workers, outworkers and workers sent by Private Employment Agencies to other employers are not usually unionized. In organisations where distant and homeworkers mainly work, as well as in private employment agencies, collective agreements are usually not concluded due to the absence of a trade union. Consequently, the potential of social partnership is not realized, although employees are not deprived of this opportunity.

The purpose of the state employment policy in these conditions is to create legal, economic and organisational conditions ensuring the development of a flexible,

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[39] Art. 18.1 of the Law of the Russian Federation "On Employment of the Population in the Russian Federation."

[40] Каждая пятая компания, где сейчас действует удаленка, продлит ее и после окончания карантина // Исследовательский центр портала Superjob.ru. 22 мая 2020 г. [Every Fifth Company Where the Remote Control Is Currently Operating Will Extend It After the End of Quarantine, Research Center of the Portal Superjob.ru, 22 May 2020] (Aug. 15, 2020), available at https://www.superjob.ru/research/articles/112374/kazhdaya-pyataya-kompaniya/.

[41] Российские компании начали переходить на четырехдневную рабочую неделю // Новости Mail.ru. 8 апреля 2020 г. [Russian Companies Began to Move to a Four-Day Work Week, News Mail.ru, 8 April 2020] (Aug. 15, 2020), available at https://news.mail.ru/economics/41289027/?frommail=1.

efficient labour market. It will make it possible to overcome the structural mismatch between labour supply and demand, reduce the proportion of illegal employment and increase labour motivation and labour mobility.

2.3. China

China not only has to deal with common global issues such as the sharing economy, algorithmic recruitment and crowdsourcing, but also has to examine the problems in the labour field caused by China's own special national conditions.[42] As an ILO member country, China has recognized and ratified more than 20 international labour conventions, and some of the conventions that have not been ratified by China and the proposals that do not require ratification are also used for reference in China's labour legislation.[43] Similar to Brazil, in China, international labour conventions and recommendations do not necessarily have legal force, and only the legislative organs or relevant administrative organs can convert their contents into laws and administrative regulations.

Due to its own unique historical reasons, China has different labour legislations in the Mainland, Hong Kong, Macau and Taiwan. Its legal tradition includes both the continental legal system and the Anglo-American legal system, forming a "one country, two jurisdictions" pattern, leading to major differences in employment relationship determination standards and employment contract rules. They apply their respective laws and regulations.[44] This paper will take Mainland China as the main model to explore the reasons for the emergence of non-standard employment contract in China and whether labour legislation meets international standards.

China's labour law do not distinguish between standard employment and non-standard employment. In practice, the focus of disputes concerning the protection of the rights and interests of workers in informal employment usually starts with the

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[42] For example, some state-owned enterprises have redundant staff and lack of front-line personnel due to legal restrictions on dismissal and total labour requirements. That is, strict restrictions on the dismissal system have led to the excessive number of non-main business employees (such as logistic service personnel) in some state-owned enterprises, especially industrial enterprises, and it is difficult to withdraw from their jobs. However, the state has a requirement for the total amount of employees of state-owned enterprises, therefore, under the situation of "wide in and strict out," the front-line production of enterprises under the condition of lack of employees (first-line employment often requires young employees) cannot introduce labourers through the typical employment, resulting in some state-owned enterprises only through labour outsourcing to meet the needs of enterprises.

[43] For example, the prohibition of forced labour, the opposition to employment discrimination, improves the social insurance system, establishes working hours and rest and vacation systems. In addition, China voted in favor of Recommendation No. 198 at the 95th International Labour Conference, which also shows that China is also facing the legislative perfection of labour relations definition standards and the existence of hidden employment relationships in society.

[44] In addition, there are a large number of local administrative regulations in China, and these local administrative regulations are different, resulting in different local judicial practice calibers, which is inconvenient to analyze in detail in this paper.

identification of employment relations. However, labour legislation does not define what is the employment relation. Although it was defined in the Public Consultation Draft of the Employment contract Law[45], unfortunately, this clause was not adopted in the end. The Notice on Matters Related to the Establishment of Employment relations (the Ministry of Labour and Social Security issued [2005] No. 12) stipulates three requirements for the determination of employment relations: firstly, the subject qualifications, which meet the requirements of employers and labourers in laws and regulations; secondly, the personal dependency, including the application of rules and regulations, control and management, and remunerated labour; thirdly, economic dependency, labour is an integral part of the employer's business.

The qualification of the employer as the subject is not only qualified as the subject, but also requires it to be listed in the legislation and does not exclude the application. The Labour Law, the Employment Contract Law, the Regulations on the Implementation of the Employment Contract Law, the Explanation of Several Provisions of the Labour Law of the People's Republic of China (Labour Office [1994] No. 289) and the Opinions on Some Issues concerning the Implementation of the Labour Law of the People's Republic of China (Labour Department [1995] No. 309) summarizes enterprises, individual economic organizations, private non-enterprise units, domestic institutions, institutions and social groups, as well as cooperative organizations such as accounting firms and lawyers firms and the foundation, are employers, but also completely excluding the type of natural person employer.[46] The Taiwan Labour Standards Law stipulates that employers include persons in charge of business operations,[47] but it cannot be applied in the mainland China. This leads to the fact that when the employer is unqualified or not the above-mentioned subject, it is difficult to determine the employment relationship involving the contract[48] and the employment relationship caused by the attachment,[49] even if the parties meet some elements of the standard employment.

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[45] The employing unit recruits labourers as its members, and the rights and obligations arising from the labourers providing paid labour under the management of the employing unit.

[46] Art. 2 of the Labour Law, Art. 3 of the Labour Contract Law, Art. 2 of the Explanation of the Several Provisions of the Labour Contract Law, Art. 1 of the Opinions on Several Issues concerning the Implementation of the Labour Law.

[47] According to paragraph 2 of Article 2 of the Taiwan Labour Standards Law, an employer refers to a business owner who hires labour, a person in charge of business operation or the representative of the employer as the person handling the labour affairs of the employer. There are three types of employers: (1) Business owners; (2) The person in charge of business operation; (3) A person who handles labour affairs on behalf of the business owner. *The Interpretation of Labour Standards Law: Review and Prospect for 20 Years of Practice* 28 (Taiwan Labour Law Society (ed.), Shanghai: New Xue Lin Publishing Co., Ltd., 2009).

[48] *Zhengning County Heng'an Construction Co., Ltd. v. Jiao Xiaoli*: the appeal case of confirm labour relationship dispute 472 (Qingzhongmin Zhongzi 2014); *Lu Junjie, Qing'an v. State-owned Forest Farm Administration*: Shuguang Forest Farm Labour dispute, Civil Disputes Civil Judgment, 866 (Hei12 Minzhong 2019).

[49] *Wang Qinghong, Linyi v. New Era Motor Vehicle Driving Training Co., Ltd.*: confirm the labour relationship dispute, Civil Disputes Civil Judgment (2019), 9982 Lu 13 (Min Zhong 2019); *Yulin City Yiliang Shiming Auto Repair Factory v. Huang Zhenzhong*: Labour Dispute Retrial Case 15 (Gui Min Zai 2017).

In China, "worker" has different meanings in different fields. If there is no definition, it is impossible to determine in what context labourers are equivalent to employees. Labour legislation restricts labourers by means of reverse exclusion. First, they are required to meet the conditions of age,[50] health status,[51] and occupational qualifications,[52] etc., at the same time, excluding the rural labourers (except for township and village enterprise workers, farmers who urban work or do business), family nanny, active duty soldier.

In summary, China's labour legislation only sets the criteria for identifying the standard employment, and the judgment of employment relations mainly adopts the subjective judgment model.[53] The judging criterion of subjective elements and subordinate attributes is not the judging criterion to distinguish between standard employment and non-standard employment, but the criterion to identify employment relations. Whether it is standard employment and non-standard employment, the existence of employment relations is the prerequisite for the application of labour legislation and the protection of employees by labour laws. However, due to the uncertainty of the concept, this kind of subject factor standard cannot guarantee the labour rights of some employees.[54]

At the same time, the Labour Law and the Employment contract Law divide the employment contract into the fixed-term employment contract, the non-fixed-term employment contract, the employment contract with a deadline to complete certain tasks.[55] According to the international standards, the non-fixed-term employment

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50 Should reach the legal minimum age for employment (age 16).

51 Law of the People's Republic of China on Promotion of Employment restricts employment in legal industries (Art. 30).

52 The Labour Law and the Vocation Education Law of the People's Republic of China all require labourers to meet the conditions required for some vocational jobs.

53 Feng Yanjun & Zhang Yinghui, *Reflection and Reconstruction of the Judgment Standard of "Labour Relations,"* 6 Contemporary Law Review 92 (2011).

54 Taking the subject qualifications of university student as an example, there are differences in judicial decisions. In the cases of Wang Article 15 of the Labour Law and Article 2 of the Regulations on the Prohibition of the Use of Child Labour require labourer Guobing V. Love to Rent Suzhou Property Services Co., Ltd. (Civil Judgment in the Second Instance of Labour Disputes 1368 (Su05 Min Zhong 2018)), *Jingshan Yanyang Cultural Media Co., Ltd. v. Fang Yu* confirms the labour relationship dispute 00102 E (Jingshan Minyi Chu Zi 2014), there is a labour relationship between the university student and the employer, and the main reason for the judgment is that the university student is for get a job purpose. In the cases of *Xue Ying v. Nanjing Sanle Electronic Information Industry Group Co., Ltd.*, Labour Contract Dispute Appeal Case 627 (Ning Min Zhong Zi 2014), *Xu Yunxin v. Chinese People's Revolutionary Military Museum*, Labour Dispute, Appeal Case 59942 (Yi Zhong MinChuzi 2014), there is no labour relationship between the two parties, and the main reason for the judgment is that the student does not have the subject qualifications for the labour relations.

55 The Hong Kong Employment Ordinance divides labour contracts into continuous and discontinuous contracts. The Law No. 7/2008 of the Macao Labour Relations Law divides labour contracts into contracts with a fixed or uncertain period and contracts with no period. The Taiwan Labour Standards Law divides labour contracts into fixed-term labour contracts and non-fixed-term labour contracts.

contract is the standard employment, the other two types of employment contract are the non- standard employment. However, apart from the difference in contract term, these three types of employment contracts in mainland China have no difference in the protection of employees' labour rights, especially in aspects of wages, working hours, rest and vacation, dismissal protection and social insurance.

It is worth mentioning that, due to the different economic development conditions in various regions of China, the minimum wage standards are also different. So the employees of the above three types of employment contracts have different minimum wages according to their regions; some provinces even divide cities and counties into different files, and the minimum wage standards for each file are also different, as shown in the following table. There was no minimum wage system in Hong Kong China before 2011, the Minimum Wage Ordinance came into force on 1 May 2011, and the hourly wage system was adopted. Since 2011, the legal minimum wage level has been adjusted every two years, increased from $34.5 per hour to $37.5 per hour, as of 1 May 2019.[56]

Monthly Minimum Wage Standards in Beijing, Shanghai, Fujian and Xinjiang (as of June 2019)[57]						
Unit: yuan ¥						
Province	Implementation Date	Monthly Minimum Wage Standard				
		First Level	Second Level	Third Level	Forth Level	Fifth Level
Beijing	1 September 2019	$2120.00				
Shanghai	1 April 2019	$2480.00				
Fujian	1 July 2017	$1700.00	$1650.00	$1500.00	$1380.00	$1280.00
Xinjiang	1 January 2018	$1820.00	$1620.00	$1540.00	$1460.00	

Like other countries, the development of tertiary industry in the era of industry 3.0 and 4.0 in China has triggered the development of non-standard employment (flexible labour). According to the China Labour Statistics Yearbook 2019, China's tertiary industry accounted for 22.3% in 1979 to 52.2% in 2018,[58] except for 2004, 2005 and 2006 which were slightly lower than the previous years, the proportion of the

[56] The Government of the Hong Kong Special Administrative Region of the People's Republic of China, the Labour Department (Aug. 15, 2020), available at https://www.labour.gov.hk/tc/news/mwo.htm.

[57] Ministry of Human Resources and Social Security of the People's Republic of China (Aug. 15, 2020), available at https://www.mohrss.gov.cn/SYrlzyhshbzb/laodongguanxi_/fwyd/202002/t20200210_359176.html.

[58] The National Bureau of Statistics of China, China Labour Statistics Yearbook (2019) (Aug. 15, 2020), available at http://www.stats.gov.cn/tjsj/ndsj/2019/indexch.htm.

tertiary industry in the total GDP has increased year by year, until 2015, it accounted for more than half of the total GDP. Meanwhile, the proportion of employed person in the tertiary industry also increased from 12.6% in 1979 to 46.3% in 2018.[59] Such changes in the industrial structure have led to the flexibility of labour, the diversity of employment relations and the individuality of employment contracts, and have also confirmed that the development of labour legislation and the industrial revolution are concomitant. The development of non-standard employment forms in China also has its own special reasons. The development of non-standard employment forms in China also has its own special reasons.

The relevant regulations issued in the 1980s[60] have laid the foundation for the status of the fixed-term employment contract in China as equivalent to the standard employment contract. In 2002, the State Council of China issued the Notice on Further Improving the Re-employment of Laid-off and Unemployed Persons (Zhong Fa [2002] No. 12), which proposed to encourage laid-off and unemployed persons to obtain employment through various forms such as part-time, temporary, seasonal, flexible work. The Information Office of the State Council issued the White Paper on China's Employment Status and Policies in April 2004 stated that: "Develop flexible and diverse forms of employment and increase employment channels." At the same time, the government has formulated relevant policies on medical insurance wage payment and other aspects, which provided soil for the development of non-standard employment forms in China. In recent years, China's economy has entered a new normal, the downward pressure on the economy is obvious, a structural imbalance between supply and demand. For these reasons, Opinions of the State Council on Promoting the Accelerated Development of the Service Outsourcing Industry in January 2015, indicating that the service outsourcing industry will become a national strategy and the service outsourcing has become the new normal. The Recommendation for the 13th Five-Year Plan for Economic and Social Development of the Central Committee of the Communist Party of China on 29 October 2015, clearly stated that during the "13th Five-Year Plan" period, the government should be "to improve the quality of labour force, the labour participation rate and the labour productivity, to increase the flexibility of the labour market, to promote the free flow of labour among regions, industries and enterprises." China began to vigorously carry

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59 The National Bureau of Statistics of China, China Labour Statistics Yearbook (2019) (Aug. 15, 2020), available at http://www.stats.gov.cn/tjsj/ndsj/2019/indexch.htm.

60 The labour legislation concerning labour relations during this period includes: the Provisional Regulations on the Recruitment of Workers in State-Owned Enterprises, the Provisional Regulations on Institution of Labour Contract System in State-Owned Enterprises, the Interim Provisions on the Dismissal of Staff and Workers in Violation of Discipline in State-Owned Enterprises, the Provisional Regulations on the Management of Temporary Workers in Enterprises Owned by the Whole People (Nationally Owned Enterprises), the Provisional Regulations on the Management of Labour in Private Enterprises, etc. These regulations have made major reforms to China's traditional fixed-work system, but they were repealed in 2001.

out supply-side structural reform, and put forward the "five priority tasks,"[61] hoping to create more effective supply and promoting high-quality economic growth; "reducing costs" has become one of the important tasks of supply-side reform. Since then, the Politburo of the CPC Central Committee made it clear that the focus of reducing costs is to increase the flexibility of the labour market, curb asset bubbles and reduce the macro tax burden. The increased flexibility of the labour market is regarded by employers as an important means of "reducing costs."[62]

The in distinguishability among the above three of contracts in terms of applicable targets, labour standards and dismissal protection, as well as the strict regulations of labour dispatch, which not only reflects the legislative principle that China's labour legislation favours the tilt protection of labours, but also increases the employers 'resentment of the above three of contracts. At the 2016 NPC and CPPCC sessions, some representatives and economists from the business community said that the Employment contract Law should be amended, because it has the disadvantages of restricting flexible employment, overprotecting labourers, ossifying labour market, increasing enterprise labour costs[63] and hindering economic development. On the other hand, the scholars, government workers and labourers who hold a position to protect labour rights argue that the cost of enterprises is not just the labour costs, but the tax costs (the main costs).Therefore, under the circumstances that the country has successively introduced a large number of tax cost reduction policies, it is impossible to relax the regulation of the labour market, out of the needs to protect the labour side that maintains a weak position. In addition, both the Communiqué of the Fifth Plenary of the 18th Central Committee of the Communist Party of China and the Government Work Report (2016) mentioned "strengthening support for flexible employment and new forms of employment." Opinions of the State Council on Effectively Ensuring Employment and Entrepreneurship at Current and Future Periods (No. 28 [2017] of the State Council) is even more clear that "support the development of emerging business types; improve employment, social security and other systems adapting to the characteristics of new employment types; explore the mode of payment out of unemployment and work-related injury insurance to flexibly employed personnel." Based on this, with the support of national policies,

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61 "Cutting overcapacity, de-stocking, de-leveraging, reducing costs and improving weak links."

62 Tian Ye & Liu Xia, *Balancing Flexibility and Security of Employment in a Flexible Age-Focusing on Debate over Labour Contract Law*, 19(2) Journal of Tianjin University (Social Sciences) 139 (2017); Zhang Ran & Cao Huaqing, *Supply Side Structural Reforms Need Flexicurity Employment Policies*, 3(30) Economy and Management 64 (2016); Tian Silu, *Evolutionary Course and Legal Response to Atypical Developing Trend of Labour Relationship,* 6 Law Science 138 (2017); Ban Xiaohui, *Shared Development, Supply-Side Reform and Social Issues: Summary of High-End Forum on Shared Development and Social Legal Construction*, 6 Journal of Sichuan University (Philosophy and Social Science Edition 2016).

63 Research Group of China Academy of Labour and Social Security, *Research on Labour Market Flexibility and Legal Regulation: Research from the Evaluation of the Implementation Effect of the Labour Contract Law*, 3 China Labour 34 (2018).

a large number of employers have begun to adopt new, more flexible, atypical forms of employment in order to avoid labour legislation.

As mentioned earlier, the difference in employees' legal labour rights is extremely small among the fixed-term employment contracts, the employment contracts that set the completion of specific tasks as the term to end contracts and the indefinite employment contract. However, based on a 2010 study by the China Urban Workforce Survey (CULS), we found that, among the employment contract types signed by labourers between the ages of 16 and 60 in the five cities of Shanghai, Wuhan, Shenyang, Fuzhou and Xi'an, the proportion of signing employment contracts without a fixed term is 19.93% – in respect of migrant workers and 44.58% – urban local labourers, while the proportion of signing fixed-term employment contracts (less than 3 years) is 19.93%-migrant workers and 53.48% – urban local labourers. By 2016, the term of the fixed-term employment contracts signed by migrant workers is mainly "three years or more," accounting for 65%, and the urban local labour reached 71%.[64] From the above data, it can be seen that the signing rate of the fix-term employment contracts is much higher than that of non-fixed term employment contracts in China. It can be seen that, unlike western developed countries, China's mainstream employment contract type is not fixed-term employment contracts but a fix-term employment contract.

Although both forms of labour employment are subject to strict employment and labour protection, the short-term nature of the fixed-term employment contract makes it difficult for labourers to achieve long-term stable employment expectations. In order to prevent the "40, 50 phenomenon,"[65] Article 14[66] of the Employment contract Law stipulates the conditions for the conversion of the fixed-term employment contracts to non-fixed term employment contracts, in order to realize the labourers' right to employment safety. However, the provisions of "worked for 10 years consecutively" and "two fixed-term employment contracts have been concluded consecutively" are considered by employers to face "easy in, hard out," and the provisions will bring adverse effects to the employers. For this reason, after the promulgation of the Employment

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64 王美艳.《劳动合同法》的实施:问题和对策建议[J].贵州财经学院学报 [Meiyan Wang, *The Implementation of China's Labour Contract Law: Problems and Policy Suggestions*, 1 Journal of Guizhou University of Finance and Economics 23 (2013)].

65 The "40, 50 phenomenon" in the labour market refers to employers' unwillingness to recruit 40- and 50-year-old labourers. Employers believe that the golden age of labourers is before 40 and 50, so they are reluctant to hire again after using up the golden age of workers. Some employers even specify that labourers must no older than 45 years when recruiting.

66 Article 14 of the Labour Contract Law provides four situations: the employee has already worked for the employer for 10 full years consecutively; when the employer initially adopts the labour contract system or when a state-owned enterprise re-concludes the labour contract due to restructuring, the employee has already worked for this employer for 10 full years consecutively and he attains to the age which is less than 10 years up to the statutory retirement age; the labour contract is to be renewed after two fixed-term labour contracts have been concluded consecutively; the employer fails to sign a written labour contract with an employee after the lapse of one full year from the date when the employee begins to work.

contract Law, large-scale layoffs began in companies such as South Korea's LG Electronics, Wal-Mart Global Procurement Center China, Spreadtrum Communications' Shanghai headquarters, and some employers began to use the form of labour dispatch to reuse workers that have worked for themselves for nearly a decade, in order to evade employers' labour law obligations. This provision also makes the employer choose to sign a fixed-term employment contract with employees for less than ten years, or not to renew a second employment contract or enter into a third employment contract with the same employee, taking a negative attitude towards the long-term employment of labour. In summary, the purpose of legislation is clear and beneficial to labour, but there are many obstacles to the realization of its value.

The Employment contract Law stipulates that labour dispatch as a special form of employment in section 2 of Chapter V, it stipulates the conditions for the establishment of labour dispatching units, the content of labour dispatch agreements, the obligations of dispatching units and accepting units and so on, hoping to standardize the development of labour dispatch and prevent the continued expansion of labour dispatch form of employment in China. However, due to the ambiguity of the regulations, the labour dispatch is out of control to a certain extent.[67] For example, Article 66 of the Employment contract Law (2008) stipulates that worker dispatch services shall normally be used for temporary, auxiliary, or substituting positions; Article 57 stipulates that a worker dispatch service provider shall be established according to the Company Law and have a registered capital of not less than RMB 500,000 Yuan. Due to the ambiguity of the definition of the three positions and the low cost of the design of labour dispatch companies, the number of labour dispatch companies and labour dispatch workers in China began to increase year by year in 2008. According to the *Report on the Current Situation Analysis and Investment Prospect Evaluation of China's Labour Dispatch Industry in 2019–2025* (released by Zhiyan Consulting Co., Ltd.), the number of labour dispatching companies increased from 10,000 in 2009 to 35,000 in 2017, and the number of labour dispatched workers increased from 27 million in 2009 to 36 million in 2017, as shown in the table below.

Trend of the Number of Labour Dispatch Companies and Workers in China from 2009 to 2017[68]

Year	Number of companies (ten thousand units)	Number of workers (ten thousand units)
2009	1	2,700
2010	1.2	3,100

[67] Xie Decheng, *The Ambiguity of China's Labour Dispatch Law and Its Improvement*, 8 Law Science 121 (2011).

[68] Analysis on the number of workers and market size in China's labour dispatch industry in 2017 (Aug. 15, 2020), available at http://www.chyxx.com/industry/201904/726793.html.

2011	1.5	3,700
2012	1.8	4,000
2013	2.2	4,500
2014	2.5	4,200
2015	2.8	3,800
2016	3	3,500
2017	3.5	3,600

The number of dispatched labour was the highest in 2013, and then began to decline. This is influenced by the amendment of the Employment contract Law in 2012. The Employment contract Law (2012 Amendment) and the Interim Provisions on Labour Dispatch issued in 2014 stipulate that the labour dispatch is a supplementary form which can only be implemented in temporary, auxiliary or substitutable positions; the number of dispatched workers employed shall not exceed 10% of the total number of its workers. In addition, the registered capital of the labour dispatching unit has also risen to 2 million Yuan, and the administrative license has been set up.

The Interim Provisions on Labour Dispatch and the Employment contract Law clearly stipulate that the term for the employment contract between a worker dispatch service provider and the workers to be dispatched must not be less than two years.[69] During the time period when there is no work for the workers. During the time period when there is no work for the workers, the worker dispatch service provider shall compensate the workers on monthly basis at the minimum wage prescribed by the people's government of the place where the worker dispatch service provider is located; to pay social insurance premiums, provide labour protection and safety and health conditions for the dispatched employees; employers also have to pay overtime salary, bonuses, non-discriminatory and job-related benefits, implement a normal wage adjustment mechanism. Labour dispatched workers enjoy the same basic labour rights as the standard employment workers, such as the right to equal pay for equal work, dismissal protection, to organize and join trade unions etc. In addition, if the accepting unit causes damage to the dispatched worker, the labour dispatching unit shall bear joint and several liability for compensation.

[69] Taking Shenzhen as an example, in the second half of 2015, the labour contract signing rate of labour dispatched employees was as high as 100%, and the labour contract term of 2 years and the labour contract term of more than 2 years and less than 5 years accounted for about 90%, which becoming the mainstream of the labour contract term of the labour dispatch; at the same time, 8580 persons of them signed labour contract with no fixed term, which was a year-on-year growth of 10.9%. Lisa Wu, *A Study of Labour Dispatch in Shenzhen in 2015: Annual Report on Shenzhen's Labour Relationship*, Social Sciences Academic Press (China) 112 (2016).

Even though the stricter labour dispatch employment system is stipulated, due to the ambiguity of the legislative regulations, a large number of labour dispute cases have been generated during the application of the law, including: the definition of "auxiliary positions" the confirmation of legal liability under invalid labour dispatch agreements the conversion of direct employment,[70] the recognition of "equal pay for equal work," the payment of economic compensation, etc. In the database of Peking University Magic Weapon,[71] a total of 63,525 judgment documents on labour disputes and personnel disputes for labour dispatch, and the cases were mostly considered from 2014 to 2019. Among them, there were 4789 cases of equal pay for equal work (564 cases in Jiangsu Province and 434 cases in Henan Province); 2,381 cases of second instance, and an increase of nearly 450 cases in 2015 compared with 2014; 1098 cases of auxiliary positions, mostly in Liaoning, Jiangsu and Shanghai; 353 cases of the liability under invalid labour dispatch contracts, including 128 cases in 2016 alone. It can be seen that labour disputes have not been reduced due to the amendment of the law, and there are still cases where the rights and interests of dispatched workers are violated.

China adopts the time-defining method for part-time employment, using weekly working hours as the standard. Since the legislation adopts a "general" or "average" number of daily working hours, that is, the maximum length of working time is not 4 hours per day, then the part exceeding 24 hours per week should be overtime or should be considered as a conversion condition for full-time employment? The Labour Law and the Employment contract Law do not stipulate this, and the relevant laws and regulations in various regions have different opinions. For example, Beijing Municipality[72] stipulates that: the workers who work for more than 4 hours a day in the same employer entity shall be regarded as full-time employees. Under Regulations of Jiangsu Province on Employment Contract, overtime is not applicable to part-time employment unless the agreement between the employer and the employee.

According to the legislation, the wages of part-time employees are not lower than the minimum hourly wage standards stipulated by the government of the employer's location, rather than adopting the principle of "equal pay for equal work" as in the case of labour dispatch. Therefore, the wages of the part-time employees with the same type of job, job position, etc., and the standard employment employees may differ greatly. In addition, the legislation also does not make

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70 *See* Art. 17 of the Taiwan Fundamental Labour Law (2012 Amendment).

71 This database is one of the earlier case databases in China, but also other case databases, such as China Judgment Online and the official websites of local courts. But these databases do not fully collect all the judgments in China, even in the mainland China. Although the collection is not complete, it is already a comprehensive database of cases in mainland China, so the data of this database is selected as the statistical basis.

72 Circular of Beijing Municipality on Several Issues concerning the Administration of Non-Full-Time Employment.

clear which labour standard laws the part-time employees can enjoy, such as the right to rest on statutory holidays, paid annual leave, social insurance and so on. Neither the Employment contract Law nor the Regulation on Paid Annual Leave for Employees stipulates whether part-time employees can enjoy paid annual leave. In the local regulations, there are two ways, one is to make it clear that the part-time employees do not enjoy paid annual leave, and the other is to be agreed between the employer and the employee.[73] Regarding the issue of arranging employees to work on statutory holidays, most regions have not made regulations.[74] Whether the part-time employees participate in social insurance or what kind of social insurance they can take is mainly based on the Opinions on Several Issues concerning the Non-Full-Time Employment issued by the Ministry of Labour and Social Security in 2001: besides industrial injury insurance, labourers can choose to participate in urban employee insurance or resident insurance. The urban employee insurance includes many types of insurance, and employers pay; the urban and rural resident insurance includes pension insurance and medical insurance, and the part-time employees pay. The two insurance models have significant differences in payment costs and insurance treatment. The part-time employees do not enjoy the same rights as dispatched labourers in terms of dismissal protection. According to the legislation, both parties can terminate the contract at any time without employers being subject to time procedures and financial compensation payment obligations.

Concluding the present review of the Chinese regulation of non-standard employment we should note that in recent years, China has made stable employment and employment expansion the common priority for economic and social development. The government has placed employment policies at the macro-policy level and adopted more flexible employment methods to provide more jobs. This has also led to the rapid development and growth of non-standard employment forms and employers. However, the new forms of non-standard employment do not match the current labour legislation completely. As a country with statutory laws, the revision of the law requires a certain period of time and procedure, which also leads to the lag of labour legislation. Lagging labour legislation and weakened subordination are not conducive to the protection of employees' labour rights and interests under the new employment forms.

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[73] Art. 12 of the Several Opinions of Zhejiang Province on Implementation of the System of Paid Annual Leave for Employees of Enterprises. Guiding Opinions of Shanghai Municipality on Several Issues concerning the Labour and Personnel Dispute (I): In principle, the paid annual leave system is not applicable to the part-time employment workers, the retirees employed by employing unit, non-standard employment labour organizations and their personnel, but if the two parties agree otherwise, the agreement shall prevail.

[74] Implementation Opinions of Hunan Province on Strengthening the Management of the Part-Time Employment stipulates that the wage is not less than three times of the local minimum hourly wage standard. Several Provisions of Shenzhen Municipality on the Non-Full-Time Employment stipulates that wage is not less than 300% of the employees' own standard wage. Notice by the Ministry of Labour and Social Security on Issuing the Opinions on Several Issues concerning the Non-Full-Time Employment stipulates that the wage is not less than 300% of the employees' own hourly wage.

Although China has not ratified the Convention No. 175 and No. 181, but actively endorsed the Employment Relations Recommendation and regulated some forms of non-standard employment in domestic legislation. China also actively promotes the application of international labour standards in the domestic. There are achievements and shortcomings, but efforts are still being made to explore the balance between the regulation and autonomy of the open labour market.

2.4. South Africa

After the first democratic elections in South Africa in 1994, the country experienced a flurry of new legislation. The most important employment laws are: Constitution of the Republic of South Africa,[75] Labour Relations Act,[76] Basic Conditions of Employment Act,[77] Employment Equity Act,[78] Skills Development Act,[79] Unemployment Insurance Act[80] and acts like the Occupational Health and Safety Act and Compensation for Occupational Injuries and Diseases were amended.

The Constitution of South Africa provides for a special place of International Law, International Agreements and Foreign Law. Section 139(b) and (c) of the Constitution states that our Courts must consider International Law when they interpret our Bill of Rights. Section 231(2) states that International Agreements binds South Africa, section 231(4) states that International Agreements become law in South Africa when it is enacted into our national legislation.[81]

The most important employment law in South Africa is the Labour Relations Act (LRA), 66 of 1995. Section 1(a) and 1(d) of the LRA states that one of the purposes of the LRA is to give effect to the obligations incurred by South Africa as a member of the ILO and to fundamental labour rights as stated in section 23 of our Constitution.

Two court judgments stressed the importance of international law and ILO conventions: in *National Union of Metal Workers of South Africa and Others v. Bader Bop (Pty) Ltd. and Another* the CC said that the rights of minority trade unions to strike are based on the principles established in ILO conventions 87 and 98.[82] In *Parry v. Astral Operations Ltd.* the Labour Court (LC) stated that labour rights have been elevated to constitutional rights, and these rights are protected by and strengthened

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75 Constitution of the Republic of South Africa (Act No. 108 of 1996).

76 Labour Relations Act (Act No. 66 of 1995).

77 Basic Conditions of Employment Act (Act No. 75 of 1997).

78 Employment Equity Act (Act No. 55 of 1998).

79 Skills Development Act (Act No. 97 of 1998).

80 Unemployment Insurance Act (Act No. 63 of 2001).

81 In this regard special attention must be given to the conventions and recommendations of the ILO.

82 Judgment of the Constitutional Court of South Africa in *National Union of Metal Workers of South Africa and Others v. Bader Bop (Pty) Ltd. and Another* [2003] 2 B.L.L.R. 103 (CC).

through public policy and collective bargaining but within the limits allowed by the Constitution.[83]

A standard employment relationship entails that the employment is full-time and the employee has one employer that the employee works on the employer's premises, that the employment is ongoing and that an employment contract is in place.[84] South Africa's labour legislation does not draw any distinction between full-time employees, part-time employees, casual workers, foreign workers, level of seniority, male/female, etc.; once it is established that a person is an employee, that person is entitled to all protections in terms of all labour legislation; access to labour dispute bodies is the same for all employees; the definition of an employee in section 200A of the LRA and the Code of Good Practices ensures equal protection for vulnerable employees; the CCMA and our Labour Courts will assume that a person is an employee, the onus will be on the employer to proof otherwise; Labour legislation in SA does not make provision for training in International Labour Standards, however section 231(4) of Constitution states that it must be taken into consideration and is Law in SA.[85]

Only individuals who are employees can make use of the statutory dispute resolution mechanisms by referring disputes to the Labour Courts or the Commission for Conciliation, Mediation and Arbitration (CCMA). The fundamental labour rights contained in our Constitution and other Labour laws are only applicable to employees.[86] One would assume that foreign nationals that work in South Africa without a valid work permit will not be considered to be an employee in terms of labour legislation, the same would apply to sex workers or workers performing illegal work. Our courts have provided clarity in this regard with two very interesting judgments.

In *Discovery Health Ltd. v. Commission for Conciliation, Mediation and Arbitration and Others*, the applicant, Discovery Health, terminated the services of an employee without following any normal procedures after it was discovered that the employee was working without a valid work permit. The employee obtained an arbitration award in his favour for an unfair dismissal at the CCMA. The employer took the matter on review in the Labour Court claiming that as the employee was an illegal worker without the necessary work permit, they were not obliged to follow the standard dismissal procedures and were also not allowed to employ the employee. The Labour Court disagreed with the arguments of the applicant and stated that the LRA states that all employees are entitled not to be unfairly dismissed and the Constitution stated that everyone is entitled to fair labour practices. No distinction is drawn between different categories of employees. The moment the employee was employed

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83 Judgment of the Labour Court of South Africa in *Parry v. Astral Operations Ltd.* [2005] 10 B.L.L.R. 989 (LC).

84 Anthea van der Burg, *Going for Broke: A Case Study of Labour Brokerage on Fruit Farms in Grabouw* (Stellenbosch: Centre for Rural Legal Studies, 2008).

85 Shalina S. Naidoo, *A Critical Analysis of Temporary Employment Services in Terms of Current Legislation*, unpublished LLM thesis, University of KwaZulu-Natal (Pietermaritzburg, 2016).

86 *See* sec. 23 of Constitution of the Republic of South Africa.

a contract of employment was established which can only be terminated by following due process. Any person employed is entitled to fair labour practices.[87]

In May 2010 a Cape Town based sex worker, Kylie, who had been dismissed from a brothel for not performing her duties properly, won her case in the Labour Appeal Court (LAC). The LAC ruled that just because someone worked in an illegal profession, this does not mean that they have no rights under the LRA.[88] Interesting that the LAC could not order re-instatement as the worked performed by Kylie was illegal, she was entitled to compensation for an unfair dismissal. These two cases clearly illustrate that vulnerable employees are open to all different forms of exploitation and our courts have provided protection for them in terms of our Constitution and LRA.

The protection of employees against unfair labour practices is crucial for job security.[89] Many employers and businesses often argue that people in their "service" are not employees but independent contractors to avoid their obligations in terms of labour legislation. Different tests have been developed over the years to determine the actual employment status of individuals.[90]

The control test: The employer has control over the result of the employee's work and how it is done whereas an independent contractor will determine the what, when and how of his own work. This test has been rejected as the employer can no longer supervise and manage the entire spectrum of jobs in the ever-changing world of work. The organisation test: Does the individual form an integral part of the organisation? This has also been rejected by our courts as being too vague. The dominant impression test: Here the courts will weigh up various factors that point towards a contract of employment, which include factors like; only works for one entity, must provide work personally cannot delegate duties, who determines the working hours and who provides the tools to perform duties.

The South African legislation has enshrined a comprehensive definition of who is an employee.[91] The definition of an employee in both the LRA and the Basic Conditions of Employment Act (BCEA) are verbatim the same and can be summarised as follows:

If any one or more of the following factors are present, irrespective of the wording in the contract of an employment, that person will be an employee:[92] The manner in which the person works is subject to the control or direction of another person;

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87 Judgment of the Labour Court of South Africa in *Discovery Health Ltd. v. Commission for Conciliation, Mediation and Arbitration and Others*, [2008] 7 B.L.L.R. 633 (LC).

88 *Kylie v. Commission for Conciliation, Mediation and Arbitration and Others*, 2010 (10) B.C.L.R. 1029 (LAC).

89 Kola O. Odeku, *Labour Broking in South Africa: Issues, Challenges and Prospects*, 43(1) Journal of Social Sciences 19, 20 (2015).

90 *Labour Relations in South Africa* 14–15 (R. Venter & A. Levy (eds.), 5th ed., Oxford: Oxford University Press, 2015).

91 In this regard *see* sec. 213 of the LRA, sec. 83A of the BCEA and also sec. 200A of the LRA.

92 Sec. 200A of the LRA and sec. 83A of the BCEA.

the person's hours of work are subject to the control or direction of another person; In the case of a person who works for an organisation, the person forms part of that organisation; the person has worked for that other person for an average of at least 40 hours per month over the last three months; the person is economically dependent on the other person for whom he or she works or renders services; the person is provided with the tools of the trade or work equipment by the other person; the person only works for or renders services to one person.

The rise in casualization in South Africa is a result of employers attempts to avoid a standard employment relationship and the obligations incorporated into this relationship.[93] Business owners in South Africa have increasingly sought to "externalise" the traditional full-time, permanent, employer-employee relationship into a triangular labour broker connection.[94] The law provided mainly for the standard employment relationship without taking into account agency employees or some other non-standard employees. In most cases these employees were prejudiced as they did not have access to the right not to be unfairly dismissed or to be protected against unfair labour practices. Agency work or part – time work in South Africa falls under Temporary Employment Services (TES) and is regulated by the LRA. There has always been disputes regarding the TES employees; are they employed by the TES or by the client of TES and for how long can a person be employed on part-time basis. To understand the scenario in South Africa it is important to briefly provide a background of labour brokers/Temporary Employment Services.[95]

Almost 1.5 million people are employed via Labour Brokers/Temporary Employment Services (TES) in SA. TES employees are often paid less than the employees of the receiving company and their employment benefits are not the same. In general TES employees are open to abuse and have limited protection, the TES employees are in fact now vulnerable employees.

The trade union movement in South Africa have asked for a total ban of TES and have argued that all employees that are placed by a TES on the premises of a client are in fact employees of the client. The legislature has opted not to ban TES's but rather control and regulate them. In *Assign Services (Pty) Ltd. v. National Union of Metalworkers of South Africa and Others* the Constitutional Court have ruled that after three months of service the TES employees can no longer be considered as temporary placements and in fact becomes employees of the client.[96]

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93 Odeku 2015.

94 Stefan van Eck, *Temporary Employment Services (Labour Brokers) in South Africa and Namibia*, 13(2) Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad 107 (2010).

95 Paul A. Smit, Examples given to students during a lecture on 5 June 2019 regarding the amendments of the Labour Relations Act at North West University (Potchefstroom, South Africa, 2019).

96 *Assign Services (Pty) Ltd. v. National Union of Metalworkers of South Africa and Others*, [2018] Z.A.C.C. 22. The CC also stated that after three months of service the TES employees are not only employees of the client but become permanent employees of the client and are entitled to the same benefits as other employees. Provision has however been made for exceptions.

As we have stated before, the standard employment relationship is supposed to be full-time, with one employer, when the employee works on the employer's premises and an employment contract is concluded.[97] The addition of agency work/part time work in the triangular relationship does not equate to a standard employment relationship. The rights afforded to the standard employees were not available to the non-standard employees such as; the right not to be unfairly dismissed or not to be subjected to unfair labour practice;[98] the onus of the employer to prove that the dismissal was fair once the dismissal is established by an employee;[99] and the remedies (an order to the employer to re-instate the employee, to re-employ the employee or to pay compensation) available upon the establishment of an unfair dismissal or unfair labour practice.

It is important to note that South African High Court underlined in *Grobler v. Naspers Bpk* that the courts have a duty to protect and promote the dignity, rights and security of all in the workplace not only a select few.[100]

South African Labour legislation has taken cognisance of ILO Recommendation 198 to provide protection for non-standard employment and it is to a large extent in line with Article 7 of the ICESCR. The most important sections of ILO Recommendation 198 are sections 4–8. All these elements are reflected in the labour legislation.

Conclusion

Scholars once noted that BRICS members, unlike many countries in the developing world, have the expertise, and the political and economic capacity, to determine the orientation of their labour laws.[101] The review of the national regulations of non-standard employment in four BRICS countries demonstrates that these regulations are only partly in line with the international standards, the equal treatment of all workers is lacking in many aspects of employment relations. The general world trend in increasing the role of non-standard employment is relevant for all the countries considered in this paper.

The reasons for such a trend are mainly of two types: constructive[102] (for example, permitting to hire temporary agency workers for short term jobs and limiting the overall percent of such workers which permits enterprise to have the needed flexibility) and lobbied by business overall decrease of employment protection aimed

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97 Van der Burg 2008.

98 Sec. 185 of the LRA. The meaning of "dismissal" and "unfair labour practices" is set out in sec. 186 of the LRA.

99 Sec. 192 of the LRA.

100 *Grobler v. Naspers Bpk* (2004) 25 I.L.J. 439 (C).

101 Sean Cooney et al., *Building BRICS of Success?* in *Comparative Labour Law* 440 (M.W. Finkin & G. Mundlak (eds.), Cheltenham: Edward Elgar Publishing, 2015).

102 *See Non-Standard Employment Around the World*, *supra* note 1.

at reducing costs (for example, the exclusion of certain types of workers from the scope of protection in certain aspects, as in case of the part-time employees in China who do not enjoy the same rights as other workers in terms of dismissal protection). Or "pejotization" used in a forced way when contracting personal services, exercised by individuals, to disguise employment relations and lower costs in Brazil.

These two reasons of the "non-standardization" of the labour market are intertwined and the second one is often disguised to take the form of constructive appeal to the legislator and to convince the public opinion. The Doing Business Report[103] published in 2020, citing the then chief economist of the World Bank, Simeon Djankov and Rita Ramalho, point that flexible labour regulation provides workers with the opportunity to choose their jobs and working hours more freely, which in turn increases labour force participation.[104] This is a spread and dangerous assertion. In 2015 prof. Simon Deakin warned labour lawyers to be prepared "to question conventional wisdom on the supposed negative impact of worker protective norms and to query claims made over the desuetude of its core institutions, in particular the standard employment relationship."[105]

Indeed, even if the standard employment relationship, taking into account the rise of other forms of employment, has become a rather obsolete concept, protective norms and ensuring decent work for all are as actual as ever. Fundamental labour rights of all employees in all forms of employment should not be sacrificed following the rhetoric of jobs creation, formalization of labour market and of enhancing business management flexibility. We suppose that the constitutional review of employment law might be a way to delimit the boundaries for flexibility to safeguard the fundamental rights constraint upon it. The judgments of the South African and Russian Constitutional court referred to in this paper are the illustrations of this argument.

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