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Protection of Agency Workers in South Africa: An Appraisal of Compliance with ILO and EU Norms

by

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Declaration of Originality

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Abstract

This thesis is a policy-based study of the regulation of agency work in South Africa. It is set against the contextual background of a recent legislative overhaul and an increase in the number of precarious workers. The study aims to appraise the extent to which the South African regulatory framework complies with international norms in respect of agency work. The research considers how German and Namibian regulation might improve the current model of the regulation of agency work in South Africa.

The study identifies the purpose of labour law in South Africa as offering diversified rights as well as being economic in nature. The premise upon which the thesis is based is a social justice approach to the function of labour law. An analysis of ILO and EU regulations on agency work is conducted, and identifies a combined list of norms in respect of the protection of agency workers. South Africa's labour law policy approach is explored together with the amended regulation on agency work. A comparison is drawn with foreign countries' regulations and policy approaches: the appraisal identifies shortcomings in South Africa's regulatory model.

The study focuses on the evolutionary improvement of agency workers' protection based on international approaches. The research culminates by formulating an amended model for the regulation of agency work in South Africa, in which these proposed adaptations seek to remedy the shortcomings which were observed in the appraisal process.

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Table of Contents

Chapter 1
Introduction

Chapter 2
The Purpose of Labour Law

Chapter 3

The ILO Convention on Private Employment Agencies and the Decent Work Agenda

Chapter 4

The EU Directive on Temporary Agency Work and "Flexicurity"

Chapter 5

The South African Concept of "Regulated Flexibility"

Chapter 6

An Appraisal of the Protection of Agency Workers in South Africa

Chapter 7

Protection of Agency Workers: Comparison with Germany and Namibia

Chapter 8

Conclusion and Recommendations

Abbreviations

In respect of South Africa:

BCEA	Basic Conditions of Employment Act 75 of 1997
BCEAA of 2002	Basic Conditions of Employment Amendment Act 11 of 2002
BCEAA of 2013	Basic Conditions of Employment Amendment Act 20 of 2013
CCMA	Commission for Conciliation, Mediation and Arbitration
Constitution, 1996	Constitution of the Republic of South Africa, 1996
EEA	Employment Equity Act 55 of 1998
EEAA of 2013	Employment Equity Amendment Act 47 of 2013
ESA	Employment Services Act 4 of 2014
LAC	Labour Appeal Court
LRA	Labour Relations Act 66 of 1995 as amended
LRAA of 2002	Labour Relations Amendment Act 12 of 2002
LRAA of 2014	Labour Relations Amendment Act 6 of 2014
LRA Amendment Bill of 2010	Labour Relations Amendment Bill [B - 2010]
LRA Amendment Bill of 2012	Labour Relations Amendment Bill [B16A - 2012]
LRA Amendment Bill of 2013	Labour Relations Amendment Bill [B16B – 2012]
LRA Amendment Bill of 2014	Labour Relations Amendment Bill [B16 – 2012]
NEDLAC	National Economic Development and Labour Council
NDP 2030	National Development Plan 2030

In respect of Namibia:

NESA	Namibian Employment Services Act 8 of 2011
NLA of 1992	Namibian Labour Act 6 of 1992
NLA of 2004	Namibian Labour Act 15 of 2004
NLA of 2007	Namibian Labour Act 11 of 2007
NLAA of 2012	Namibian Labour Amendment Act 2 of 2012
NSC	Namibian Supreme Court

In respect of Germany:

ATAW	Act on Temporary Agency Work (*Arbeitnehmerüberlassungsgesetz*)
2003 amendments	First Act for Modern Services in the Labour Market (*Erstes Gesetz für moderne Dienstleistungen am Arbeitsmarkt*)
Proposed 2017 amendments	Proposed 2017 Amendment Bill (*Gesetzentwurf der Bundesregierung Entwurf eines Gesetzes zur Änderung des Arbeitnehmerüberlassungsgesetzes*)
FEO	Federal Employment Office

In respect of international instruments:

EU	European Union
Fee-Charging Employment Agencies Convention	ILO Fee-Charging Employment Agencies Convention, 1933 (No 4)
Fee-Charging Employment Agencies Convention, 1949	ILO Fee-Charging Employment Agencies Convention, 1949 (No 96)
ILO	International Labour Organisation

ILO Guide	ILO Guide to Private Employment Agencies 2007
Private Employment Agencies Convention	ILO Private Employment Agencies Convention, 1997 (No 181)
Private Employment Agencies Recommendation	ILO Private Employment Agencies Recommendation, 1997 (No 188)
SADC	Southern African Development Community
Temporary Agency Work Directive	EU Directive on Temporary Agency Work 2008/104/EC
Unemployment Convention	ILO Unemployment Convention, 1919 (No 2)
Unemployment Recommendation	ILO Unemployment Recommendation, 1919 (No 1)

Chapter 1
Introduction

> "[O]ver the past 10 years the role of TEAs has become an increasingly controversial and divisive issue in both the labour market and political debates. This policy process is as yet incomplete: the National Assembly has approved amendments to the Labour Relations Act, 1995 … which will significantly revise the framework for regulating TEAs."[1]

1. Introduction

South African law regulating agency work has recently been revised amidst heated debate between business and organised labour and the protracted policy process has resulted in a new approach towards the protection of agency workers.[2] The International Labour Organisation ("ILO") seeks to adopt a uniform approach regarding the setting of parameters for agency work. ILO instruments endeavour "to establish clear policies, legislation and [in] implementing mechanisms for the effective registration and licensing" of employment agencies on the basis that this

[1] Benjamin Sector Working Paper No. 292, International Labour Office Geneva (2013) 1. "TEAs" refer to temporary employment agencies in South Africa.
[2] The Labour Relations Amendment Act 6 of 2014 ("LRAA of 2014") and Employment Services Act 4 of 2014 ("ESA") have brought about particular changes regarding agency work. See Chapter 1 at 2.3 and Chapter 6.

aids agency work playing "a constructive role in contributing to a labour market free from exploitative conditions".[3] In considering the protection of agency workers under South Africa's amended legislation, a significant area for reflection is the study of whether the reforms align with international standards. To what extent is the South African regulatory framework in need of further adjustment?

In exploring this area, Chapter 1 highlights the importance and fascination of this study and explains the aims of the research and its position within the current field of knowledge. The chapter commences by providing contextual background pertaining to South Africa's high rate of unemployment, the prevalence of non-standard employment and the recent legislative overhaul which occurred in respect of agency work. This is followed by an exposition of the concept of "agency work" and related terms, a clarification of the research aims of the study and an explanation of the research methodology adopted. Delineations and limitations are described and, finally, a broad overview is provided of each of the chapters that form part of this thesis.

2. Contextual Background

2.1 Unemployment

South Africa has an obvious and concerning problem of a persistently high unemployment rate. Govindjee and Dupper explain the situation as follows:

> "South Africa's unemployment rate is one of the highest in the world, and significantly higher than those of other middle income economies. When using the narrow International Labour Organisation ('ILO') definition (which is the official definition in South Africa), South Africa's unemployment rate currently stands at 25%. If the broad definition of unemployment is used (which includes discouraged work seekers), the unemployment rate swells to 36.6%."[4]

[3] ILO Guide to Private Employment Agencies 2007 vii.
[4] Govindjee and Dupper *Stell LR* (2011) 775 refer to the fact that unemployment differs in South Africa depending on race, age, gender and geographic location.

After the transition to a majority democracy in 1994 the unemployment rate in South Africa rose from 22% to 25% in 2014,[5] which illustrates that tenaciously high unemployment rates are not a new challenge and that the problem worsens over time. It is also significant to note that unemployment has increased in respect of all race groups and at all levels of education.

The unemployment rate at the end of the fourth quarter in 2015 was 24.5%[6] and reached a startling 26.7% in the first quarter of 2016. The number of unemployed at 5.7 million is an increase of 10%.[7] In the second quarter of 2016 the unemployment rate remained a concern at 26.6%.[8]

Grogan and Gauntlett confirm that the recent "job shedding" in South Africa is increasingly topical due to challenging economic circumstances resulting in greater numbers of retrenchments,[9] as well as jobs lost due to terminations of various types. There is also the issue of jobseekers unable to find and secure jobs in the first place. In this regard, the authors make the point "[t]hat South Africa has one of the most sophisticated and costly dispute resolution schemes in the world [but this] will be of no consolation to those who can't get jobs, or have lost them with little or no hope of getting others".[10] In other words, protective labour laws provide no assistance to those who find themselves without employment.

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[5] Statistics SA "Employment, unemployment, skills and economic growth – An exploration of household survey evidence on skills development and unemployment between 1994 and 2014" available at http://www.statssa.gov.za/presentation/Stats%20SA%20presentation%20on%20skills%20and%20unemployment_16%20September.pdf at slide 29 accessed on 2 May 2016.

[6] Statistics SA Quarterly Labour Force Survey Quarter 4 2015 x - xii. The report covers labour market activity of persons in South Africa aged 15 to 64. In the report at iv it is stated that the working age population in the fourth quarter of 2015 was 36.3 million people, of whom 16 million people were employed, 5,2 million were unemployed, and 15,1 million people were economically inactive.

[7] http://www.tradingeconomics.com/south-africa/unemployment-rate accessed on 11 July 2016.

[8] Statistics SA second quarter results available at http://www.statssa.gov.za/?page_id=737&id=1 accessed on 22 August 2016.

[9] Grogan and Gauntlett *Emp LR* (2016) 32 2 list reasons for retrenchments as: economic growth having shrunk; a drop in exports due to falling demand from international trading partners; ballooning state expenditure; rising administered prices on businesses; flagging business confidence which deters the desire for capital investment; diminishing returns and increasing worries for international investors.

[10] As above. The authors suggest that the government should confront the economic problems that exist and come up with rational plans to fix them. For a discussion on the role of the courts in addressing unemployment and poverty, see Govindjee *Socio-Legal Review* (2012) 8 2 55. The author argues that respect for the role of the judiciary and proper enforcement of judgments could be part of the alleviation of unemployment, poverty and inequality facing South Africa.

The ILO has identified that emerging markets and economies recently have been worst hit in terms of rising unemployment.[11] The South African government recognises the urgent need for serious action to counter rising unemployment, but has failed to address the problem effectively. A poor education system and low productivity are cited by the government as reasons for the high unemployment rate.[12]

In a study of the protection of agency workers in South Africa, unemployment is an important contextual factor to bear in mind as any form of labour regulation should be sensitive to the urgent need to drastically to reduce the high unemployment rate. Furthermore, there is an argument to be made that agency work may enable the transition from unemployment into employment.[13]

2.2 Non-Standard Employment

Another significant factor to take into account is that forms of work and the composition of workforces increasingly over the past decades have become diversified.[14] Benjamin states that "the dominant trend has been the emergence of a wide variety of 'non-standard' and contingent forms of work".[15] Du Toit *et al* describe this phenomenon as follows:

> "[t]he traditional notion of 'employment', has been increasingly questioned in recent decades as a conceptual basis for the legal regulation of work. Workplaces and working relationships have been transformed as employers seek greater flexibility, *inter alia* by reducing their 'core activities' and employment commitments to a minimum. Indefinite, full-time and regular (or 'standard') employment has increasingly given way to new varieties of work."[16]

[11] http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_443500/lang--en/index.htm accessed on 2 May 2016.
[12] Department of Labour media statement http://www.labour.gov.za/DOL/media-desk/media-statements/2013/the-economy-is-not-creating-enough-jobs-job-opportunities-and-unemployment-report/?searchterm=unemployment accessed on 2 May 2016.
[13] The idea of such transition may have come from an influence of the European "flexicurity" labour market policy in which the European Expert Group on Flexicurity in 2007 drafted a list of "pathways", being different roads countries can take to improve their labour markets. One of the pathways concerns promoting upward transitions in the labour market of non-standard employment. For further detail see Bovenberg and Wilthagen *EJSS* (2008). Also see Chapter 4 at 3.3 and Chapter 7 at 4.
[14] Benjamin (2012) 24 states that this trend is present especially in developing countries in which significant numbers of workers are not protected by labour law because they work in the informal sector.
[15] As above.
[16] Du Toit *et al* (2015) 94 further state that this includes "flexitime, 'telework' and 'home-based', part-time and temporary employment as well as sub-contracting" and that this is "as employers try to

The new varieties of work include disguised employment through the use of bogus self-employment, outsourcing, fixed-term and part-time work, as well as agency work. Some of these working arrangements are not covered by labour legislation and therefore there is a risk to such workers that they are excluded from the rights usually afforded to employees.[17] This means such workers have a precarious nature to their working arrangements.[18] It has been recognised that some precarious workers are in dire need of legislative intervention in order to provide for some form of protection.

The latest amendments to labour legislation in South Africa that regulate these non-traditional types of work adopted the term "non-standard work" rather than "atypical work".[19] This is the term that will be used for the purposes of this thesis. In South Africa, three types of workers fall in this category of precarious workers: fixed-term employees, part-time employees and agency workers. The first category includes those employed on a contract of employment that terminates on the occurrence of a specified event, the completion of a specified task or project, or on a fixed date other than an employee's normal or agreed retirement age.[20] The second category is part-time employees, described as "an employee who is remunerated wholly or partly by reference to the time that the employee works and who works fewer hours than a

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manage time, space and people more effectively within the complex fluctuations of a global economy".

[17] Du Toit *et al* (2015) 101 discusses the phenomenon of outsourcing. Workers of one employer who are provided to another employer under a contract of service between the two employer-entities are excluded from the protections provided under labour legislation in South Africa. Similarly, workers who are disguised employees under the guise of self-employment acting as independent contractors are excluded from labour law protections in South Africa.

[18] See Kountoris *CLLPJ* (2012-2013) 22 for a discussion on the concept of "precarious work".

[19] Chapter IX of the Labour Relations Act 66 of 1995 ("LRA") as amended by the Labour Relations Amendment Act 6 of 2014 ("LRAA of 2014") refers to the "Regulation of Non-Standard Employment and General Provisions". In explaining the term "atypical work", Mills *ILJ* (2004) 1204 states that "[t]he term 'atypical' or 'marginal' is used to cover workers engaged in a variety of employment relationships which fall outside the traditional paradigm, including employment which is temporary or fixed-term, part-time, seasonal, casual, piece-rate or home-based, as well as self-employment and contract work. While labour legislation in most countries applies uniformly to all employees, in practice such legislation, premised on the traditional employment relationship, often makes little or no impact in terms of protecting atypical workers. They are rendered particularly vulnerable because of the tenuous nature of the employment relationship itself, or indeed the purported absence of an employment relationship altogether." Furthermore, at 1207 the author adds that "[a] key characteristic of contemporary labour markets worldwide is their significant fragmentation, with a consequent increase in employment patterns. This has resulted in an increase in atypical forms of employment falling outside the traditional paradigm of full-time employment of indefinite duration."

[20] s 198B(1) of LRA.

comparable full-time employee".[21] The third category is workers employed by employment agencies.[22]

Nowadays more and more employees work remotely from home offices, receiving instructions and submitting work online, not being physically present at an employer's workplace and working flexible hours.[23] Van Niekerk *et al* are concerned that the standard contract of employment is no longer the primary means through which work is performed and they describe this situation as one of the "contemporary challenge[s]" to labour law,[24] because the discipline of labour law was originally conceptualised for a more traditional form of employment: an indefinite contract of employment between an employer and a full-time employee who was engaged in his or her work at the employer's workplace where the employer had control over the employee's work.[25]

A likely cause for the increase in the number of non-standard workers is businesses which structure their affairs so as to escape the obligations of employers in terms of labour laws.[26] Employer obligations can be time-consuming and costly. Accurate data regarding the exact number of workers who fall in the category of non-standard employment in South Africa is not readily available.[27] However, surveys confirm that

[21] s 198C(1) of LRA.
[22] s 198 and 198A of LRA. See Chapter 1 at 3 for a discussion on the meaning of such type of work and workers.
[23] Van Niekerk *et al* (2015) 4.
[24] Van Niekerk *et al* (2015) 4.
[25] Van Niekerk *et al* (2015) 4 – 5 describe the development of non-standard forms of employment as a type of crisis for labour law. See Chapter 2 for a discussion on the purpose of labour law. Also, see Langille (2006) 27 where the author points out that the "real world of the labour market has moved on" and there is a "chasm" which exists between the narrative of labour law and reality.
[26] Benjamin *et al* Regulatory Impact Assessment 2010 available at http://www.labour.gov.za/DOL/downloads/documents/useful-documents/labour-relations/RIA13Sept2010.pdf accessed on 22 August 2016 at 14 states that one of the reasons for the rise in non-standard work is that "there are also many documented examples of the use of atypical employment relationships to minimise or avoid employer obligations under labour legislation, and/or to lower wage bills and benefit entitlements."
[27] Theron ILO Working Paper 302 2014 at vii states that "[d]ata about non-standard employment is notoriously difficult to come by, for a number of reasons. Firstly, non-standard employment is not a precise concept, and there is no generally accepted definition of non-standard employment. In particular, the extent to which externalisation gives rise to non-standard employment arrangements is poorly understood, and contested. Secondly, the primary source of data about employment has historically been collected by means of the Quarterly Labour Force Survey (QLFS), a household survey, and is aggregated per sector. However one of the consequences of externalisation is to erode the coherence of the concept of a sector to describe the nature of an economic activity. Accordingly, it is sometimes unclear in terms of which sector employment in non-standard arrangements should be captured". The author adds a third reason for the difficulty being that employers generally do not see

since the advent of democracy in the mid-1990s there has been an increase in the number of workers engaged in non-standard employment.[28] It is estimated that by June 2014, agency work accounted for 25.4% of temporary employment.[29] In 2014 Bhorat *et al* confirmed even though it is difficult to obtain exact figures in South Africa, it is possible to "capture" this category of workers by means of a "statistically circuitous and complicated manner."[30]

The authors contend that in 2014 there were 784 434 agency workers in the country, more than half of whom were employed in the services and retail sectors.[31] Using the finance sector as an example, in 1996 26.64% of the workforce was agency workers, whereas in 2014 47.36% of the workforce was employed through an employment agency.[32] Despite the difficulty in locating accurate information, available data confirms there has been an alarming increase in the number of non-standard workers in South Africa.

This increase of the prevalence of non-standard work highlights the growing relevance and need for effective regulation for the protection of agency workers and is indicative of the necessity for research on non-standard forms of employment in South Africa.

2.3 Legislative Overhaul

A third factor which is of significance to this study is that South African labour laws recently were overhauled. An important reason for the amendments was to improve the protection of non-standard employees. Amongst others, the Labour Relations

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the importance in disclosing the number of employees employed through such work arrangements. A fourth reason provided by the author is that such data comprises a "spectrum" of work, from work which fulfils the objectives of decent work and is akin to standard employment, to work which does not. The author stresses the point that there is a need for fuller disclosure and for this data.

[28] Benjamin *et al* Regulatory Impact Assessment 2010 at 13, available at http://www.labour.gov.za/DOL/downloads/documents/useful-documents/labour-relations/RIA13Sept2010.pdf accessed on 22 August 2016, the authors state that there has been an increase between 2000 and 2010 from 1,55 million to 3,89 million non-standard employees.

[29] Adcorp Employment Index June 2014 available at http://www.adcorp.co.za/Pages/Industry/Empowerment%20Index/AEIJune2014.aspx accessed on 22 August 2016.

[30] Bhorat *et al* (2014) 1 paper available at https://c.ymcdn.com/sites/apso.site-ym.com/resource/collection/29077DB2-7AAF-4A81-A57C-149DE8A7FEF6/TES_in_South_Africa_-_(Full_Report)Assessing_the_Industry's_Economic_Impact.pdf accessed on 4 May 2016.

[31] As above at 3.

[32] As above at 12.

Amendment Act 6 of 2014 ("LRAA of 2014")[33] and the Employment Services Act 4 of 2014 ("ESA")[34] were promulgated specifically to address unresolved issues pertaining to agency workers.[35]

Intense negotiation preceded the various drafts of the Bills which were first published in the Government Gazette in December 2010.[36] In describing the process, especially in terms of the regulation of employment agencies, Benjamin explains that:

> "[t]he publication of these Bills was accompanied by a Regulatory Impact Assessment ('RIA') which had been requested by the cabinet as a result of controversies over the approach adopted. The Bill was opposed by organised employers as well as trade unions and was withdrawn in early 2011. A fresh policy process to review labour legislation commenced at NEDLAC in mid-2011 and draft legislation was submitted to Parliament in early 2012. This process culminated in significant changes to the law dealing with non-standard employment that came into effect on 1 January 2015."[37]

It is important to identify what the legislature sought to achieve through changing the scheme of labour law regulation, which is partly answered in the Department of Labour's mandate and the words of the 2009 African National Congress election manifesto. In a Budget Vote Address to the National Assembly in May 2013,[38] the Speaker of the House highlighted that the government's mandate directs it to regulate the labour market through policies and programmes which are aimed at:

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[33] LRAA of 2014. For discussions of the content of the changes see Benjamin *et al* Regulatory Impact Assessment (2010) Chapter 1 and Annexure 1 available at http://www.labour.gov.za/DOL/downloads/documents/useful-documents/labour-relations/RIA13Sept2010.pdf accessed on 10 May 2016; Le Roux *Contemporary Labour Law* (2012) 91; Bosch *ILJ* (2013) 1631; Grogan *Emp Law* (2013) 4 - 9; Van Eck *De Jure* (2013) 600; and Benjamin *ILJ* (2016) 28.

[34] Employment Services Act 4 of 2014. For discussion on the content of the changes see Benjamin *et al* Regulatory Impact Assessment (2010) Chapter 4 available at http://www.labour.gov.za/DOL/downloads/documents/useful-documents/labour-relations/RIA13Sept2010.pdf accessed on 10 May 2016.

[35] Other legislative amendments included the Basic Conditions of Employment Act 20 of 2013 ("BCEAA") and the Employment Equity Amendment Act 47 of 2013 ("EEAA").

[36] No 33873, 17 December 2010, Notice 1112 of 2010.

[37] Benjamin *ILJ* (2016) 32 – 33.

[38] Budget vote Address by National Assembly in May 2013 available at http://www.labour.gov.za/DOL/media-desk/media-statements/2013/labour-minister-mildred-oliphant-to-table-budget-vote-speech-under-the-theme-201cworking-towards-a-peaceful-environment-in-labour-relations-and-collective-bargaining201d accessed on 10 May 2016.

> "improved economic efficiency and productivity; employment creation; sound labour relations; eliminating inequality and discrimination in the workplace; alleviating poverty in employment; enhancing occupational health and safety awareness and compliance in the workplace; as well as nurturing the culture of acceptance that worker rights are human rights".[39]

During the same Budget Vote Address, the Speaker further stated that:

> "[t]his is in keeping with the promises made in the African National Congress election manifesto in 2009 which promised that 'In order to avoid exploitation of workers and ensure decent work for all workers as well as to protect the employment relationship, [we will] introduce laws to regulate contract work, subcontracting and out-sourcing, address the problem of labour broking and prohibit certain abusive practices.'"[40]

The government's aims in respect of the legislative overhaul can also be ascertained from the Memorandum of Objects in respect of the LRAA of 2014. The anticipated changes were proposed to address "informalisation" of labour and to ensure that "vulnerable categories of workers receive adequate protection and are employed in conditions of decent work".[41]

These reasons for reform signify that there were unresolved issues in the previous legislative framework which needed correction. The discussions which occurred prior to the amendments provide insight into prevailing government policy in respect of the protection of agency workers.

3. Concept of "Agency Work" and Other Definitions

It is important for the purpose of this research that particular concepts be clarified at the outset.[42] The focus of this thesis is "agency work", which consists of a triangular relationship involving three different parties. Before this term is defined, the three

[39] As above.
[40] As above.
[41] Memorandum of Objects to the Labour Relations Amendment Bill 2012 1. The other issues mentioned include: adjustments to the law to ensure compliance with international labour standards; ensuring that the labour law gives effect to Constitutional rights; to enhance the effectiveness of certain labour market institutions; and rectifying anomalies and uncertainties in interpretation and application of the labour law in the past decade.
[42] See Chapter 6 at 2.1 and 2.2. The history of the regulation of agency work in South Africa as well as the corresponding meanings, historically, of concepts discussed below, will be found in Chapter 6 of this thesis.

parties making up the triangular relationship of agency work need to be identified: namely, the "employment agency", the "client" and the "agency worker".

The term "employment agency" refers to an entity, whether a natural person or a legal person, which for reward procures for or provides to a client other persons who perform work for the client and who are remunerated by the aforementioned entity.[43] This thesis deals with employment agencies as opposed to "placement agencies" or "recruitment agencies" which merely place a worker with a company for a fee. In South Africa, the LRA refers to an employment agency as a "temporary employment service" or a "TES".[44] The ILO makes use of the term "private employment agency"[45] and the European Union ("EU") refers to a "temporary employment agency".[46] This thesis utilises the term "employment agency" irrespective of whether ILO or EU norms are being discussed.

For the purposes of this research the term "client" is used to refer to a person or entity which receives agency workers from an employment agency for the purpose of work to be conducted for the client. This meaning is derived from the definition of a "temporary employment service" in South African legislation where it is mentioned that placements are made with a "client".[47] The ILO has adopted the term "user enterprise" when referring to a client but does not provide a specific definition for this concept.[48] The Temporary Agency Work Directive refers to "user undertaking" and defines this as "any natural or legal person for whom and under the supervision and direction of whom a temporary agency worker works temporarily".[49]

[43] This meaning is derived from the definition of "temporary employment service" in terms of s 198(1)(a) of the LRA.
[44] s 198 of the LRA.
[45] ILO Private Employment Agencies Convention, 1997 (No 181) ("Private Employment Agencies Convention") and the ILO Private Employment Agencies Recommendation, 1997 (No 188) ("Private Employment Agencies Recommendation").
[46] Article 3(1)(b) of the EU Directive on Temporary Agency Work 2008/104/EC ("Temporary Agency Work Directive") defines a "temporary work agency" as "any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction".
[47] s 198(1)(a) of the LRA.
[48] Article 1 of the Private Employment Agencies Convention refers to the term "user enterprise".
[49] Article 3(1)(d) of the Temporary Agency Work Directive.

In this research the term "agency worker" is used to refer to the person who is placed by an employment agency to work at a client. In South Africa, legislation dictates that the agency worker is an employee of the employment agency and the employment agency is the employer.[50] However, as discussed further in the study, it will be explained that under certain circumstances the client becomes the employer.[51]

In terms of ILO standards the term "worker" includes a "jobseeker".[52] In this thesis, however, the term "agency worker" does not include jobseekers unless expressly otherwise mentioned. In the Temporary Agency Work Directive the term "temporary agency worker" does not include a jobseeker and is defined as "a worker with a contract of employment or an employment relationship with a temporary-work agency with a view to being assigned to a user undertaking to work temporarily under its supervision and direction".[53]

Having offered the abovementioned meanings of the three parties, the concept of "agency work" follows. In South Africa[54] agency work refers to the situation in which an agency, for reward, procures for or provides to a client other persons who perform work for the client and who are remunerated by the employment agency.[55] Agency work is often referred to as "labour broking"[56] or "temporary employment services".[57] Agency work, in terms of the definition of the ILO,[58] is a broad concept which encompasses three different types of agencies, namely, an employment agency as per the South African definition, a placement or recruitment agency and an agency involved in all other services related to job-seeking.[59] Placement or recruitment

[50] s 198(2) of the LRA.
[51] s 198A(3) of the LRA. See the detailed discussion in Chapter 6 at 3.2. There are divergent opinions regarding the interpretation of provisions covering this aspect, which has led to current uncertainty regarding whether one or two employment relationships exist.
[52] Article 2 of the Private Employment Agencies Convention states that "[f]or the purpose of this Convention, the term workers includes jobseekers."
[53] Article 3(1)(c) of the Temporary Agency Work Directive.
[54] See Chapter 6 at 3.2.
[55] s 198(1)(a) of the LRA.
[56] Labour Relations Amendment Act 3 of 1983.
[57] The LRA makes use of this term, which is often abbreviated to "TES".
[58] See Chapter 3 at 3.3.
[59] Article 1 of the Private Employment Agencies Convention states that "[f]or the purpose of this Convention the term private employment agency means any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services:
(a) services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom;

agencies and agencies involved in all other services related to job-seeking are not included in the meaning of agency work for the purpose of this thesis unless expressly otherwise mentioned.

The Temporary Agency Work Directive does not define the meaning of agency work[60] but the meaning can be deduced from other definitions provided in the instrument, including the definition of an "assignment" as "the period during which the temporary agency worker is placed at the user undertaking to work temporarily under its supervision and direction".[61]

In Namibia[62] "agency work" includes other "labour market services", such as services for matching offers and applications for employment without the agency becoming a party to the employment relationship. It also covers services related to job-seeking such as providing information.[63] These additional meanings are not included in the meaning of agency work in this thesis. Agency work in terms of the German[64] definition, in essence, is the same as in South Africa, but is extended to include occasional hiring-out and situations where the agency worker is not employed.[65] These extensions are not included in the meaning of agency work for purposes of this study.

(b) services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person (referred below as a "user enterprise") which assigns their tasks and supervises the execution of these tasks;
(c) other services related to jobseeking, determined by the competent authority after consulting the most representative employers' and workers' organizations, such as the provision of information that do not set out to match specific offers of and applications for employment." Importantly, there is a distinction made between private and public employment agencies. Though the Private Employment Agencies Convention applies to private employment agencies, Article 13(1) does make reference to co-operation between private and public employment agencies in stating that "[a] Member shall, in accordance with national law and practice and after consulting the most representative organizations of employers and workers, formulate, establish and periodically review conditions to promote cooperation between the public employment service and private employment agencies."

[60] See Chapter 4 at 2.2.

[61] Article 3(1)(e) of the Temporary Agency Work Directive.

[62] See Chapter 7 at 3.

[63] s 1 of the Employment Service Act 8 of 2011. In Namibia, according to s 128(2) of the Labour Act 11 of 2007 the client is the employer party and not the employment agency. See the discussion in Chapter 7 at 3.2.3.

[64] See Chapter 7 at 2. In Germany, a labour amendment is scheduled to take effect from 1 January 2017 which will transfer the employer party from the employment agency to the client after 18 months.

[65] Weiss *BCLR* (2013) 120.

4. Research Aims and Question of the Study

The research aims of this thesis are to:

- highlight the characteristics pertaining to ILO and EU labour policy that underlie agency work;
- identify key norms that emanate from ILO and EU instruments pertaining to the regulation of agency work;[66]
- examine the regulatory models regarding agency work in Germany and Namibia;[67] and
- appraise the extent to which the South African regulatory framework complies with the international standards.[68]

The ultimate research question is whether, and how, South Africa should adapt its model regarding the regulation of agency work and the protection of agency workers. Before addressing these aims and the question, the thesis explores the role and function of labour law. It should be noted that although the study is entitled "Protection of Agency Workers in South Africa: An Appraisal of Compliance with ILO and EU Norms", it also entails the development of recommendations for an improved model for South Africa's agency workers.

5. Significance of the Study

It is submitted that the research forming the basis of this thesis is significant in terms of the timing of the research due to the extent and growth of precarious work. The research conducted for this thesis spans the past three years, during which time South African labour legislation and particularly the regulation in respect of agency work has been reformed.[69] The amendments in respect of agency work are particularly proactive and aroused much debate amongst stakeholders and attracted much media attention.[70]

[66] See Chapter 3 for the identification of ILO norms. See Chapter 4 for the identification of EU norms.
[67] See Chapter 7 for a comparative study of the regulation of agency work in Germany and Namibia.
[68] See Chapter 6 for the appraisal of South African law against international norms.
[69] The LRAA of 2014 became effective as from 1 January 2015.
[70] Benjamin Sector Working Paper No. 292, International Labour Office Geneva (2013) 1 states that the regulation of agency work in South Africa has been a "high-profile issue" for the past decade.

Furthermore, there has been a significant rise in the number of precarious workers, which elevates the urgency in terms of which their protection must be considered.[71] It is submitted, therefore, that it is apt to consider the protection of agency workers and to determine to what extent South African labour law is compliant with international norms.

In terms of recommendations the research process will seek to identify deficiencies in South Africa's policy of regulation of agency work in comparison with ILO and EU standards. It is submitted that the recommendations for increased compliance with international norms can assist the South African legislators and policymakers in elevating the law to attain world-class regulation and the protection of agency workers.

6. Research Methodology

The core of this study is based on a doctrinal analysis in so far as, in essence, it is concerned with the law as it is found in statutes, international conventions and recommendations and directives, foreign countries' legislation, court decisions relating to agency work, and proposed amendment bills. In this regard, other disciplines, such as the law of contract and social security law, have not been considered or applied as part of this study.

However, cognizance is taken of differing perspectives on the purpose of labour law, which are based on the libertarian and the social justice approaches.[72] In this thesis, despite its doctrinal nature, it is recognised that the policy approach of the architects of the law influences the written content of legislative instruments.[73] The emphasis is on understanding historical approaches and policy developments and changes. It is

[71] See Chapter 1 at 2.2.
[72] See Chapter 2 at 3.2 for a discussion of the free-market libertarian perspective and at 3.3 for a discussion of the social justice perspective on the purpose of labour law.
[73] This is evident in the Regulatory Impact Assessment 2010 conducted during the legislative reform process. Benjamin *et al* Regulatory Impact Assessment 2010 at 17, available at http://www.labour.gov.za/DOL/downloads/documents/useful-documents/labour-relations/RIA13Sept2010.pdf accessed on 23 August 2016, indicates how government policy is formed to address particular problems. This policy was the basis for specific amendments regarding the regulation of non-standard employment: government policy therefore has a direct effect on the legislation which is drafted.

recognised that contextual factors, such as a high unemployment rate, influence the purpose of legislation and change the way the legislator fashions the law.

This analysis traverses a study of laws and literature dealing with the regulation of agency work by the ILO and the EU,[74] from which it distils the underlying principles and overarching features of the laws which regulate agency work. Once identified, these are used in a comparative doctrinal manner.

This thesis undertakes a comparative study of the laws and literature relating to agency work in South Africa, Germany and Namibia[75] all of which have recently experienced changes in their regulation of agency work. South Africa and Namibia are both members of the Southern African Development Community ("SADC").[76] The comparison highlights deficiencies in the South African regulations. Furthermore, it provides guidance and improvements relating to a proposed amended model for South Africa.

7. Delineations and Limitations

The focus of this research is on the regulation and protection of agency workers. A number of aspects are specifically excluded from this study. The research falls within the field of labour law and excludes related fields such as social security law.[77] Van

[74] See Chapter 3 for a discussion regarding the regulation of agency work by the ILO. See Chapter 4 for a discussion on the regulation of agency work by the EU.
[75] See Chapter 7 at 2 for a full explanation of the choice of Germany as a country to compare South Africa with and for a discussion regarding its regulation of agency work. See Chapter 7 at 3 for the justification of the choice of Namibia as a country to compare South Africa with and for a discussion of the regulation of agency work in Namibia.
[76] SADC was formed in 1992 and has a purpose of integration of economic development. The Community consists of 15 member states. The SADC was founded by the Southern African Development Community Treaty, 1992. In 2003 the SADC entered into the Charter of the Fundamental Social Rights of the SADC which covers labour and employment in the region. These instruments unfortunately do not contain anything directly on the regulation of agency work. However, Article 5 of the Charter provides that member states are to take action to ratify and implement relevant ILO instruments. Accordingly, ILO regulations have to be given effect to. Available at www.sadc.int accessed on 3 June 2016.
[77] The South African Department of Social Development, in its White Paper for Social Welfare 1997 at Chapter 7 available at http://www.dsd.gov.za/index.php?option=com_docman&task=cat_view&gid=30&limit=10&limitstart=0&order=name&dir=DESC&Itemid=39 accessed on 23 August 2016, has expressed that "[s]ocial security covers a wide variety of public and private measures that provide cash or in-kind benefits or both, first, in the event of an individual's earning power permanently ceasing, being interrupted, never developing, or being exercised only at unacceptable social cost and such person being unable to

Niekerk *et al* explain that "labour law" refers to the "world of work and people's engagement in it".[78]

The three categories of non-standard employment in South Africa are fixed-term employment, part-time employment and agency work.[79] Whilst all three categories include work of a more precarious nature, the last category is the focus of this thesis. Triangular relationships are at the core of this research but, it must be noted, the phenomenon of outsourcing is not covered by this enquiry,[80] or placement agencies and independent contractors.[81] Furthermore, this thesis explores only two main

avoid poverty and secondly, in order to maintain children. The domains of social security are: poverty prevention, poverty alleviation, social compensation and income distribution."

[78] Van Niekerk *et al* (2015) 3. In a similar fashion, Smit *TSAR* (2010) 1 mentions that labour law is "an area of law concerned with vague and often contentious issues such as fairness, social justice and industrial democracy. It is an area of law that almost always involves contractual rights, bargaining rights and imposed standards." Despite the seemingly vague boundaries of the subject of labour law, the subject has been defined as a specific and separate field of law. Langille (2006) 16 – 17 aptly states that what justifies labour law as a separate category of law is that there is a benefit to be obtained in carving reality. He goes on to explain that "there is a package here which needs to be seen and understood as a package." He further describes, if there is a constituting narrative which is available and compelling, then there is a viable subject matter. The author believes that labour law has such constituting narrative.

[79] s 198 and s 198A of the LRA covers employment agencies. s 198B of the LRA deals with fixed-term employment and s 198C of the LRA regulates part-time employment. See Chapter 1 at 2.2 for a discussion on the increase in non-standard employment and the legislative amendments in South Africa regarding these three types of precarious workers.

[80] See Du Toit *et al* (2015) 101 – 102 for a discussion on outsourcing and disguised employment arrangements.

[81] For a discussion on employees versus independent contractors see Du Toit *et al* (2015) 90 – 94 and Grogan (2014) 16 – 17. Grogan states that "[s]tatutory definitions do not resolve the problem. 'Employee' is defined in the BCEA and LRA as:

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

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

This definition raises as many questions as those raised by the common-law definition. The civil courts have often struggled with the problem of distinguishing between 'independent contractors' and persons who are 'entitled to receive remuneration' or someone who 'assists in conducting the business of an employer'. When doing so, they have generally focused on paragraph *(a)* of the definition, and have sought to distinguish between employees proper and 'independent contractors'. However, as the courts have lately stressed, paragraph *(b)* is of no less importance, and obviously expands the definition considerably. The legislature has attempted to assist the courts with a deeming provision, to be found in s 83A of the BCEA as amended and s 200A of the LRA as amended. These sections create a presumption that, regardless of the form of the contract, a person who earns below a certain amount is an employee if that person is 'subject to the control or direction of another person' or forms part of the employer's organisation, or who has worked for the other person for an average of at least 40 hours per month for the past three months, or is economically dependent on the other person, or works for only one person, or if the other person provides the tools of the trade."

theories relating to the purpose of labour law, namely, the libertarian[82] and social justice perspectives.[83]

In the discussion of the ILO and EU regulations instruments pertaining only to the subject matter of the research are covered and other instruments are purposefully excluded.[84] ILO and EU structures and processes of law-making and monitoring and enforcement are not described in any detail and are referred to briefly where they are useful or necessary.

In the instance where regulation in Germany and Namibia is discussed, the law which is relevant to the subject matter only will be covered.[85] The history of the regulation of agency work in both countries is purposefully provided in a non-detailed manner. The legislative processes, government structures, court structures and enforcement procedures in Germany and Namibia also are not covered in detail.

Relevant literature available up until 1 August 2016 has been included in this thesis and includes court decisions, legislation, books and academic articles. More recent materials have not been worked into the research.

8. Overview of the Chapters in the Study

This chapter is followed by Chapter 2, entitled “The Purpose of Labour Law” which introduces the purpose of labour law by examining the eras of the period of collective *Laissez Faire,* the economic era, and the modern era. Competing perspectives on

[82] See Chapter 2 at 3.2.
[83] See Chapter 2 at 3.3. Other theories are referred to by Benjamin (2012) 24 – 26. Klare’s theory is that there are four purposes of labour law being: (a) promoting allocative and productive efficiency and economic growth, (b) macroeconomic management, (c) establishing and protecting fundamental rights, (d) redistributing wealth and power. For further detail see Klare (2000) 68. Furthermore, Benjamin describes Langille as believing the purpose to be the development of human capital. Whilst Collins is described as finding that labour law can be used to create a framework to support competitive enterprises. Rogowski in Rogowski (2013) advocates for “reflexive labour law” which is meant to account for labour law in the modern society.
[84] The instruments focused on are the Private Employment Agencies Convention and the Private Employment Agencies Recommendation, as well as the Temporary Agency Work Directive. Instruments which do not form part of the study are the ILO Part-Time Work Convention, 1994 (No 175) and the ILO Termination of Employment Convention, 1982 (No 158), as well as the EU Directive on Fixed-Term Work 1999/70/EC and the EU Directive on Part-Time Work 1997/81/EC.
[85] See Chapter 7 at 2.2.4 for a discussion on the current regulation of agency work in Germany. Furthermore, for a discussion on agency work in Namibia, see Chapter 7 at 3.2.2.

the purpose of labour law are explored: the free-market libertarian perspective where the goal is an economic one in terms of which freedom of contract is an important doctrine[86] and the social justice perspective[87] where social justice is the goal and protection of employees is valued over freedom of contract. The function of labour law in South Africa can be described as one of diversified rights with some economic elements to it.[88]

In Chapter 3, under the heading "The ILO Convention on Private Employment Agencies and the Decent Work Agenda", the focus is on the relevance of international standards. ILO standards pertaining to agency work are analysed by dealing first with early conventions and recommendations and then the current instruments.[89] The challenges faced by the ILO are considered[90] in order to clarify the ILO's responses and which reflect a shift in the ILO's policy.[91] The chapter culminates in a distillation of particular norms of ILO policy.

The Temporary Agency Work Directive is examined in Chapter 4, under the heading "The EU Directive on Temporary Agency Work and 'Flexicurity'". The role and function of the EU is considered, before exploring the contents of the Temporary Agency Work Directive[92] and comparing the contents of the Private Employment Agencies Convention and the Temporary Agency Work Directive.[93] The underlying policy at EU level is investigated. The chapter explores the history of EU policy as it leads to the development of the policy of "flexicurity",[94] it analyses different definitions and understandings of the policy and lays out the development of the flexicurity approach.[95] It provides pathways to flexicurity[96] and evaluates the policy of

[86] See Chapter 2 at 3.2.
[87] See Chapter 2 at 3.3.
[88] See Chapter 2 at 4.3.
[89] See Chapter 3 at 3.1 to 3.4.
[90] See Chapter 3 at 4.2. These include the issue of whether the organisation and the instruments are of relevance, globalisation, universality, interpretational difficulties, drafting style, and a lack of enforcement mechanisms.
[91] See Chapter 3 at 5.
[92] See Chapter 4 at 2.1 and 2.2.
[93] See Chapter 4 at 2.3.
[94] See Chapter 4 at 3.1.
[95] See Chapter 4 at 3.2.
[96] See Chapter 4 at 3.3.

flexicurity.[97] Thereafter, it explores the question regarding which policy may develop after the flexicurity policy in the EU.[98] Particular norms of the EU policy are distilled.

Chapter 5 discusses South Africa's labour market policy of "regulated flexibility" under the heading "The South African Concept of 'Regulated Flexibility'". By considering different eras of change, the chapter traverses South African policy development[99] and explores the meaning of regulated flexibility by identifying competing interests and seeking a conceptual framework of the policy.[100] The policy in South Africa is then analysed by considering the mechanisms which give effect to the policy. This includes collective bargaining, additional protection for lower-income earners and additional flexibility for smaller undertakings.[101] Thereafter, the future of labour law policy in South Africa is discussed.[102]

Chapter 6 entitled "An Appraisal of Agency Workers in South Africa", is concerned with the regulation of agency work in South Africa and traverses the changes in respect of the regulation of agency work in South Africa.[103] The chapter provides background and sets out the amendments to the legislation in South Africa.[104] It analyses early case law following the legislative changes which reflect potential issues arising from the amendments.[105] The chapter considers whether and to what extent the amendments have addressed previous shortcomings in South Africa's regulation of agency work. South Africa's current regulation is appraised against a combined list of international norms distilled in earlier chapters from ILO and EU regulations.[106]

Chapter 7 is entitled "Protection of Agency Workers: Comparison with Germany and Namibia". The reasoning behind the selection of these countries is explained. The discussion of Germany includes a brief history and an analysis of current regulation,

[97] See Chapter 4 at 3.4.
[98] See Chapter 4 at 3.5.
[99] See Chapter 5 at 2.1 – 2.4.
[100] See Chapter 5 at 3.1 – 3.3.
[101] See Chapter 5 at 3.3.1 – 3.3.5.
[102] See Chapter 5 at 4.
[103] See Chapter 6 at 2.
[104] See Chapter 6 at 3.
[105] See Chapter 6 at 4.
[106] See Chapter 6 at 5.

and the anticipated amendments to be in effect from the beginning of 2017.[107] The chapter considers labour market policy in Germany and compares the German regulation and international norms identified in earlier chapters.[108] Significantly, a comparative study of German and South African regulation is undertaken which identifies guidance for South Africa. The history of the regulation of agency work in Namibia is explored showing the policy changes over time[109] in order to study labour market policy in Namibia and compare Namibian regulation with the identified international norms.[110] Significantly, a comparative study of Namibia's and South Africa's legislation provides guidance for South Africa.

Finally, in Chapter 8, under the heading "Conclusion and Recommendations", outcomes are reached in respect of the research question, whether and how South Africa should adapt its model regarding the regulation of agency work and the protection of agency workers. Guidance and improvements which South Africa's policymakers and the legislature can gain from the study are identified. The research in this thesis culminates in recommendations for an adapted model for the regulation of agency work in South Africa.

[107] See Chapter 7 at 2.1.
[108] See Chapter 7 at 2.2 to 2.4.
[109] See Chapter 7 at 3.1.
[110] See Chapter 7 at 3.2 to 3.4.

Chapter 2
The Purpose of Labour Law

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1. Introduction

As stated in Chapter 1 the aims of this thesis are to consider the underlying policy considerations which influence the protection of agency workers in South Africa and to appraise whether the current regulation and recent legislative amendments in respect of this vulnerable group of employees comply with international norms.

Before considering the international norms in respect of the protection of agency workers in Chapters 3 and 4, this chapter reflects upon the general purpose of labour law. Labour law scholars propose various theories regarding the aim of labour law[111] which, in turn, have influenced the development of vastly different sets of labour policies that give rise to legislation which reflects the policy-makers' conviction regarding the regulation of employment relationships. Therefore, Chapter 2 aims to facilitate a deeper understanding of the goals of labour law and their influence on the underlying policies and legislation which determines the level of protection afforded to agency workers.

Expressed differently, a discussion on the role of labour law is relevant to the appraisal of South Africa's regulation of agency work. The reason for this is that the approach to the function of labour law impacts government policy and the legislation which is crafted. This in turn has a direct influence on the protection and rights provided to agency workers.

This chapter traverses the main historical perspectives of the purpose of labour law which was strongly influenced by the work of Kahn-Freund. Secondly, it considers two broad competing outlooks which emerged in the late 1970s and 1980s, namely, the social justice and the libertarian perspectives.[112] Thirdly, the chapter reflects upon the current South African approach to the purpose of labour law and then draws a number of conclusions.

Apart from the perspectives covered in this chapter there are other theories pertaining to the role and function of labour law.[113] However, for the sake of brevity

[111] See Chapter 2 at 3.1.
[112] Davies (2009) 20 summarises the developments which took place in the 1960s and 1970s during which time economic considerations became increasingly important. These led to governments in the 1980s relying heavily on economic considerations, and in so doing, allowing for the idea of a "free market" in which there is minimal labour regulation. This is the libertarian perspective. At 38 – 55, Davies discusses the relationship of labour rights and human rights and also provides the historical development of human rights, in which workers' rights came to be recognised and protected. This is a description of the formulation of the social justice perspective. For a further explanation of these two main perspectives, see Van Niekerk *et al* (2015) 6 – 10. Further detail on the two perspectives is provided for in Chapter 2 at 3.2 and 3.3.
[113] See Klare (2000) 68; Benjamin (2012) 24 – 26; and Rogowski (2013). Furthermore, see Mitchell *AJLL* (2011) 59 where the author opines that labour law is going and how it has to evolve, as today's labour law "no longer maps onto labour market, economic and social reality".

and achieving the aims of this chapter the focus is on the main theories referred to above.

2. Historical Perspective on the Purpose of Labour Law[114]

2.1 Introduction

The history of different perspectives on the role that labour law ought to play is best understood in stages. In the paragraphs that follow, the following stages are set out, namely, the collective *laissez faire* era, the economic era, and the modern era.

2.2 Collective *Laissez Faire* Era

Discussions regarding the purpose of labour law and its history often refer to the work of Sir Otto Kahn-Freund.[115] He suggested that "the law is a technique for the regulation of social power", which power is unevenly distributed in all countries, and labour law is chiefly concerned with this "elementary phenomenon" of social power.[116] In the words of Davies and Freedland, in their interpretation of the Hamlyn Lectures series given by Kahn-Freund in 1972, "the principle purpose of labour law, then, is to regulate, to support and to restrain the power of management and the power of organised labour".[117] From this view it is apparent that there are competing powers at play in the workplace; management on the one hand and organised labour on the other.

Power, as referred to in this context, means that the single employee usually has little or no power at the bargaining table with the employer, but Kahn-Freund

[114] For a summary on the existence of labour law as a separate legal subject see Van Niekerk *et al* (2015) 3 – 6. Also see Langille (2006) 14 – 17, where the idea of a constituting narrative is examined. The author mentions that comprehensiveness and coherence is required when determining whether a subject is worthy of being a separate legal subject.
[115] Davies and Freedland (1983) 12. Kahn-Freund through his study of the law in the United Kingdom "was entrusted with the task of trying to elucidate one branch of the law of the United Kingdom and of comparing it with the corresponding institutions and principles of other nations." Kahn-Freund's study of the role of labour law began in the 1950s during which time he developed the "collective laissez-faire" theory. It is interesting to note that before the work of Kahn-Freund, labour lawyers used sociology, and its branch of industrial relations theory to understand the law. In this regard see Davies (2009) 3 – 4.
[116] As above at 14.
[117] As above at 15 the authors mentioned that the words "management" and "labour" refer to the activities of planning and regulating production and distribution and co-ordinating capital and labour on the one side, and the activity of producing and distributing on the other side.

declared, if a collection of workers negotiates with an employer, both parties are bearers of power[118] and he concluded:

> "the main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship."[119]

This concept of labour law was devised by Kahn-Freund in the 1950s, and he is considered the "founding father" of academic labour law.[120]

In essence, the original conception of the purpose of labour law was that labour law would seek to protect employees as they lacked power or did not have as much power as employers, therefore, it is employee-focused and is centred on the needs and well-being of employees above the interests of employers. Kahn-Freund found that protective legislation enlarges the worker's freedom to give priority to his and his family's, interests.[121] His view is substantially relevant to the protection of categories of precarious employees such as agency workers.

Klare points out that the strategies used to provide security to employees were, first, to cater for collective bargaining and, second, to have a legislated floor of minimum standards for employees.[122] Accordingly, the protective legislation was not meant to cover details conveying rights on employees and the processes in respect of the entire employment life cycle, from hiring to termination of employment, but provide only the most basic of minimum employment conditions.

These views demonstrate Kahn-Freund's theory of "collective *laissez faire*" according to which employers and trade unions were left to regulate their own affairs

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[118] As above at 17.
[119] As above at 18. As identified by Benjamin (2012) 22, the Constitutional Court in *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* at (2007) 28 ILJ 2405 (CC) described this oft-quoted description of the purpose of labour law as a "famous dictum". Benjamin also states that this description is repeatedly cited in articles, textbooks and judgments even today. In *Mahlamu v Commission for Conciliation, Mediation and Arbitration & Others* (2011) 32 ILJ 1122 (LC) at 1127, Van Niekerk J recently cited this description in this Labour Court decision and mentioned it as the "main purpose of labour law".
[120] Benjamin (2012) 22.
[121] Davies and Freedland (1983) 24.
[122] Klare (2000) 68. This was as per the conceptualisation by Kahn-Freund.

through negotiation.[123] Other than the protective legislation that provided basic minimum standards, the parties were free to engage in collective bargaining with a view to self-regulating their employment relationship.[124] Davies summarises what Kahn-Freund identified as the three main reasons for collective *laissez faire*:

> "[f]irst, he argued that legal intervention was unnecessary because collective bargaining was an effective way of protecting workers. …Second, he claimed that workers' rights were more secure if they were acquired through collective bargaining rather than through constitutional or legislative guarantees. ...Third, he thought that collective *laissez faire* was more flexible than legislation because it allowed unions and employers to decide things for themselves."[125]

The advantage of this approach for employers is that there is room to be flexible when circumstances require flexibility, but in the context of this study it should be noted that collective bargaining has its limitations: it is often difficult for agency workers to improve their situation in the workplace through this mechanism.[126]

2.3 Economic Era

During the 1960s and 1970s many governments moved to enhance the powers of employers at the expense of employees.[127] During the "economic upswing" after the Second World War,[128] for economic reasons governments wanted to reduce the level of strike action and to manage the economy more actively.[129]

At the same time many countries also embarked on a path of the "constitutionalisation" of labour law during the post-war period. D' Antona explains

[123] Davies (2009) 4.
[124] See Deakin (2005) 35 for a discussion on the genealogy of social rights. The author states that during the mid-twentieth-century the social legislation addressed a specific set of economic risks arising from the fact that the vast majority of the population were directly or indirectly dependent on wages for subsistence. He notes that the aim of stabilising labour through collective bargaining and the protective legislation was to avoid a situation wherein the costs of dealing with insecurity fell entirely on the social welfare system.
[125] Davies (2009) 4. Kahn-Freund's inclination towards the use of collective bargaining is confirmed in Davies & Freedland (1983) 21 where it is stated that Kahn-Freund suggested that "[a]s a power countervailing management the trade unions are much more effective than the law has ever been or can be."
[126] See Chapter 5 at 2.3.2.
[127] Benjamin (2012) 23.
[128] According to Du Toit *ILJ* (2007) 1406 collective bargaining reached its "historical peak" during this time of economic boom. Both industrialised countries and colonised nations used collective bargaining to govern labour relationships.
[129] Davies (2009) 4.

that the guarantees of organisational rights, the protection of labour standards and the principles of welfare state, labour law and social security became constitutional principles and took on an "axiological existence."[130]

In the 1960s and 1970s there was a move away from collective *laissez-faire* and the focus increasingly is economic in nature.[131] According to Du Toit at the time the impact of collective agreements on the labour markets and the increasingly fragile economy were simply too great to be left to the self-interest of trade unions and employers,[132] as a result governments enacted more legislation in relation to industrial conflict and industrial relations, albeit not with the purpose of protecting employees' interests. The parties were no longer left to their own devices to negotiate more favourable positions.

Davies maintains that governments became increasingly concerned about the economic implications of labour law.[133] Union wage demands affected inflation and strikes impacted on productivity.[134] In the 1980s there was a strong move away from Kahn-Freund's conception of the purpose of labour law and the idea arose "that labour law might be contributing to high levels of unemployment".[135] Accordingly, in the 1980s governments drew heavily on the arguments of economists who favoured free markets and supported minimal regulation in the arena of labour law.

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[130] D' Antona (2002) 31 states that during this time there was extraordinary post-war economic development.
[131] Deakin and Morris (2012) 30 state that in the UK the government had failed to reconcile the tensions between traditional forms of state support for voluntary collective bargaining and increasing intervention in the economy by way of income policies. They mention that the "stage was set for a revolution in economic and social policy which would see the abandonment both of collective laissez-faire and of the attempt to manage the economy through state corporatism". At 31, the authors also state that during the 1980s the subordination of social policy to an economic agenda reached a new level.
[132] Du Toit *ILJ* (2007) 1407 explains that collective *laissez faire* could only have existed under conditions of "relative stability and sustained economic growth experienced in industrialised countries during the 1950s and 1960s".
[133] Davies (2009) 20.
[134] As above. See also Weiss (2006) 177 who makes mention of an example of the 1988 "Doorn Declaration" which was an agreement by trade unions of Belgium, the Netherlands, Luxembourg and Germany wherein they agreed on certain principles including that wage settlements should correspond to the evaluation of prices and that collective agreements should attempt to strengthen mass purchasing power. This indicates that even in collective bargaining agreements there was a strong consideration of economic factors.
[135] Davies (2009) 20 notes that there also existed a significant school of thought that viewed labour laws as one of the ways in which governments could actually help firms to become more successful – in other words, labour law could assist in achieving economic goals.

There was a definite decline in trade union density during this era. According to Du Toit, should this trend continue, it would spell the end of collective bargaining.[136] Langille confirms that there was a radical drop in union density rates and the de-centring of collective bargaining during this time.[137] By the 1990s, Du Toit explains, in terms of the role that labour law was to play, the situation was almost exactly the reverse of the approach adopted by Kahn-Freund.[138] There was a marked change in thinking, which led to a shift in the idea of the purpose of labour law.

2.4 Modern Era

In the late 1970s in South Africa measures were put in place which put the employee first, despite an evolving trend which moved from a protective strategy to an economically-centred approach. A new Industrial Court was established and its role was to "serve as an important protective mechanism for individual workers in cases where their security [was] threatened."[139] Also, new legislation was introduced which contained the concept of "unfair labour practice".[140] Brassey *et al* state that the purpose of labour legislation in South Africa in the late 1980s was to ensure industrial peace.[141]

The history of the purpose of labour law reflects a shift from a perspective which sought to protect employees who had less power to a strategy which was economically centred. In South Africa during the time under review there was a shift to a mixture of the two approaches. This development leads to a discussion of the

[136] Du Toit *ILJ* (2007) 1417 provides several reasons for the threat to collective bargaining, and the question is posed as to what future collective bargaining has. For statistics on trade union density see http://stats.oecd.org/Index.aspx?DataSetCode=UN_DEN, accessed on 18 February 2015. According to the OECD, the trade union density for the United Kingdom in 1999 was 30.1% and in 2013 that dropped to 25.4 %. The trade union density in Australia in 1999 was 25.4" and that dropped to 17.00% in 2013. And for OECD countries together, density dropped from 20.8% in 1999 to 16.9% in 2013.
[137] Langille (2006) 15. Also see Deakin and Morris (2012) 35, where the authors state that in contrast to a period of rapid growth in the 1970s, in the 1980s and 1990s union membership declined rapidly. They add that the proportion of trade union members in workplaces with more than 25 workers fell from 65 percent in 1980 to 47 percent in 1990 and 36 percent in 1998.
[138] Du Toit *ILJ* (2007) 1422.
[139] Van Niekerk *ILJ* (2004) 857 - 858 refers to a quote by the then Minister at the second reading of the Industrial Conciliation Amendment Bill.
[140] As above at 858.
[141] Brassey *et al* (1987) 61 and 62.

two competing perspectives regarding the purpose of labour law: the economic or libertarian perspective and the social justice perspective.[142]

3. Competing Perspectives on the Purpose of Labour Law

3.1 Introduction

As previously mentioned there are various theories about the purpose of labour law. However, as Van Niekerk *et al* point out:

> "[t]here are two broad views on the extent to which the state should intervene in the labour market. The first is a *laissez-faire,* free-market model; the second is a perspective that emphasises, in a variety of forms, the need for social justice in the workplace."[143]

Accordingly, only these two perspectives are analysed in greater detail below and the defining features of each perspective are discussed.

3.2 Free-Market Libertarian Perspective

The defining features of the libertarian perspective include the following: competitive and successful economic goals, the importance of the doctrine of freedom of contract, minimal legal intervention and arguments against the protective view of labour law.

3.2.1 Competitive and Successful Economic Goal

The libertarian perspective is also referred to as the economic, neoclassical or free-market perspective. Mitchell and Arup describe the libertarian perspective as one where there is a preference for free markets and individual freedoms over controlled markets and collectivism. In terms of this model, labour law is viewed as a means of business facilitation, a stimulus to economic efficiency, a contributor to national competitiveness and macro-economic regulation.[144] They argue, as well as the original countervailing force purpose, the purpose of labour law is to order and regulate employment relationships so as to achieve efficiency in production and to

[142] For an analysis of the current purpose of labour law in South Africa today, see Chapter 2 at 4.3.
[143] Van Niekerk *et al* (2015) 6.
[144] Mitchell and Arup (2006) 6, 10 and 11 refer mainly to the Australian context.

support the development of a competitive and successful economy, whereas the goal of protecting workers requires a compromise with other social and economic goals.[145] Though these arguments are valid, it is difficult to reconcile oneself to a view in which the role of labour law is approached entirely from an economic viewpoint.

3.2.2 Doctrine of Freedom of Contract

Van Niekerk *et al* describe this perspective as one where "the contract of employment and the individual bargain that it represents" are "the only legitimate mechanism to regulate the employment relationship".[146] Davies explains that supporters of the liberation perspective are strong advocates of the doctrine of freedom of contract[147] by which labour law or regulation is viewed as unnecessary and interfering in the negotiation process. Davies comments that the "neoclassical camp" is even hostile to legal intervention.[148]

As explained by Van Niekerk *et al*, a justification for this view is that labour laws have the "unintended consequence" of protecting those who are employed at the expense of unemployed people.[149] There are unemployed people who are willing to work below legislated minimum conditions to ensure that they have some form of income. Because of labour laws they are not permitted to do so and, therefore, are precluded from entering the world of employment. The reasoning entails that a person should be in a position to work under any conditions to which they agree or, in other words, there is an infringement of the right to work where labour laws exist which provide for minimum standards of employment.[150]

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[145] As above at 10.
[146] Van Niekerk *et al* (2015) 6.
[147] Davies (2009) 28 states that this means that people should be allowed to enter into contracts with whomever they choose, on whatever terms they decide. They argue that the law should only interfere where there is evidence that one person has not given their genuine consent. Davies goes on to state that in accordance with this perspective, the law should not be presumptive as to tell people what is in their best interests.
[148] As above at 26. A minimum wage, for example, interferes directly with the normal process of wage determination in the market by setting a minimum below which wages cannot fall.
[149] Van Niekerk *et al* (2015) 7.
[150] As above.

This argument is strengthened by the fact that labour laws are fashioned for employees as opposed to people outside the employment relationship.[151] Libertarians contend that there is not necessarily an inequality of bargaining powers in the employer-employee relationship. However, in agreement with Langille, the argument merely constitutes a "form of economic nonsense."[152]

3.2.3 Minimal Legal Intervention

As alluded to above, the libertarian approach argues that labour law regulation has little or no value to the labour market. Davies states that "[m]any neoclassical economists believe that labour law creates unemployment by increasing the labour costs faced by employers".[153] According to this argument employers have less time available and money to spend on employing further potential employees, they are too busy ensuring compliance with complex labour legislation and legal regulation which increases costs.[154]

Libertarians also argue that countries with minimal labour regulation have a competitive advantage over other countries with stringent labour laws:[155] countries with low labour costs and limited red tape are viewed as being more likely to attract foreign investment than a country with complex labour regulation. Developing countries have been known purposefully to have lowered labour standards. As expressed by Davies, the idea is that "if firms are profitable, society as a whole – and

[151] See Benjamin (2012) 31 – 32 regarding the argument that labour laws should extend beyond the reach of only those who fit within the definition of "employee". The author advocates labour law which extends to all workers. Benjamin states that the labour market is a broad concept and is not defined by statute or common law "employees". Work has become increasingly diverse and there is an increase in agency workers. Furthermore, see Benjamin (2002) 75 – 91 for a discussion on how the definition of "employee" is the determining-factor regarding who receives protection by labour laws. See Klare (2002) 4 and 5, for a discussion on how labour laws are becoming increasingly ill-fitted due to factors such as: work is performed outside of conventional employment; there is a new meaning of work in new cultural contexts; and globalisation.
[152] Langille (2006) 15.
[153] Davies (2009) 33. At 35 it is stated "[n]ew labour laws may increase employers' costs and lead to redundancies where the employer cannot pass those costs on to the workers through wage cuts."
[154] As above at 26.
[155] According to Van Niekerk *et al* (2015) 7 this argument assumes a linkage between lower labour standards and competitive advantages in the global market. On the topic of over-regulation, the World Bank states at 104 of the Report "Doing Business 2015: Going Beyond Efficiency" as found at http://www.doingbusiness.org/reports/global-reports/doing-business-2015 accessed on 20 February 2015, that "too much regulation increases the cost of doing business, dissuading firms from entering markets at all and thus hurting economic development prospects."

the employees of those firms in particular – will reap the benefit."[156] It is submitted that this is a dangerous argument in so far as it can lead to a "race to the bottom".[157]

Supporters of the libertarian perspective argue that employers should be in a position to be able to dismiss workers at will: this insecurity encourages employees to work harder and be more productive.[158] As will be argued later in the chapter, this point of view cannot be supported.

A major shortcoming in the argument for deregulation is that there appears to be no hard evidence or statistics showing that deregulation is linked to competitiveness. Van Niekerk *et al* maintain that research shows the opposite is true.[159] Langille states that investment is not attracted and trade performance is not improved by lowering labour standards.[160] Hepple asserts that South African labour laws are not overly-regulated but actually quite flexible.[161]

Another major shortcoming in the libertarian perspective, is should companies be more profitable due to deregulation, there is no mechanism in place to ensure that such profits are distributed to employees.[162] Accordingly, deregulation does not benefit the economy or society as a whole. Instead, the wage gap between the wealthy and the poor will increase.

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[156] Davies (2009) 27.
[157] Langille (2006) 30 describes this concept as "a prisoners' dilemma" in which "states are 'forced' to bid down their labour standards in competition with other states seeking to attract or retain mobile investment."
[158] Davies (2009) 33.
[159] Van Niekerk *et al* (2015) 7. Low labour standards are in fact often a sign of minimal productivity, which is a deterrent for foreign direct investment.
[160] Langille (2006) 32. Also see the World Bank Report "Doing Business 2015: Going Beyond Efficiency" found at http://www.doingbusiness.org/reports/global-reports/doing-business-2015 accessed on 20 February 2015, where the question of whether regulation attracts investment is explored. This report states that regulation helps define the playing field for firms and reduces the costs of information search for new market entrants. Furthermore, a stable system of governance, citizen participation and good-quality public services increase the chances of franchise location in a country.
[161] Hepple *AJ* (2012) 2 and 3.
[162] Davies (2009) 27.

3.2.4 Protective View of Labour Law is Not Supported

In 1970 Hayek argued that social legislation interferes with the abstract rules of just conduct and undermines personal autonomy and the well-being of society.[163] Brassey *et al* note, in the South African context, around the 1980s, whereas some labour legislation such as the Basic Conditions of Employment Act ("BCEA")[164] intended to protect employees from exploitation, it was not the function of labour law to "improve the lot of employees" nor was it the function to "redress the bargaining imbalance that is said to exist".[165]

Mitchell and Arup declare that in the 1990s labour law's protective approach was increasingly "out of step" with society and political and economic considerations: they contend that in countries such as Australia, Britain and the United States, labour policies were re-shaped away from employment protections and more market-based approaches to capital-labour relations were established.[166]

Bhorat shares a number of libertarian views. He observes that post-apartheid South Africa has some of the worst inequality in the world in terms of payment for work done, significant levels of poverty and very high unemployment rates.[167] For these reasons Bhorat argues that South Africa needs a policy framework which will kick-start economic growth.[168]

3.3 Social Justice Perspective

The defining features of the social justice perspective are, namely, the goals of: social justice, the protection of employees over freedom of contract, legal

[163] Deakin (2005) 52.
[164] Basic Conditions of Employment Act 3 of 1983.
[165] Brassey *et al* (1987) 62.
[166] Mitchell and Arup (2006) 10.
[167] Bhorat (2004) 3 and 5 - 6. More recently, also see Bhorat *et al TFJ* (2014) on lowered poverty levels in general in South Africa, however a rising gap between wealthy and poor.
[168] As above at 28. For other recommendations, see the Regulatory Impact Assessment 2010 available at http://www.labour.gov.za/DOL/downloads/documents/useful-documents/labour-relations/RIA13Sept2010.pdf accessed on 20 November 2013. Bhorat and the other authors state, in respect of the then proposed amendment of s 198 of the Labour Relations Act 66 of 1996 ("LRA") which regulates agency workers, that there would be negative economic consequences of such amendment. See 52 - 72 for the relevant full cost-benefit analysis. They state there would be potential job losses, an increased cost in doing business, potential increase in the case-load of the CCMA and the Labour Court, and there would be increased administrative costs on the employer. They recommended alternatives to the amendment proposed at that time. Further details of this report are discussed in Chapter 6.

intervention and regulation, labour rights viewed as human rights and the extension of social security and protection to all workers.

3.3.1 Social Justice

The social justice perspective promotes the idea that labour law should strive towards the goal of a more equal "distribution of wealth and power in society".[169] Smit believes that "[t]he goal of achieving social justice is the ultimate aim for which we should all strive".[170] In the debate between labour and trade, Langille asserts that the real problem is improving the world.[171] Smit defines social justice as the "art of good and fair".[172] Van Staden draws a link between International Labour Organisation ("ILO") commitments and South African labour law, and is of the opinion that the body of work of the ILO should inform the South African understanding of social justice.[173] This perspective places the aim of attaining social justice above economic considerations.

Smit argues that social justice can be achieved only should each person strive for a better world. For this reason, she believes that labour law is incapable of satisfying the aim of social justice,[174] but labour law should strive to achieve this goal. Van Niekerk *et al* assert that labour regulation can serve as a tool which furthers the interests of social justice because it promotes the fair distribution of wealth and power.[175] The author argues that this distributive effect is the answer to one of the main shortcomings of the libertarian's call for deregulation. Smit maintains that growing income and social inequalities is a key reason to continue to strive towards the attainment of social justice.[176]

[169] Davies (2004) 17.
[170] Smit *TSAR* (2010) 2.
[171] Langille *ILJ* (1998) 1016.
[172] Smit *TSAR* (2010) 2 refers to this definition being attributed to Justinianus.
[173] Van Staden *TSAR* (2012) 92 - 93. See also 105, where the author states that the understanding of "social justice" is something which is constantly changing.
[174] Smit *TSAR* (2010) 2.
[175] Van Niekerk *et al* (2015) 8 - 9.
[176] Smit *TSAR* (2010) 2.

3.3.2 Protection of Employees Instead of Freedom of Contract

Kahn-Freund's approach to the purpose of labour law focused on the protection of employees by means of collective bargaining and recognition of rights. Bell explains that:

> "a rights-based approach to employment law tilts the balance in favour of workers. Although economic considerations are not rendered inadmissible, the evocation of 'rights' has the effect of prioritising social objectives and diminishing the weight attached to business interests."[177]

Rigaux asserts that the function of labour law is to preserve the dignity of working people.[178] It can be argued that justice for employees cannot be secured if the relationship is analysed in purely contractual terms.[179] Langille's stance is that social justice is the reason for the existence of labour law and he believes that the contract of employment should not be permitted to be the only means of regulating the employer–worker relationship. He makes the point that due to inequality in bargaining power, employees will not attain just outcomes should the contract of employment reign supreme.[180] Besides the contract of employment, some other regulation of employment relationship is required. Hyde opines the need for labour law is that justice will not emerge through unregulated contracting.[181] Reyniers agrees labour law is a "necessary correction" to the free labour market and unfair social competition.[182]

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[177] Bell *ELR* (2012) 32 and 33.
[178] Rigaux (2014) 4 states that the economy treated and still treats work and the worker as a commodity. Rigaux is of the opinion that the preservation of the wage-earner's dignity is the primary function of labour law. See also Reyniers (2014) 161 – 174 for further discussion on labour law as a protector of employees' dignity.
[179] Langille (2006) 15. At 30, Langille asks whether labour law should not in fact be at the centre of national economic policies. Even though most factors of production are flexible, labour or human rights are not. See Hyde (2006) 48 and 49 where he states that Langille believes that the purpose of labour law is to uphold important values against the market, so as to achieve social justice which would not occur with unregulated contracting.
[180] Langille (2006) 15.
[181] Hyde (2006) 49 concurs with the views of Langille on the subject of the purpose of labour law. The author, however, raises the criticism that Langille's formulation does not go far enough in that it does not specify which non-market values should be considered as labour law values.
[182] Reyniers (2014) 170 explains that labour law came to being as a result of poor working conditions in the industrial revolution, where labour relations were controlled by the freedom of work and to carry on a business, contractual freedom and freedom to arrange one's own affairs.

3.3.3 Legal Intervention

The social justice perspective favours the use of legal intervention. Kahn-Freund's approach did not favour detailed labour regulation but rather collective bargaining as a means to protect workers. However, Van Niekerk *et al* point out by the end of the 1970s Kahn-Freund expressed the idea that collective *laissez-faire* required adjustment.[183] In this regard, Langille explains that collective bargaining does not secure the result for employees but merely provides procedural justice,[184] requiring something more, such as human rights codes.[185]

3.3.4 Labour Rights as Human Rights

Human rights play an important role in respect of the social justice perspective. Langille's point of view in attacking libertarians is to characterise problems in labour law as human rights problems and not fundamentally as economic issues.[186]

Davies asserts that an important step in classifying labour rights as human rights came with the creation of the ILO in 1919,[187] and also the adoption of the Universal Declaration of Human Rights in 1948 which includes social rights.[188] This Declaration of Human Rights paved the way for the recognition of the rights of freedom of association, of equal treatment and non-discrimination.

Davies argues that significant rights, such as the right to just and favourable remuneration, which ensure an "existence worthy of human dignity", were included in the UN Universal Declaration, as well as the conventions that followed.[189] These labour rights subsequently were imported into the national law of those states striving to uphold international labour standards. The European Union's ("EU")

[183] Van Niekerk *et al* (2015) 9.
[184] Langille (2006) 25.
[185] As above. Other ways of re-writing the bargain include employment standards legislation and health and safety legislation.
[186] Langille *ILJ* (1998) 1014 and 1015.
[187] Davies (2009) 39. Also see Creighton (2004) 253 for a discussion the role of international labour standards and the future of labour law.
[188] As above. The author points out that this led to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.
[189] Davies (2009) 45. Article 23(3) of the UN Universal Declaration states "everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection."

Charter of Fundamental Rights contains not only civil and political rights, but also social and economic rights.[190]

Many countries consider human rights extremely important, which has the effect of elevating the level of importance of labour rights.[191] Jaspers and Roozendaal opine the recognition of social rights as fundamental may halt or slow down neo-liberal policies which aim to improve competitiveness of national economies at the expense of worker protection.[192]

Bell argues, if a worker's right is deemed a human right or fundamental right, any other policy or principle is excluded from consideration. This is often coupled with the constitutionalism of parts of employment law. He makes the point that "those elements identified as fundamental rights acquire an entrenched status as higher legal norms and are typically housed in a constitutionally significant document".[193]

3.3.5 Social Security and Social Protection

In this context of the social justice perspective, in addition to the view that labour rights are human rights, there is a conviction that the idea of security should somehow be extended. Mitchell and Arup state that the traditional field of labour law should be broadened and the most obvious consequence is that labour law shifts its focus from the "employee" to the "worker",[194] which means that the protection provided by labour law would be applicable to those who fall outside of the definition

[190] Bercusson (2004) 179 states that "[i]t is fitting, therefore, that the European Union's (EU) Charter of Fundamental Rights should be recognised in this volume as one source of the renewal of labour law". Bercusson describes the Charter as having the potential to renew labour law in Europe

[191] For a study of how EU law influences or contributes to changes in national law, see Sciarra (2004) 201 – 211.

[192] Jaspers and Roozendaal (2014) 132 refer to the coming into force of the European Charter of Fundamental Rights in 2009. At 133 they state that the fact that a certain social right is a fundamental right, may be a convincing argument for policy-makers not to "tinker with" the level of protection of that right too frivolously. They are of the belief that the promotion of social rights to fundamental rights at the EU level is of undeniable importance to the protection of employees.

[193] To this Bell *ELR* (2012) 32 adds that in a rights-based approach, as opposed to an economic approach, the balance is titled in the favour of workers. However, when writing on the EU Directives on atypical work and the rationale behind them, Bell found that the Temporary Agency Work Directive placed a greater focus on flexibility for employers than security for employees. This is discussed in further detail in Chapter 4.

[194] Mitchell and Arup (2006) 4. The suggestion would encompass extending core labour law to all workers and not just employees. They state that many labour lawyers may just want to extend "social law" or protections to all workers, but they suggest that the core labour law protections is what needs to be extended, not just social law. The authors also propose revitalising the approach to regulation by focusing on new topics and new processes which concern both economic and social objectives.

of employee. Agency workers, who are not included in the definition of "employee" in respect of both the employment agency and the client, in this context gain the advantage of employee status with both entities.

In a positive development Supiot *et al* recommend that the notion of security should be redesigned at three levels.[195] The first is that labour law should protect workers between jobs, which is a step further than the suggestion made by Mitchell and Arup that labour law protection should be extended to workers falling outside of the formal definition of employee. The second level is that there should be a continuity of status above and beyond different cycles of work and non-work. According to the third level social law should include a broader notion of work. All of these recommendations lean towards increasing the protection and security of workers, which means increased protection for agency workers as well.

4. The Purpose of Labour Law in South Africa

A full discussion of the current labour market policy in South Africa is set out in Chapter 5. However, at this point there is an analysis of the purpose of labour law in South Africa which influences the development of labour policy.

In order to better understand the current purpose of labour law in South Africa it is important to take cognizance of the local labour market. Hepple comments that "[t]here can be no doubt that the most striking feature of South Africa's labour market is the extreme level of unemployment"[196] and adds that the nature of work has changed and "in the current labour market climate workers change their jobs and their work status much more frequently than in the past."[197] As a result of these factors many workers are now excluded from labour protection.[198]

[195] Supiot *et al* (2001) 221 declare that the employment model should not be left in the confines of labour law. Due to flexibility, the working world may split into two –being formal employment as is known within traditional labour law and flexible forms of work. They state that it may be argued that this split has in fact taken place. At the time of writing, they stated that the notion of security needs to be redesigned to prevent exclusion from security.
[196] Hepple *AJ* (2012) 2.
[197] Benjamin (2006) *Transformation* 32.
[198] As above at 34.

There has been a sharp increase in the use of non-standard workers. Benjamin notes that the number of employment agencies has become the biggest and most high-profile labour market policy issue in South Africa and this exponential increase has been the "motor for the development of externalisation in South Africa".[199] Employers have been able to reduce labour costs and risks through the mechanism of not having formal employment relationships in place. A widely held view, both within South Africa and abroad, is that South African labour law is extremely onerous and this has led to externalisation.[200] However, as several authors, such as Hepple, indicate this is not necessarily the case.[201]

There are convincing reasons why at this stage of the development of labour law in South Africa the social justice perspective trumps the free-market libertarian approach. South African courts have reiterated that the legislation has its purpose in protection of the rights of employees.[202]

The South African government have also recently confirmed the government's view on the function of labour law in the country as being one of a social justice perspective. In an address by the Minister of Labour it was stated that "the South African labour laws are grounded on the fundamental African philosophy of Ubuntu" and that this means that the laws "protect workers regardless of their geographic origins, documented or undocumented."[203] In the same address, the Minister of Labour emphasised that the government were "proud of the fact that as a country we chose the rights based approach to realising economic and social rights of our people particularly the poor and the marginalised."

[199] As above at 37.
[200] Benjamin (2012) 38 refers to this perception as the "hassle factor", as there is a widespread perception that it is more difficult to dismiss an employee in South Africa than it is to do so virtually anywhere else in the world. See also Hepple *AJ* (2012) 1.
[201] Hepple *AJ* (2012) 2 and 3.
[202] The protective approach of labour law was adopted in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) ILJ 2405 (CC) at para 72 where the famous Kahn-Freund dictum is quoted as being the reason for labour law. Similarly, in *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of South Africa* (1996) ILJ 821 (CC) at para 66 the Court makes it clear that employers enjoy greater social and economic power than employees, thus justifying particular employee rights.
[203] Speech by the Minister of Labour on the occasion of the 2015/2016 Budget Vote of the Department of Labour tabled in the National Assembly. Available at www.labour.gov.za/DOL/media-desk/speeches/2015/speech-by-the-minister-of-labour-on-the-occassion-of-the-2015-16-budget-vote-of-the-department-of-labour-tabled-in-the-national-assembly accessed on 23 January 2017.

Besides the Courts and the government of the country expressing that the labour laws in South Africa are founded upon the social justice perspective, academics have confirmed this view. In 2006 Benjamin wrote that labour law's main purpose in South Africa primarily is to create security for employees,[204] leaning towards a social justice perspective. According to this stance, South Africa's labour exists mainly so as to provide protection for employees. He adds that the security of employees is diminished by the "de facto flexibility" that employees enjoy due to the high rate of unemployment and the over-supply of unskilled labour.[205] It is suggested that this view is still apposite today.

Similarly, Van Niekerk *et al* advance the following cogent arguments.[206] Their first point relates to South Africa's obligations as a member of the ILO. There is a duty on South Africa to ensure that fundamental rights are given effect, such as the rights of freedom of association, collective bargaining, equality at work, elimination of forced labour and child labour. The principles underlying the core ILO conventions need to be observed because of the ILO's Declaration on Fundamental Principles and Rights at Work.[207] The current labour law systems of a number of southern African countries largely are influenced by international standards.[208]

Their second argument relates to the fact that South Africa is a constitutional democracy which recognises labour rights within the Constitution of the Republic of South Africa ("Constitution, 1996"). In the words of Van Niekerk *et al*, labour market policy choices are "constrained by the Constitution", and any limitations on such rights need to be justified.[209] Smit agrees that the "building blocks of social justice are recognised and entrenched" in the Constitution, 1996 and lists several rights which are labour rights, but identifies the right to fair labour relations as the most

[204] As above at 39. At 24 – 25, Benjamin recognises that it may not be necessary or wise to identify a "single defining goal" as this may lead to losing "sight of the differing purposes of different types of labour law".
[205] Benjamin (2006) 39.
[206] Van Niekerk *et al* (2015) 8.
[207] The Declaration, along with ILO obligations and standards, are discussed in detail in the following chapter.
[208] Kalula (2004) 277 points out that there was renewed interested in the ILO and international standards in general during the time of South Africa's democratic transformation.
[209] Van Niekerk *et al* (2015) 8. Also see Kalula (2004) 282 where the author points out that the link between human rights and labour law has become increasingly important in southern Africa. See, Du Toit *et al* (2015) 82 and 83, regarding the interpretation of labour statutes in compliance with the Constitution, 1996.

significant.[210] She observes that social justice can be achieved only through the collective efforts of lawmakers, judges and ordinary people or will forever remain an elusive dream.[211]

This thesis favours the social justice approach. Workers who enjoy dignified working conditions are more likely to be productive and loyal, in the long term the economy will benefit. Weiss demonstrates that empirical evidence shows that stricter labour standards result in improved health and human capital[212] and increase the productivity potential of workers. Fair working conditions result in better motivation and a willingness of workers to strive for high performance. Long-term and stable relationships between the worker and the employer provide incentives to employers to invest in training as the employer is able to recover returns from training. Job security provides incentives to workers to share their knowledge and skills with colleagues without fear of losing their jobs. Hepple states that:

> "[t]he challenge for labour lawyers is to provide for the regulation of informal work in ways that enhance employment and income opportunities that provide a measure of social protection, that secure fundamental rights and that promote social dialogue."[213]

There is an opinion that investment is not attracted and trade performance is not improved through lower labour standards[214] and the foundation upon which the libertarian perspective is based is flawed. Also, the absence of protection has negative consequences for workers and their families and for enterprises and society at large.[215]

Though the social justice perspective forms the underlying purpose of labour law in South Africa, the picture is not as one dimensional as it may seem, some elements of the libertarian approach are relevant. Langille maintains that labour law policy

[210] Smit *TSAR* (2010) 6 and 7. The right to fair labour practices includes the right to organise, strike and engage in collective bargaining. The right to fair labour practices is enshrined in s 23 of the Constitution, 1996.
[211] As above at 36.
[212] Weiss *IJCLLIR* (2013) 7 - 8.
[213] Hepple *AJ* (2012) 18.
[214] Langille (2006) 32.
[215] Benjamin (2006) 35.

should be at the centre of national economic policy[216] and suggests that the current purpose of labour law debate has intensified and has moved towards trying to incorporate the best of competing perspectives. Fredman refers to this development as a "third way", between the social justice and libertarian approaches.[217]

It is contended, as the debate is on-going and without an end in sight, neither of the two competing perspectives on labour law on their own is appropriate for South Africa. As will be seen in later chapters both the libertarian and social justice perspectives, are evident in current labour law policy and legislation.[218] It is submitted that both competing perspectives are supported in the government's expressed labour market policy of "regulated flexibility", which is discussed in detail at Chapter 5.[219]

This thesis supports the view that the purpose of labour law is to protect employees and their human rights, and simultaneously to allow to for flexibility for employers to be competitive. Therefore, it is suggested that a mixture of the two competing perspectives must form the current purpose of South African labour law.[220] This model can be described as one which establishes a diversified rights and economic policy framework.

5. Conclusion

The study on the purpose of labour law has been relevant to the appraisal of South Africa's regulation of agency work. This is because the underlying belief in the function or purpose of labour law at any one time gives rise to the labour policy in existence at that time and directly effects the labour legislation which is drafted. Depending upon the perspective embodied by the drafter, legislation can be

[216] Langille (2006) 30. The reason provided by the author is that most factors of production, especially goods and capital, but also ideas and processes, are "mobile". However, human beings are not.
[217] Fredman (2004) 9. At 10 it is stated that the basic principles of this approach are (i) a facilitative state, (ii) civic responsibility, (iii) equality of opportunity and (iv) community and democracy.
[218] See Chapter 5.
[219] See Chapter 5 at 2.2 and 2.3.
[220] For a discussion on how a framework combining security and flexibility can exist and be implemented more effectively, see Njoya *CLLPJ* (2012) 459 who advocates for greater reliance on "employee voice" through means of employee participation in decision making within a framework of reflexive law where there are diverse interpretations of both security and flexibility. For comments on Njoya's paper, see Villiers *CLLPJ* (2012) 481.

produced giving rise to distinctly different regulations. Labour legislation, in turn, is a key factor in establishing the level of protection and security on which categories of employees, such as agency workers, rely.[221]

As discussed, the historical purpose of labour law was to be a countervailing force to compensate for the so-called inherent inequality of bargaining power between an employee and an employer. This approach was followed by a shift towards a libertarian perspective as governments became concerned about the economic well-being of enterprises and their competitiveness.[222] Consequently, labour laws were kept to a bare minimum or there was deregulation. There is a view, however, that labour rights should be seen as human rights in the competing approach of the social justice perspective, according to which the protection of employees is placed above business interests. There is strong support for both of these perspectives.

It is suggested that the ongoing debate has led to the development of theories which support both libertarian and social justice perspectives. Labour law now seeks to fulfil both economic and social goals, which has resulted in labour policies reflecting a mixture of both perspectives. The current South African labour policy of regulated flexibility is one such example.[223] The policy aims to provide both protection and security for employees, simultaneously allowing for flexibility for employers and, in this way, speaks to business interests and the economy. In South Africa it is not possible to have a labour policy in place which completely disregards the social justice perspective, due both to the international obligations that South Africa has adopted and the Constitution, 1996. The Constitution, 1996 characterises labour rights as human rights and therefore affords them a higher status.

[221] It should be noted, however, that other factors will also influence the drafting of legislation, such as the voters of the current political party in power in South Africa, the ANC and also, to a large extent, the trade union federation Cosatu, which has a strong alliance to the ANC.
[222] There is also the theory that historically, during times of moral or social crisis, labour law has had the function of economic subordination and resistance. See Arthurs *CLLPJ* (2013) 585. The author is of the view that labour law's purpose should develop to play the role of ensuring fairness and decency in economic relations. On labour law during times of financial crisis, see also Pagnerre *CLLPJ* (2013) 299 on France; Yannakourou and Tsimpoukis *CLLPJ* (2013) 331 on Greece; Biasi *CLLPJ* (2013) 371 on Italy; Fernandes *CLLPJ* (2013) 397 on Portugal; and Marshall *CLLPJ* (2013) 449.
[223] Note that the policy of regulated flexibility is analysed in detail in Chapter 5.

In terms of personal preference the social justice perspective is selected over the libertarian approach. In terms of the first policy employees are better cared for, provided with training, rewarded better and offered greater protection. On the whole, such employees are more likely to be satisfied than their counterparts under a system based on a libertarian perspective of the purpose of labour law. In turn, this boosts the economy and is beneficial to society as a whole. The positive aspects of such a perspective should be felt in the long-term as opposed to a quick-fix or a short-lived scenario.

Accordingly, it is pertinent to state that the remainder of this thesis is premised on the basis that a balance of both social and economic goals in a labour policy is the ideal for which to strive. Nevertheless, due to the reality of it being difficult to obtain a balance seen by both parties as acceptable, the rights of employees and social goals must transcend those of a purely economic nature in cases where the correct balance cannot be struck. Social goals and the protection of workers, in this instance, agency workers, should form the core of any labour policy, at the same time economic considerations must be included in the policy.

In the chapters that follow, the international norms of the ILO and the EU will be analysed in order to identify the labour policies in place and to reflect on the level of protection established for employees, and agency workers, in particular.

Chapter 3
The ILO Convention on Private Employment Agencies and the Decent Work Agenda

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1. Introduction

South Africa is a founding member of the International Labour Organisation ("ILO") at its establishment in 1919. From that time international labour standards have played a role in the development of South African labour law. Even during South Africa's

lengthy exclusion from membership of the ILO because of "apartheid" policies the ILO played a pertinent role in the country's labour law.[224] Currently, South Africa is a member of the ILO and international labour standards have a direct influence on the formulation of the country's labour policies.

The ILO adopted specific conventions and recommendations pertaining to employment agencies,[225] setting norms which provide insight into international best practice for employment agencies. In this context, the question posed is whether employment agencies should be forbidden, strictly regulated or, perhaps, be encouraged to exist.

This chapter analyses the labour policy underlying the ILO conventions and recommendations in respect of the protection of agency workers and identifies significant norms from the conventions and recommendations. Later the ILO norms will be referred to in order to appraise South Africa's compliance under prevailing legislation in respect of its regulation of agency work. From a policy perspective it is of particular interest to determine whether labour market considerations play a role or if the policy focus is on a rights-based approach with an emphasis on the elimination of all forms of precarious work.

2. Relevance of International Labour Standards

The Constitution of the Republic of South Africa, 1996 ("Constitution, 1996")[226] is the supreme law of the land.[227] The Constitution, 1996 in particular, gives "customary international law" a significant status. Section 232 states "[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation

[224] See Van Niekerk *et a*l (2015) 20 where it is stated that an ILO Special Committee on Apartheid produced annual reports to the ILO Conference on the labour-related aspects of Apartheid. These reports highlighted the effects of the government policies on black workers. In 1988 COSATU lodged a complaint against the Apartheid Government with the ILO. Until 1991 the Government refused to accept the jurisdiction of the ILO. However, during that year it allowed a fact-finding mission from the ILO on freedom of association to come to South Africa. The ILO mission drew up a number of recommendations on how South Africa could improve its labour laws to be consistent with international standards.
[225] See Chapter 3 paragraphs 3.2 and 3.3.
[226] The Constitution of the Republic of South Africa Act 108 of 1996.
[227] s 2 of the Constitution, 1996.

that is consistent with international law over any alternative interpretation that is inconsistent with international law."

Shortly after the adoption of the Constitution, 1996 Dugard noted that this "constitutionalisation" of the common-law rule on "customary international law" gives that rule additional weight and ensures that customary international law is no longer subject to subordinate legislation.[228] Furthermore, section 233 of the Constitution, 1996 provides that when interpreting any legislation every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any interpretation which is not consistent with international law.

The Bill of Rights contained within the Constitution, 1996 provides for a number of labour rights.[229] In respect of the interpretation of the Bill of Rights, section 39 of the Constitution, 1996 draws a distinction between "international law" and "foreign law". The section directs that international law "must" be considered and that foreign law "may" be taken into account.

The Constitution, 1996 does not provide definitions for the terms "international law" or "foreign law". Megret states that international law is most often understood as law which is fundamentally different from domestic law.[230] The author explains that "international law's mode of emergence was traditionally highly peculiar, and had

[228] Dugard *EJIL* (1997) 79. See Dugard (1994) at chapter 4 for a general picture of the application of international law in South Africa and international Law before the end of Apartheid in South Africa.
[229] s 23 of the Constitution, 1996 provides the following: "(1) Everyone has the right to fair labour practices. (2) Every worker has the right (a) to form and join a trade union; (b) to participate in the activities and programmes of a trade union; and (c) to strike. (3) Every employer has the right (a) to form and join an employers' organisation; and (b) to participate in the activities and programmes of an employers' organisation. (4) Every trade union and every employers' organisation has the right (a) to determine its own administration, programmes and activities; (b) to organise; and (c) to form and join a federation. (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1). (6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)."
[230] Megret (2012) 64. International law comprises law between states as opposed to between individuals. At 70, the author states, regarding international law, most significantly it lacks some of the key hallmarks of a functioning domestic legal order being a centralised legislative body, a compulsory court system and centralised enforcement.

more to do with the diffuse and bottom-up crystallization of norms over time."[231] In other words, international law is applicable between states and is the result of norms which have developed over time and have been given the status of law. Foreign law, it is suggested, is the domestic law of other countries.

The courts have considered whether international law refers only to international standards that South Africa has assented to and ratified or also to instruments which are not binding on the Republic. In a seminal Constitutional Court decision, *S v Makwanyane and Another*,[232] it was held that both binding and non-binding international instruments are to be used in the interpretation of legislation.[233] This ruling is especially relevant as South Africa has not assented to the ILO conventions which will be analysed below. With reference to the meaning of international law, ILO conventions and recommendations constitute international law.[234]

The Labour Relations Act 66 of 1995 ("LRA") confirms the importance of international standards. A primary object of the LRA is to give effect to obligations of the Republic which it incurred as a member state of the ILO.[235] Furthermore, section 3 provides that any person applying the LRA must interpret the provisions of the LRA in compliance with the public international law obligations of the Republic.

As will be seen in later chapters, international labour standards impact significantly on the drafting and wording of national legislation, such as the LRA. The South African High Court confirms that:

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[231] As above at 70. This is as opposed to a centralised legal framework, as is the case typically with domestic law. See Charlesworth (2012) 187 – 20 for a discussion on where international law originates.
[232] *S v Makwanyane and Another* 1995 (3) SA 391.
[233] In *Makwanyane* at para 35 it was stated that "[c]ustomary international law and the ratification and accession to international agreements is dealt with in section 231 of the Constitution which sets the requirements for such law to be binding within South Africa. In the context of section 35(1), public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which Chapter Three can be evaluated and understood". Furthermore, it was stated that "reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions of Chapter Three".
[234] *Murray v Minister of Defence* (2006) 11 BCLR 1357 (C). In this decision the Court gave the example of ILO conventions and recommendations in respect of international law. At 1358 it was stated that "[s]ection 39(1) of the Constitution obliged the Court to consider international law such as the ILO Conventions and Recommendations when interpreting any right to fair labour practice."
[235] s 1(b) of the LRA.

> "[t]he International Labour Organisation has through a large number of Conventions and Recommendations, such as the International Labour Organisation Convention, 158 of 1982, played a formative role in the development of South African labour law."[236]

Furthermore, by virtue of South Africa's membership of the Southern African Development Community ("SADC"), the country is obligated under the Charter on Fundamental Social Rights in the SADC, 2003 to ratify and implement ILO instruments.[237] This confirms the relevance of international standards and directs South Africa to follow the norms laid out by the ILO.

3. ILO Standards on Agency Work

3.1 Introduction

The policy focus of the ILO predominantly is rights-based with a strong focus on the protection of employees and the promotion of social justice.[238] The study which follows facilitates in identifying ILO norms in respect of the protection of agency workers and allows for an appraisal of South African law. ILO standards consist of two types of instruments, namely, conventions and recommendations. Conventions are binding instruments that may be ratified by member states.[239] Recommendations, on the other hand, are non-binding guidelines.[240] It is submitted they may be described as morally binding. They supplement conventions and

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[236] *Murray v Minister of Defence* (2006) 11 BCLR 1357 (C) at para 23.

[237] Article 5 of the Charter on Fundamental Social Rights in the SADC, 2003 provides that member states need to take appropriate action to ratify and implement relevant ILO instruments and as a priority the core ILO conventions. Smit *JLSD* (2015) 179 - 180 discusses the status of ILO core conventions in the SADC. Smit forms the argument that the Charter on Fundamental Social Rights in the SADC, 2003 and the ILO core conventions which have been ratified by the SADC member states can form the basis of a transnational labour relations system in the ILO. It should be noted that no such transnational labour regulation for the SADC exists currently. Accordingly, there is no SADC regulation on agency work.

[238] See Chapter 3 at 5. In respect of a social justice approach, Weiss *SC* (2011) 1 - 2 points out international financial institutions such as the World Bank and the International Monetary Fund have been protagonists of the deregulation of labour markets. He states that such institutions stress the negative economic effects of, for instance, the minimum wage system, measures which restrict free entry and exit of labour markets, systems of centralised and collective bargaining and working time restrictions. The drive behind their arguments is purely economic. An important point is that a purely economic view is a short-sighted one. See the discussion in Chapter 2 at 5.

[239] http://ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm accessed on 22 August 2014.

[240] Also see Waugh (1982) 188 where the author states that ratification of an ILO convention by a member state of the ILO binds it to the provisions therein and this is usually achieved through bringing national law and practice into conformity.

provide policy direction to member states, which makes them equally important in terms of a state's labour policy development. Both instruments serve as guidelines for governments when developing and implementing labour law and social policy.[241]

3.2 Early Conventions and Recommendations

As early as 1919, agency work was mentioned in the ILO Unemployment Convention, 1919 (No 2) ("Unemployment Convention") and in the ILO Unemployment Recommendation, 1919 (No 1) ("Unemployment Recommendation").[242] Significantly, at that stage non-profit employment agencies were permitted to exist but were to be controlled by a central state authority. The Unemployment Recommendation stated that fee-charging agencies ideally should be prohibited.[243]

During a following stage of development the ILO Fee-Charging Employment Agencies Convention, 1933 (No 34) ("Fee-Charging Employment Agencies Convention") elevated the prohibition on fee-charging employment agencies from the status of a recommendation to a convention. Henceforth, member states were encouraged to abolish profit-making employment agencies.[244]

It is submitted that the regulation of employment agencies by the ILO amounts to over-regulation and this resulted in the ILO revising its Fee-Charging Employment Agencies Convention.[245] The Fee-Charging Employment Agencies Convention, 1949 (No 96) ("Fee-Charging Employment Agencies Convention 1949") provided that

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[241] http://ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-use/lang--en/index.htm accessed on 22 August 2014. Also see Waugh (1982) 188 where the author states that recommendations are usually more detailed than conventions and represent model, ideal or optimum objectives.
[242] ILO Unemployment Convention, 1919 (No. 2) and ILO Unemployment Recommendation, 1919 (No. 1). Article 2 of the Unemployment Convention states that "1. Each Member which ratifies this Convention shall establish a system of free public employment agencies under the control of a central authority. Committees, which shall include representatives of employers and of workers, shall be appointed to advise on matters concerning the carrying on of these agencies. 2. Where both public and private free employment agencies exist, steps shall be taken to co-ordinate the operations of such agencies on a national scale."
[243] ILO Unemployment Recommendation, 1919 (No. 1) stated that all practical measures should be taken to abolish such agencies.
[244] Van Eck *IJCLLIR* (2012) 32. Also see Van Eck *IJCLLIR* (2014) 54 and 55. He points out that the limitation was later relaxed with the revision of the Fee-Charging Employment Agencies Convention, 1949 (No. 96).
[245] As above at 33.

member states either could abolish such agencies or regulate them.[246] Valticos points out most member states chose the option of abolishing fee-charging employment agencies.[247]

In a significant development in 1997 agency work was legitimised by the ILO with the adoption of the ILO Private Employment Agencies Convention, 1997 (No 181) ("Private Employment Agencies Convention").[248] Van Eck indicates that the preamble to the Private Employment Agencies Convention specifically mentions that employment agencies operate in a very different environment than in the past.[249] O' Donnell and Mitchell confirm that by the time the ILO enacted this new standard it was merely reflecting what already had become an established policy position in many European countries.[250] The ILO recognised the need for particular standards and introduced conventions and recommendations relating to particular groups of atypical workers, specifically part-time workers,[251] agency workers, home workers[252] and domestic workers.[253] Historical developments of ILO standards regarding agency workers are indicative of a change in policy from their prohibition to allowing for their existence and providing protection for agency workers.[254]

3.3 Private Employment Agencies Convention, 1997

The introduction to the Private Employment Agencies Convention states that the General Conference of the ILO is "aware of the importance of flexibility in the

[246] Article 3 of the ILO Fee-Charging Employment Agencies Convention stated that "1. Fee-charging employment agencies conducted with a view to profit as defined in paragraph 1 (a) of Article 1 shall be abolished within a limited period of time determined by the competent authority." Provision was made for supervision and control of agencies in the period before abolition. Article 6 regulated fee-charging agencies not conducted with a view to profit. The article provided for supervision by an authority.

[247] Valticos *ILR* (1973) 50. At 56, the author suggests that general standards in existence do apply to temporary employment agencies and address some social problems. However, he states that particular standards with more precise provisions would fill some gaps that exist. Valticos explained that with the rise in the number of non-standard forms of work, and of agency work especially, there were recommendations by some that specific standards for such work should be developed

[248] Van Eck *IJCLLIR* (2014) 55.

[249] Van Eck *IJCLLIR* (2012) 34. At 33, the author adds that at the time of adoption of the Private Employment Agencies Convention, globalisation was already in full swing.

[250] O' Donnell and Mitchell (2001) 9.

[251] ILO Part-Time Work Convention, 1994 (No 182).

[252] ILO Homework Convention, 1996 (No 177).

[253] ILO Domestic Work Convention, 2011 (No 189).

[254] Van Eck *IJCLLIR* (2012) 35.

functioning of labour markets"[255] and that the ILO recognises "the role which private employment agencies may play in a well-functioning labour market".[256] The Private Employment Agencies Convention does not try to prevent or prohibit private employment agencies as some countries have done in their national labour legislation. It is clear the ILO recognises their place in the labour market: Article 2 declares that the purpose of the Private Employment Agencies Convention is "to allow for the operation of private employment agencies and to protect workers".[257] The introduction emphasises a need to prevent abuses and to protect workers, demonstrating elements of a rights-based approach by the ILO towards agency workers.[258]

The definition of "private employment agency" is broad and encompasses three types of agencies: a recruitment type agency, a private employment agency and all other services related to job-seeking.[259] Article 1 states

> "1. For the purpose of this Convention the term private employment agency means …
> (a) services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships…;
> (b) services consisting of employing workers with a view to making them available to a third party, … (referred to below as a 'user enterprise') which assigns their tasks and supervises the execution of these tasks;
> (c) other services relating to jobseeking, determined by the competent authority after consulting the most representative employers and workers organizations….
> 2. For the purpose of this Convention, the term workers includes jobseekers."

The ILO Guide to Private Employment Agencies ("ILO Guide") was published in 2007 with the purpose of providing guidance to national legislators in developing legal frameworks in line with the Private Employment Agencies Convention.[260] The

[255] Introduction of Private Employment Agencies Convention.
[256] As above.
[257] Article 2 of the Private Employment Agencies Convention.
[258] Van Eck *IJCLLIR* (2012) 35 alludes to the fact that the underlying purpose of the Private Employment Agencies Convention is to recognise the role that such employment agencies can play in respect of job creation but it also aims to ensure that workers who are employed by such employment agencies are not exploited.
[259] Article 1 of the Private Employment Agencies Convention.
[260] ILO Guide to Private Employment Agencies – Regulation, Monitoring and Enforcement Geneva, International Labour Office 2007.

ILO Guide states that the Private Employment Agencies Convention has reference to all types of agencies as they all have placement as their main function.[261] However, it is submitted that this is problematic in that these services are very different and therefore should not necessarily be covered by one convention. For example, the employer party in the instance of a recruitment agency and the employer party in the instance of an employment agency are not the same. The ILO Guide even states:

> "[a]n important requirement of any [private employment agency] legislation should be a clear and unambiguous definition of the term [private employment agency]. This avoids a confusion regarding the application of the legislation."[262]

Article 4 of the Private Employment Agencies Convention states that workers recruited by employment agencies should not be denied the right to freedom of association and the right to bargain collectively, however, achieving these rights is a challenge for such workers as they are employed by the employment agency and placed with different clients. Practicalities around organisational rights also are challenging in that the workers do not work at the workplace of their employer but rather at client company workplaces.

Article 5 provides for equal treatment in respect of treatment by the employment agency without distinction on several listed grounds.[263] The ILO Guide reflects the importance of this particular article by mentioning a statement made by a large employment agency that employment agencies "can either promote equal opportunities and improve transparency in the labour market or perpetuate discriminatory practice".[264] Indeed, they have the power to perpetuate inequality. Article 5(1) states that:

> "[i]n order to promote equality of opportunity and treatment in access to employment and to particular occupations, a Member shall ensure that private

[261] As above at 10.
[262] ILO Guide to Private Employment Agencies – Regulation, Monitoring and Enforcement Geneva, International Labour Office 2007 10.
[263] Article 5 of the Private Employment Agencies Convention provides the following grounds: race; colour; sex; religion; political opinion; national extraction; social origin; or any other form of discrimination covered by national law and practice, such as age and disability.
[264] ILO Guide to Private Employment Agencies – Regulation, Monitoring and Enforcement Geneva, International Labour Office 2007 25.

> employment agencies treat workers without discrimination on the basis of race, colour, sex, religion, political opinion, national extraction, social origin, or any other form of discrimination covered by national law and practice, such as age or disability."

Article 5(2) further provides that it shall not be implemented in such a way as to prevent employment agencies from providing "special services or targeted programmes designed to assist the most disadvantaged workers in their jobseeking activities". A shortcoming here is that there is no explicit mention of equal treatment of employees of an employment agency with those employees employed directly by a client. Accordingly, there can be different treatment of these two groups of employees even though they work side by side at the same workplace. Such inequality is likely as those employed directly by a client may receive benefits, such as medical aid, death and disability cover, company pension schemes and so forth, which the employees of the employment agency are less likely to have. Although equality is of key importance, it is argued that Article 5 merely provides the bare minimum protection and it could have been formulated in greater detail.

Article 7 of the Private Employment Agencies Convention states that fees or costs should not be charged to workers whether directly or indirectly,[265] which is an important rule as it prevents exploitation of the agency worker. It aids in the protection of agency workers, who already are in a more precarious position due to their employment by means of an employment agency.

According to Article 12 the member state shall allocate the respective responsibilities of employment agencies and the client, and lists specific responsibilities such as those relating to collective bargaining, training, social security benefits and compensation for occupational health and safety claims. In this regard it is positive that the Private Employment Agencies Convention places the obligation on the member state to determine and allocate these important obligations. The Article

[265] The general principle in terms of the Private Employment Agencies Convention is that agency workers should not have to pay in order to get their job. However, the ILO Guide does make provision for some exceptions. It states that "[i]t seems adequate to allow [private employment agencies] to collect fees from jobseekers in order to compete with illegal market participants gaining profit through acceptance of bribes. This, however, is only acceptable as long as safeguards to protect jobseekers from exploitation are introduced and the amount of fees is regulated."

encourages member states to provide clarity and certainty for workers as well as the other parties in the triangular relationship.

The next part of the Private Employment Agencies Convention refers to practicalities surrounding ratification, and does not create any further protection for workers employed by private employment agencies. It is suggested that it was a step in the right direction that the ILO identified the need to implement a convention on employment agencies and to protect employees of such agencies.

The ILO Guide states that the Private Employment Agencies Convention was adopted to replace earlier standards which were aimed at the abolition of employment agencies and that the Convention recognises that employment agencies contribute to the functioning of the labour market.[266] It is clear that the ILO adopts the view that regulation is necessary to protect employees of employment agencies and that is the purpose of regulation. At the same time the ILO Guide suggests that regulation should improve the functioning of the labour market and should not serve as a tool to restrain competition or to create unnecessary burdens on private employment agencies.[267]

In the past the ILO restricted the operation of employment agencies in so far as they undermine the principle that labour is not a commodity.[268] In 1997 the ILO changed this policy and allowed the operation of employment agencies and provided for their regulation. It is submitted that the reason for the ILO's change was premised on the need to allow flexibility in the labour market, but also to regulate the widespread practice of agency work.[269]

3.4 Private Employment Agencies Recommendation, 1997[270]

The protection of agency workers is the main thrust of the Private Employment Agencies Recommendation. This instrument goes further than the Private

[266] ILO Guide to Private Employment Agencies – Regulation, Monitoring and Enforcement Geneva, International Labour Office 2007 1.
[267] As above at 2.
[268] Raday *CLLPJ* (1999) 413.
[269] As above.
[270] ILO Private Employment Agencies Recommendation, 1997 (No 188).

Employment Agencies Convention in providing recommendations for the additional protection of agency workers.

For example, Article 2 of the Private Employment Agencies Recommendation suggests that stakeholders need to work together to give effect to the provisions of the Private Employment Agencies Convention and mentions "tripartite bodies or organisations of employers and workers" who should engage in effective social dialogue pertaining to the regulation of agency work.[271]

Article 4 provides that member states should adopt measures to prevent "unethical practices",[272] however, the term is not defined: "[t]hese measures may include laws or regulations which provide for penalties, including prohibition of private employment agencies engaging in unethical practices". This is an important protection and it is asserted that it is unfortunate that the same principle is not included in the Private Employment Agencies Convention.

Such a measure to prevent unethical practices could include a system of registration or licensing of employment agencies. The disadvantage of not having "any scheme for the registration and control" of employment agencies in place, is the exacerbation of the vulnerability of low-paid agency workers to abuse by employment agencies.[273]

The Private Employment Agencies Recommendation also suggests that agency workers should be provided with a written contract of employment,[274] which can give workers some security as to the particulars of their rights and duties. At least it can provide clear evidence of their employment and the terms and conditions. However, this provision is not in the Private Employment Agencies Convention.

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[271] Article 2 of the Private Employment Agencies Recommendation states "(1) Tripartite bodies or organizations of employers and workers should be involved as far as possible in the formulation and implementation of provisions to give effect to the Convention. (2) Where appropriate, national laws and regulations applicable to private employment agencies should be supplemented by technical standards, guidelines, codes of ethics, self-regulatory mechanisms or other means consistent with national practice."
[272] Article 4 of the Private Employment Agencies Recommendation states "[m]embers should adopt all necessary and appropriate measures to prevent and to eliminate unethical practices by private employment agencies. These measures may include laws or regulations which provide for penalties, including prohibition of private employment agencies engaging in unethical practices."
[273] Benjamin *AJ* (2012) 37.
[274] Article 5 of the Private Employment Agencies Recommendation.

Furthermore, reference is made to the health and safety of workers and the prohibition of discrimination, as well as to the promotion of equality through affirmative action programmes. Measures should be taken to promote the usage of proper, fair and efficient selection methods.[275]

Article 15 of the Private Employment Agencies Recommendation regulates another significant aspect in these areas which:

> "(a) prevent the user enterprise from hiring an employee of the agency assigned to it; (b) restrict the occupational mobility of an employee; (c) impose penalties on an employee accepting employment in another enterprise."

These rights are crucial in allowing an agency worker to transition from non-standard work to standard employment.[276] It is submitted that it would have been highly advantageous for agency workers to have these rights included in the Private Employment Agencies Convention.

The last part of the Private Employment Agencies Recommendation deals with the relationship between public employment services and private employment agencies[277] and encourages the adoption of measures to promote cooperation between these agencies. Article 16 states such cooperation should be encouraged in relation to the implementation of a national policy on organising the labour market.[278] It is submitted that cooperation could have a positive effect on job creation.

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[275] Article 13 of the Private Employment Agencies Recommendation states "[p]rivate employment agencies and the competent authority should take measures to promote the utilization of proper, fair and efficient selection methods."

[276] See Chapter 4 at 3.3. The idea of such transition to more secure and standard employment may originate from an influence of the European "flexicurity" labour market policy where the European Expert Group on Flexicurity in 2007 drafted a list of "pathways", different ways countries can improve their labour markets. In this regard, one of the pathways concerns promoting upward transitions in the labour market of non-standard employment. For further detail see Bovenberg and Wilthagen *EJSS* (2008).

[277] In South Africa, the Employment Services Act 4 of 2014 (ESA) has recently been promulgated. The ESA seeks to promote employment and facilitate access to the labour market for work-seekers. In doing so, the ESA establishes public employment services which are to provide job-matching services free of charge, according to Section 5. In Chapter 3 of the Employment Services Act, the relationship between employment agencies and public employment services are covered. For a discussion on the ESA see Chapter 6 at 4.

[278] The Introduction to the ILO Guide 2 reflects ILO policy regarding agency work and the link between national legislation and policy. The following statement is made: "[l]egislation can help in shaping the role of [private employment agencies] within the context of national employment and migration policies, local specificities of labour markets and levels of socio-economic development. Regulation

4. Challenges Faced by the ILO

4.1 Introduction

The ILO's overarching labour policy is considered below and incorporates an examination of the major challenges the ILO faces regarding the organisation's existence, and the purpose, relevance and enforceability of policy, so as to highlight the ILO's responses to its policies and developments in respect of its conventions and recommendations.

4.2 Challenges

4.2.1 Relevance

In 2005 Hepple argued that one of the causes of a noticeable decline in standard-setting by the ILO and ratification by member states is the increasing irrelevance of international standards.[279] Historically, the ILO catered for the standard form of employment, whereas the changing world of work challenges the relevance and applicability of ILO standards.

Wisskirchen comments, although the ILO had been active for a period of 86 years, it was only moderately well-known in member states and its activities seem to have a limited influence[280] due to the instruments from the ILO's early days being formulated at a time when industry and the world of work were different to what they currently are. Weiss re-affirms this claim and states that a study was conducted in which it was established that only a fraction of conventions and recommendations were up to date.[281]

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should, therefore, ensure that [private employment agencies] offer their services in the interests of their clients as well as in support of the overall development goals of countries. It should improve the functioning of the labour market, not serve as a tool to restrain competition and create an unnecessary burden for [private employment agencies]".

[279] Hepple (2005) 35. Smit and Fourie *TSAR* (2009) 522 advance the idea that the ILO should formulate a campaign aimed at increasing ratification related to the protection of non-standard workers.

[280] Wisskirchen *ILR* (2005) 253. At 261 the author states that there are many reasons for this, among them many of the ILO standards are obsolete.

[281] Weiss *SC* (2011) 3. The study was conducted in 2002 and reflected that 71 conventions were up to date whilst 54 conventions were not. Also 73 recommendations were up to date but 67 were not. Efforts are being made to update some instruments whilst some have to be discarded.

4.2.2 Globalisation

Globalisation poses another challenge to the ILO. In the past the standard of living of a state's people depended largely on the abundance of natural resources, the availability of sufficient capital and sufficient labour, whereas today natural resources matter less and technology, capital and labour are more readily available in many countries.[282] Developed countries have an advantage over developing nations. The ILO endeavoured to create international labour standards that cater for both developed and developing countries.

Globalisation results in a greater focus on the competitiveness of countries rather than on workers' rights and is not necessarily supportive of the ILO's traditional goal of striving for social justice. Hepple raises the issue that the real question posed by globalisation is not whether there are too many international standards, as some believe, but rather whether the standards are the ones that are needed to counteract the effects of globalisation on the majority of the world's workers.[283] The further question is whether such standards are effectively monitored.

4.2.3 Universality

The notion of "universality" poses a further challenge to the operation of the ILO.[284] The question asked is whether it is possible to approach globalisation through the universal application of international labour standards[285] and relates to their relevance. If countries are so different, for instance developed versus developing, how can an international instrument cater for and be relevant to both countries? Langille is of the view that there should be a shift from the universal application of standards to a more local and contextual application.[286]

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[282] Potter *STLR* (2005) 247.
[283] Hepple (2005) 39.
[284] The term "universality" refers to the ILO's instruments being applicable universally. In other words, it applies to all member state countries, irrespective of their particular circumstances, resources, strengths or weaknesses.
[285] Hepple (2005) 35.
[286] Langille *CLLPJ* (2010) 530 favours a shift from a top down to a bottom up approach. In other words, the standards are derived from the workers and not from governments or unions. He also promotes a shift from "all at once" to a "few things at once" approach where there is a narrower focus of standards. These ideas run against the current universality principle.

By contrast, others do not have a negative view of universality. Trebilcock does not believe that the universality of conventions establishes a problem for human freedom: the author suggests that there is room for both universal standards and laws which are local, contextual and embedded.[287]

4.2.4 Interpretation

A further challenge is the criticism of difficulties in interpreting ILO standards. The organs which monitor compliance of ILO standards, such as the Committee of Experts and the Conference Committee, often debate differences regarding the interpretation of instruments.[288] There is no final and binding decision-making body to revert to, which is problematic. The style of drafting of conventions or recommendations, whether detailed or vague, has an effect on the interpretation of such instruments.

4.2.5 Drafting Style

Another criticism levelled against the ILO is that the style of drafting of standards has been too detailed and inflexible, resulting in low rates of ratification as member states are unable to comply with all the details found within the instruments. Wisskirchen points out that the shortcomings of the ILO and the result thereof are largely a consequence of the methods of the ILO.[289] The author adds that details and practical aspects should not be included in conventions but should rather be left to the member states who ratifying such conventions.[290] Trebilcock emphasises that the available flexibility devices in existing international standards should not be ignored.[291]

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[287] Trebilcock *CLLPJ* (2010) 558. At 559 the author adds that universality can and should promote the empowerment that may grow out of human freedom.
[288] Wisskirchen *ILR* (2005) 283.
[289] As above at 254. At 259 the author points out double standards are rejected by the ILO and should not be allowed.
[290] As above at 259. The author also supports the idea of greater utilisation of flexibility clauses and allowances for member states' climatic conditions or industrial organisation.
[291] Trebilcock *CLLPJ* (2010) 554 mentions that a common technique is for a member state to be allowed to exclude branches of economic activity or categories of workers when ratifying conventions. At 556 the author mentions that it is also possible to set a threshold at which certain obligations are excluded, or to progressively implement a convention. At 260 the author states that an excessive number of legal and technical details is usually the cause.

4.2.6 Enforcement Mechanisms

The final challenge highlighted which will be considered is the lack of enforcement of the standards and the weak supervisory mechanisms of the ILO in the member countries. Swepston correctly notes "[i]t is not the existence *per se* of Conventions and Recommendations that makes the ILO effective, but rather the fact that their implementation is regularly and systematically monitored."[292] Unfortunately, the most common criticism against the ILO is that it lacks proper supervisory powers.[293]

5. ILO's Policy Shift

The criticisms and shortcomings of the ILO's standards, fortunately, led to the ILO taking action in the form of a number of reform strategies. It is submitted that the ILO's reform strategies discussed below to a large extent address the criticisms levelled against it and reinforce the importance of international labour standards.

In reaction to the mentioned criticisms the ILO adopted the following measures: it identified eight core rights found in the 1998 Declaration on Fundamental Principles and Rights at Work,[294] the ILO adopted a process of review of international labour standards and in 2008 the ILO formulated the Declaration on Social Justice for a Fair Globalization[295] which promotes the decent work agenda.

5.1 Declaration on Fundamental Principles and Rights at Work

One of the most important of these reforms was the introduction of the ILO Declaration on Fundamental Principles and Rights at Work, 1998 ("Declaration on Fundamental Principles and Rights at Work").[296] The adoption of the Declaration on

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[292] http://www.leeswepston.net/supersys.htm accessed on 12 October 2014.
[293] Helfer *ASILP* (2007) 391 goes as far as saying that the ILO is largely perceived to be an institution that is weak and ineffectual and also refers to the words of Mathews who states that "[t]he ILO has indeed been around forever, but it has done nothing forever, so it is not terribly interesting". Hyde *LEHR* (2009) echo's Langille (2005) 16 in so far as it is basically a system in which taxpayers pay lawyers in domestic departments to compile reports which are sent to other lawyers and then to committees in Geneva, "without ever achieving any traction with the real world during or after the process at all."
[294] ILO Declaration on Fundamental Principles and Rights at Work, 1998.
[295] ILO Declaration on Social Justice for a Fair Globalization, 2008.
[296] ILO Declaration on Fundamental Principles and Rights at Work, 1998. Van Staden *TSAR* (2012) 94 - 95 makes reference to three reformulations of the Treaty of Versailles in 1919, the founding document of the ILO. These are the Declaration of Philadelphia in 1944, the Declaration on Fundamental Principles and Rights at Work in 1998, and the Declaration on Social Justice for a Fair

Fundamental Principles and Rights at Work increased ratification of the eight core conventions.[297] This development is positive as the ILO set out to achieve universal ratification of the core conventions. The Declaration on Fundamental Principles and Rights at Work and the core conventions strive to ensure worker protection, which emphasises the policy focus of the ILO and its standards.

The idea behind the Declaration on Fundamental Principles and Rights at Work was to establish basic minimum rights which would have to be observed irrespective of ratification. The fundamental rights include the freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment or occupation.[298]

It has been debated whether other core rights should be added to this list, such as the right to a living wage and the right to health and safety in the workplace.[299] Supiot indicates there is the view that the list of rights in the Declaration on Fundamental Principles and Rights at Work "implicitly gives others a secondary status and has rather relegated them to the warehouse of normative accessories".[300] Irrespective of the rights included or excluded in the list, the Declaration on Fundamental Principles and Rights at Work is positive in that it is a first step towards a "genuine international social public order binding on all states".[301]

The rights are meant to create protection for workers while allowing for trade liberalism in a globalised world. The Declaration on Fundamental Principles and Rights at Work refers to the fact that the ILO recognises its obligation to assist

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Globalisation in 2008. He adds that the reformulations show the resilience of the ILO in adapting to forces of change.

[297] Hepple (2005) 60. The conventions are: Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Forced Labour Convention, 1930 (No. 29); Abolition of Forced Labour Convention, 1957 (No. 105); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182); Equal Remuneration Convention, 1951 (No. 100); Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

[298] Consensus was reached between the different member states on the core, minimum rights. Collier (2012) at 329 mentions amongst the ILO's 183 member states there were divergent views on what should and should not be regulated. However, consensus emerged on these core labour rights. See also Van Niekerk *et al* (2015) at chapter 2 for a further discussion.

[299] Weiss *SC* (2011) 5.

[300] Supiot *CLLPJ* (2006) 115.

[301] As above.

member states to achieve their objectives, which includes helping members in their efforts to create a climate for economic and social development.[302] The instrument provides that labour standards should not be used for protectionist trade purposes. Paragraph 5 states that the International Labour Conference:

> "[s]tresses that labour standards should not be used for protectionist trade purposes, and that nothing in this Declaration and its follow-up shall be invoked or otherwise used for such purposes; in addition, the comparative advantage of any country should in no way be called into question by this Declaration and its follow-up."

Around the time of the drafting of the Declaration on Fundamental Principles and Rights at Work a number of states challenged the connection between labour standards and trade. Developing countries with an apparent competitive advantage over developed countries in terms of lower labour standards and employee protections did not support the idea of a system of social labelling as per the Director-General's proposal. They argued that such a system would mean there is an untenable link between labour standards and trade, which they rejected.[303] As a result of this challenge, the Declaration on Fundamental Principles and Rights at Work does not contain any explicit linkage to trade.

Contrary to the traditional sanctions for non-compliance, the Declaration on Fundamental Principles and Rights at Work provides that the ILO will assist member states to comply with the established norms;[304] as this instrument is a declaration and not a convention. At the same time this fresh approach seems to have been quite successful in that it resulted in ratifications of the core conventions.[305]

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[302] ILO Declaration on Fundamental Principles and Rights at Work, 1998 para 3.
[303] Hepple (2005) 61. The arguments were that a binding Declaration on equal pay for work of equal value would contravene the principle of voluntary adherence by states. Furthermore, the principle of equal pay for equal work would question the comparable advantage of developing countries. Also, there was a claim that the ILO reports on social progress would allow the ILO to determine an acceptable comparative advantage. Lastly, there was the argument that social labelling would legitimise the use of labour standards for protectionism.
[304] Van Staden *TSAR* (2012) 100 mentions the follow-up mechanism of reports, calls for reports, review by outside experts and by political bodies within the ILO. Also see Potter *STLR* (2005) at 250 who states that "[t]he Declaration and its follow-up are based on the view that 'sunshine', in the form of peer review, publicity, and targeted technical assistance will do much more, and more quickly, to promote fundamental worker rights than the sledgehammer approach of trade sanctions which developing countries would strongly resist."
[305] As mentioned by Hepple (2005) 60.

The action by the ILO in respect of the Declaration on Fundamental Principles and Rights at Work is commended. Cox calls for a better appreciation of the work done by the ILO as it has revitalised itself in the decade leading up to the Declaration on Fundamental Principles and Rights at Work.[306]

5.2 The Decent Work Agenda

In 1999 the ILO launched another significant reform strategy: Juan Somavia, Director-General of the ILO, initiated the "decent work" agenda or campaign. In describing the thinking behind the decent work agenda, Somavia stated that "[w]e needed to rekindle the spirit, reinvigorate tripartism and be perceived as relevant to the 21st century. That sentiment is the origin of the decent work agenda."[307]

The strategy is based on four pillars:[308] first, to promote and realise standards and fundamental principles and rights at work, second, to create greater opportunities for women and men to secure decent employment and income, third, to enhance the coverage and the effectiveness of social protection for all and the fourth pillar is to strengthen tripartism and social dialogue.

Somavia proposed that a primary aim of the ILO should be to promote opportunities for men and women to obtain decent and productive work in conditions based on freedom, equality, security, and human dignity. This aim is based on the idea that social justice consists of a set of regulations, institutions and policies to ensure fair treatment and equal distribution of opportunities and income.[309] This idea formed the basis for the formulation of the pillars. The meaning of "decent work" has been explained as follows:

> "[j]obs of acceptable quality (constructive, profitable, and gainful work) both within the formal and the informal sectors; decent remuneration (to fulfil basic economic and family needs); fair working conditions; fair and equal treatment at work (no discrimination); safe working conditions; protection against unemployment; access to salaried jobs or self-employment (promoting

[306] Cox *EHRLR* (1999) 451. At 458 the author states that the Director-General, Juan Somavia, led the "substantial revitalisation" of the ILO.
[307] Rodgers *et al* (2009) 222.
[308] As above at 223. The authors explain that the decent work agenda was "a way of expressing the overall goal of the ILO, and a framework to bring its different programmes together."
[309] Hepple (2005) 63.

> entrepreneurship and supporting small businesses by providing access to credit, premises, management training, business advisory services, and so on); training and development opportunities; and job creation."[310]

The ILO recognises that globalisation has created a winner-takes-all-situation and has established an "ethical vacuum."[311] The decent work agenda is a strategy to counteract this tendency. The ILO has found there is a direct link between decent work as a development agenda and the elimination of poverty.[312]

The decent work agenda is significant in that it allows for application to all forms of work, including non-standard work, and is not limited to traditional forms of employment. It creates basic social and economic rights for all workers. As an approach it recognises the changing world of work and modernises the ILO's manner of setting international labour standards. There is an economic element to the agenda as there is a drive towards job creation, jobs consisting of profitable work, and work which is sustainable.

The concept of decent work is underpinned by the idea that work is not only a source of income but also a source of personal dignity, family stability and economic growth. In its turn, this concept demands an expansion of opportunities for productive jobs and employment[313] and the decent work agenda is an expression of hope to create further employment.

The ILO policy focus is still on employee rights and the protection of such rights but it has been broadened to include the creation of work opportunities. Van Eck explains that the agenda shifted the policy focus of the ILO from a rights-based or social justice one to a focus which includes potential job creation and poverty reduction.[314]

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[310] McGregor *QLRPB* (2006) 3 suggested a rather wide definition for decent work, namely "(i) productive work in which rights are protected, which generates an adequate income with adequate social protection; and (ii) sufficient work, in the sense that everybody should have full access to income earning opportunities."
[311] As above. McGregor adds that this had weakened the fabric of social society.
[312] As above. Furthermore, there was a finding in the same report that disparities in incomes, work and security worldwide were threatening the legitimacy of the global economy. These findings led to the formulation of the decent work agenda.
[313] Cohen and Moodley *PELJ* (2012) 1.
[314] Van Eck *DJ* (2013) 602. Reference is made to a quote by Juan Somavia, the ILO Director General at the time, who said "the principal route out of poverty is work, and to this end the economy must generate opportunities".

The focus creates the idea of the inclusion of socio-economic minimums, but such minimums are not provided as they are dependent upon each member state's circumstances.

As mentioned earlier in the chapter in the past there was inadequate knowledge of the ILO and its work, however, the decent work agenda attracted media attention and this has led to "soft pressure" being placed on members to comply.[315] The decent work agenda has generated many discussions on what decent work entails and who should be entitled to such work. The phrase "decent work" is often used today in South African media articles in the context of labour law.[316] Nelson Mandela succinctly stated that:

> "[d]ecent work is based on the efforts of personal dignity, on democracies that deliver for people, and economic growth that expands opportunities for productive jobs and enterprise development … Decent work is about the right not only to survive but to prosper and to have a dignified and fulfilling quality of life. This right must be available to all human beings. We rely on the ILO to continue its struggle to make decent work a global reality."[317]

5.3 Declaration on Social Justice for a Fair Globalization

Emanating from the idea of decent work, the ILO in 2008 adopted the Declaration on Social Justice for a Fair Globalization.[318] The preface to the document states that it expresses the contemporary vision of the ILO's mandate in the era of globalisation. The Declaration on Social Justice for a Fair Globalization is another of the ILO's reform strategies in response to criticisms and, in particular, the challenge of globalisation to the world of work. The preface states that it builds on the original

[315] Weiss *SC* (2011) 6 states that the decent work agenda has succeeded in gaining much attention throughout the world. The agenda is, according to the author, stimulating discussions on how to meet the goals embedded in the comprehensive concept of the decent work agenda and also it is serving as a base of legitimacy by putting soft pressure on actors in the member states of the ILO.
[316] The preface to the ILO Decent Work Country Profile South Africa (2011) states that "[t]he Decent Work Country Profiles compile in one document all available data on decent work, statistical and legal indicators, as well as analysis of gaps and trends on decent work. The Profiles facilitate the evaluation of progress made towards decent work and inform national planning and policymaking." The report goes on to state that "[t]he current document covers all decent work elements in South Africa for which indicators are available; it therefore gives an overall assessment of the South Africa decent work situation, and can serve as a reference or baseline document for the country's decent work agenda."
[317] Rodgers *et al* (2009) 205. The words of Nelson Mandela, former president of South Africa, formed part of a message delivered by him to the International Labour Conference in 2007.
[318] ILO Declaration on Social Justice for a Fair Globalization, 2008.

values and principles found within the ILO but reinforces them in order to meet the challenges of the 21st century.

Importantly, the preface states that the Declaration on Social Justice for a Fair Globalization institutionalises the decent work concept and places it at the core of its policies in order to reach its constitutional objectives, which statement elevates the significance of the decent work agenda. The preface further sets out that the Declaration on Social Justice for a Fair Globalization is a "compass" for the promotion of a fair globalisation which is based on decent work and is also a tool to assist in speeding up the process of implementation of the decent work agenda in member states.

The Declaration on Social Justice for a Fair Globalization commences by setting out the advantages of globalisation: high rates of economic growth and employment creation in some countries.[319] However, the disadvantages of globalisation are then set out as being income inequality, high levels of unemployment and poverty and growth of informal work which impacts on the protection of workers.[320] The Declaration re-affirms that the ILO has a key role to play in helping to promote and achieve progress and social justice in a constantly changing environment.

Reference is made to the Declaration of Philadelphia of 1944 which states that labour is not a commodity and that poverty is a danger to prosperity. The Declaration on Social Justice for a Fair Globalization also states that the Declaration of Philadelphia provides the ILO with the responsibility to examine and consider all international economic and financial policies in light of the fundamental objective of social justice: the social justice perspective has been and remains the underlying

[319] Declaration on Social Justice for a Fair Globalization, 2008 5. The advantages are expressed as "the process of economic cooperation and integration has helped a number of countries to benefit from high rates of economic growth and employment creation, to absorb many of the rural poor into the modern urban economy, to advance their developmental goals, and to foster innovation in product development and the circulation of ideas."
[320] As above. The disadvantages are expressed as "global economic integration has caused many countries and sectors to face major challenges of income inequality, continuing high levels of unemployment and poverty, vulnerability of economies to external shocks, and the growth of both unprotected work and the informal economy, which impact on the employment relationship and the protections it can offer."

policy focus of the ILO. However, attention is given economic considerations as reflected in the decent work agenda strategic objectives.

The Declaration on Social Justice for a Fair Globalization sets out four strategic objectives of the decent work agenda and notes that they are inseparable, interrelated and mutually supportive:[321] to promote employment by creating a sustainable and economic environment, to develop and enhance social protection, to promote social dialogue and tripartism, and to realize "the fundamental principles and rights at work".[322] Regarding the important question of how the strategic objectives are to be met, the Declaration on Social Justice for a Fair Globalization provides that each member state is to determine this programme; in doing so, member states should have due regard to "national conditions and circumstances", "the interdependence, solidarity and cooperation among all Members of the ILO" and "the principles and provisions of international labour standards".[323]

Part II deals with "Method of Implementation" and sets out the responsibilities of the ILO. It states that the ILO should review and adapt its institutional practices, strengthen and streamline technical cooperation and expert advice, promote shared knowledge and understanding, provide assistance to members who request it, and develop new partnerships with non-state entities and economic actors.

The Declaration on Social Justice for a Fair Globalization is not detailed and does not prescribe actions which member states are obliged to take. Instead, it assists in reflecting the policy of the ILO and is a campaign to encourage member states to comply voluntarily with the strategic objectives of the decent work agenda. No actual obligations are created and, therefore, there are no sanctions for non-compliance. Instead, the ILO lists its own responsibilities in the achievement of a fair globalisation and decent work. Rodgers *et al* make the valid point that the Declaration on Social Justice for a Fair Globalization is the most intensive effort by the ILO to build and implement a coherent and integrated agenda at national and international levels.[324]

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[321] Declaration on Social Justice for a Fair Globalization, 2008 at I. Scope and Principles, A and B.
[322] As above.
[323] Declaration on Social Justice for a Fair Globalization, 2008 at I. Scope and Principles, C.
[324] Rodgers *et al* (2009) 6 233. There are criticisms against the Declaration on Social Justice for a Fair Globalization and against the notion of the decent work agenda. The authors mention that "decent" is

This policy statement is further evidence that the ILO's policy shift is from a rights-based one to a policy which includes a focus on the economic considerations of employees, namely, poverty reduction and job creation. It is clear the ILO has identified that both the rights of workers and economic considerations are of importance.[325]

5.4 Additional Actions by the ILO

An additional response by the ILO to the challenges experienced was to focus on principles or soft law as opposed to detailed conventions. The Declaration on Fundamental Principles and Rights at Work is an example of the new approach. The document cannot be ratified and does not contain detailed rules but rather sets out principles. Wisskirchen states in a fast-changing world it is vital to identify basic principles and to formulate indispensable minimum standards, leaving room for movement by employers and employees.[326]

Despite the fact that this soft law approach may ensure a greater number of ratifications or voluntary compliance, employees have been critical: they want actual obligations to be created and for proper sanctions to be taken against members who do not comply and are not supportive of soft law. On the other hand, employers are in favour of the idea of stand-alone recommendations which are not attached to any particular convention: again a soft law approach.[327]

The ILO has been through a process of review of current standards, particularly those which were drafted before 1985, in order to determine whether they are relevant and up-to-date in a globalised world. Of the 184 conventions analysed by a Working Group on Policy regarding the Revision of Standards, 71 were classified as

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subjective and therefore has different meanings depending on the interpreter and different meanings in other languages. It is submitted that, the concept is therefore quite vague which leaves room for different levels of compliance by different member states. Also there is no accurate way to track progress of the Declaration on Social Justice for a Fair Globalization and the objectives are difficult to measure.

[325] See also Van Eck *IJCLLIR* (2012) at 34 and 35 where the author discusses the policy shift in particular in relation to employment agencies.

[326] Wisskirchen *ILR* (2005) 268.

[327] As above at 262.

up-to-date:[328] the 25 conventions adopted after 1985 were deemed to be automatically up-to-date. Of 194 recommendations, only 73 are up-to-date.[329]

There has been a move towards integration of standards. Accordingly, each particular international labour standard is not examined in isolation but is examined as part of a bigger picture. This approach should improve "the coherence, relevance and impact of standards and related activities".[330] In this regard, the ILO has been considering the idea of framework instruments which focus on general principles in respect of a particular topic: health and safety is an example of an area of labour law which could be covered by a framework instrument.[331] Framework instruments can cover groups of countries which have similar circumstances or levels of development.

The ILO has come to realise that their goal of achieving social justice cannot be achieved without the buy-in of all role-players. International framework agreements entered into between multinational enterprises and trade unions are growing in usage, especially in developed countries, and are an important example of the power of cooperation between employers and trade unions. These agreements introduce three important tools, namely, joint monitoring committees that include representatives from workers and employers, proactive strategies to create a culture respectful of international framework agreements and the adoption of incentives for employee representatives at national, local and cross-border levels.[332]

The activities of private actors are vital in complementing the ILO's task of setting and spreading international labour standards. In this regard codes of conduct of multinational enterprises are relevant.[333] Weiss says that a "private-public policy mix"

[328] Wisskirchen *ILR* (2005) 262. Of those conventions that are classified as outdated, several have been and will be set aside in that there will be no calls for their ratification and there will also not be any monitoring of compliance with those particular conventions.
[329] Hepple (2005) 63.
[330] Wisskirchen *ILR* (2005) 266.
[331] Hepple (2005) 63 states that "[t]he intention is to focus on general principles and to produce a framework instrument which is more promotional than prescriptive in content."
[332] Weiss *SC* (2011) 14.
[333] As above at 15. The author adds "[t]hese private activities should not be conceived as rivals to the ILO's mission. The two sides depend on each other and produce synergy effects by a public-private-policy mix for which no alternative is available."

is required.[334] Similarly, there is a view that the international labour regime should be transformed by introducing shared responsibility between the ILO, states and private actors to ensure minimum standards are met and maintained for all workers.[335]

6. Conclusion

The purpose of this chapter is to illustrate the policy development that has taken place at the ILO and to identify the international norms in respect of the protection of agency workers.

Workers' rights are at the centre of what constitutes social justice. The policy approach of the ILO historically has focused on the protection of workers' rights. However, there have been a number challenges the ILO faces and criticisms of its manner and style of setting standards, including the issue of the irrelevance of international standards in a changing world of work where there are growing numbers of non-standard employees, the issue of universality, the point that international standards are too detailed and inflexible, the contestation of the methods of supervision and enforcement of standards, and the challenge of globalisation that places greater emphasis on economic considerations.

The ILO rose to the challenge in addressing these issues. In response to the criticisms levelled against it and to the challenge of globalisation, the ILO adopted a number of reform strategies. The Declaration on Fundamental Principles and Rights at Work provides for basic minimum rights irrespective of ratification. The ILO changed tack to a soft law approach and a focus on principles in instruments, which addresses complaints of inflexibility and too much detail. This change has led to greater ratifications of core standards.

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[334] Weiss *SC* (2011) 15. This view opens the door to the possibility of another potential response by the ILO to challenges it has experienced.

[335] Milman-Sivan *MJIL* (2013) 678 proposes a model in terms of which "responsibility for remedying the unjust working conditions in the global labor market should be borne by a complex set of agents and institutions that take part in global production. It is our assertion that the ILO should assign legal responsibility for unjust working conditions in the global labor market not only to the states in whose territory violations of labor standards arise, but also to brands and powerful TNCs."

The decent work agenda is a significant reform strategy, which created awareness of the ILO's activities and workers' basic rights. Further, the reform strategy of the Declaration on Social Justice for a Fair Globalization reaffirms the pillars of the decent work agenda. Moreover, the ILO went through a review process of its standards to determine relevance and what is outdated and should be shelved.

Through the reform strategies, one observes a policy shift in the international view of the role and purpose of labour law. Whereas historically labour law was based on the protection of workers' rights, there has been a shift to include considerations which are economic in nature, for example, agency work was initially prohibited by the ILO, but it is now regulated and viewed as a source of employment and income. It is suggested that this shift was necessitated by the changing world of work.

As discussed in this chapter, the ILO historically catered for traditional forms of employment and thus has not been effective in ensuring protection of agency workers' rights. However, to the credit of the ILO, it has produced instruments which deal particularly with such employees. The Private Employment Agencies Convention and the Private Employment Agencies Recommendation are examples of the implementation of this strategy.

The Private Employment Agencies Convention contains minimum standards, but does not address the practical application of some of the rights conferred. It is submitted that the Private Employment Agencies Recommendation contains provisions which ideally should have been included in the Private Employment Agencies Convention. Significantly, based on the discussions in this chapter, it is suggested that the following principles can be considered to be current ILO norms with regard to the protection of agency workers:

First, flexibility in the functioning of the labour markets is important and employment agencies should be allowed to operate. Fees or costs may be charged to clients but not to agency workers. Second, agency workers need to be protected and should be provided with the rights of freedom of association and collective bargaining. Third, agency workers should be provided with the right to equal treatment. Fourth, agency workers should not be prohibited from working for the client subsequent to

placement by the employment agency. These norms establish greater opportunities for agency workers to secure decent employment and income and social protection. Fifth, tripartism and social dialogue should be strengthened. Lastly, the responsibilities of the employment agency and client should be allocated respectively.

What follows in the next chapter is a study of the European Union's ("EU") regulation of agency work and the European policy concept of "flexicurity". International standards will be identified to facilitate an appraisal of South Africa's regulation of agency work.

Chapter 4
The EU Directive on Temporary Agency Work and "Flexicurity"

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1. Introduction

Whereas Chapter 3 identified the International Labour Organisation ("ILO") norms pertaining to employment agencies, this chapter analyses the European Union ("EU") Directive on Temporary Agency Work ("Temporary Agency Work Directive")[336] and the EU policy referred to as "flexicurity"[337] in order to identify international norms at an EU level in respect of the protection of agency workers.

It is submitted that the consideration of the position within the EU is justified for several reasons. There are strong parallels between the EU policy concept of

[336] EU Directive on Temporary Agency Work 2008/104/EC.
[337] "Flexicurity" is a term first used by Wilthagen and Tros *Transfer* (2004) 166 – 186. Flexicurity will be defined as far as is possible in this chapter and it will be seen there are many definitions for the policy. In its simplest form, it is submitted that it appears to amount to a balance between flexibility for employers and security for employees. See the discussion that follows in Chapter 4 at 3.2.

flexicurity and South Africa's labour law policy known as "regulated flexibility".[338] EU policy could be a guide for South African policymakers with regard to correcting policy where it is lacking because flexicurity has been defined[339] and particular "pathways"[340] to achieving the aim of the policy have been distilled. It is submitted that South Africa can gain from the EU flexicurity policy in so far as underpinning it is a feature by which workers transition from unemployment into employment or from precarious work into standard employment.[341]

At the outset in this chapter a summary of the aims, structure, system and legislation of the EU is provided. The content of the Temporary Agency Work Directive is examined to identify the minimum standards adopted by the EU and to reflect on the level of protection provided for agency workers. It will be shown that the policy focus of the EU developed from one that aimed to ensure market integration to a strategy to improve competitiveness through regulation.[342]

2. The EU Directive on Temporary Agency Work

2.1 Role and Function of the EU

The official stated objective of the EU is to promote peace.[343] Further objectives include attaining an internal market in which competition is free and undistorted; a highly competitive social market economy aiming at full employment and social progress; and the promotion of social justice and protection.[344]

The EU's institutional framework consists of the European Parliament, the European Council, the Council of Ministers, the European Commission, and the Court of Justice of the European Union. Together, these bodies oversee the running of the

[338] See Chapter 5.
[339] See Chapter 4 at 3.2.
[340] See Chapter 4 at 3.3.
[341] See Chapter 4 at 3.3 and Chapter 8 at 3.
[342] Bell *ELR* (2012) 31.
[343] http://europa.eu/scadplus/constitution/objectives_en.htm accessed on 22 July 2014. However, see Defeis *GJICL* (2004) 74 where the author states that the EU was formed to further market integration. At 75 the author states that "[t]he European Community (Community) was intended to be an institution of limited competence, encompassing primarily economic concerns, and human rights protection was left to existing institutions and individual member states." But later, "the entrenchment of human rights in the fabric of EU law has become a reality."
[344] http://europa.eu/scadplus/constitution/objectives_en.htm accessed on 22 July 2014.

EU. Membership of the EU is open to all European states which respect the values of the Union.[345]

Law of the EU takes precedence over any member's national legislation and their respective constitutions.[346] The EU's legislative instruments include directives, regulations, decisions, recommendations and opinions.[347] Non-legislative instruments include European regulations, European decisions, recommendations and opinions. Of relevance to this study is the Temporary Agency Work Directive. A directive lays down the result to be achieved but allows the member states to choose how to achieve such results within a specified timeframe.[348] The procedure of making such laws is complex; voting takes place in the Council and the Parliament after initiation by the committee.

The core policy focus of the EU is the creation of a common market, which is an economic aim.[349] As early as the 1970s and gaining momentum in the 80s and 90s, social laws were enacted, including those on labour. De Burca states that even before the formation of the EU, within the European Economic Community there was a holistic European project involving the social integration of the member states.[350]

Defeis notes that when the Treaty of Rome, the founding document of the European Economic Community, came into force in 1957, human rights were an afterthought.[351] Subsequent to its founding human rights have become a reality in the fabric of EU law. Initially the Treaty of Rome contained a single substantive provision pertaining to human rights, namely, the equal treatment of workers, being a

[345] http://europa.eu/scadplus/constitution/membership_en.htm accessed on 22 July 2014.
[346] De Burca *ELR* (2003) 817.
[347] http://europa.eu/scadplus/constitution/legislation_en.htm accessed on 22 July 2014.
[348] As above.
[349] De Burca *ELR* (2003) 818. Barnard *ELR* (2000) 57 states, in respect of the economic purpose of the EU, or any such community, that "[t]he existence of Community social policy can be justified for reasons of welfare of Community citizens, of integrating citizens into the Union, and of productivity: that social rights and market regulation, far from being obstacles to economic and social progress, should be seen as inputs into the productive process. However, underpinning all such positive rationales for social policy is the negative concern: the need to enact European Community social legislation to avoid social dumping by corporations due to a "race to the bottom" by state legislatures."
[350] As above. Also see Defeis *GJICL* (2004) for a discussion on the originally economic purpose shifting to one where human rights are entrenched in EU law.
[351] Defeis *GJICL* (2004) 75.

social right with a long history and of considerable importance in the EU.[352] At first, the provision dealt with equal treatment based on gender, but the right has developed to include multiple grounds. It was significantly expanded at the adoption of the Amsterdam Treaty.[353] There was some resistance to the inclusion of social aspects in European law, but since the Amsterdam Treaty there has been an incorporation of a strengthened social agreement.[354]

The EU legislates where it considers absolutely necessary or where the member states are unable to do so themselves. In either instance, the instruments contain minimum requirements when it comes to labour law.

2.2 Contents of the Directive

The preamble to the Temporary Agency Work Directive states:

> "[m]ember States should provide for administrative or judicial procedures to safeguard temporary agency workers' rights and should provide for effective, dissuasive and proportionate penalties for breaches of the obligations laid down in this Directive."[355]

The scope of the Temporary Agency Work Directive is broad. It applies to workers with a contract of employment with an employment agency who are then assigned to clients to work temporarily under their direction and control.[356] It is the view of Horton and Countouris that the scope of application of the Temporary Agency Work Directive is superficial because the definitions provided refer back to the national law of member states.[357]

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[352] As above.
[353] As above at 80.
[354] http://europa.eu/legislation_summaries/institutional_affairs/treaties/amsterdam_treaty/a14000_en.htm accessed on 22 July 2014.
[355] Article 21 of the Temporary Agency Work Directive. In terms of protection, Article 12 of the preamble states "[t]his Directive establishes a protective framework for temporary agency workers which is non-discriminatory, transparent and proportionate, while respecting the diversity of labour markets and industrial relations."
[356] Article 1(1) of the Temporary Agency Work Directive.
[357] Horton and Countouris *ILJ* (2009) 330. Even the definitions of the agency, the agency worker, and the client are "addressed rather superficially and are effectively referred back to the existing national definitions of these terms." Article 3(1) provides the following definitions for these parties; "(f)or the purposes of this Directive: (a) 'worker' means any person who, in the Member State concerned, is protected as a worker under national employment law; (b) 'temporary-work agency' means any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user

The Temporary Agency Work Directive applies to private and public undertakings which are temporary work agencies and to user undertakings engaged in economic activities, whether or not they operate for gain.[358] It is not ideal to have a single directive which applies to a variety of situations. It is submitted that a broad application as opposed to a narrow application is positive, nonetheless.

The Temporary Agency Work Directive allows for the prohibition of agency work.[359] However, it is justified only on the grounds of "general interest" which refer, in particular, to the protection of agency workers, the requirements of health and safety, or the need to ensure that the labour market functions properly and abuses are prevented. These grounds offer a potential escape route to members who choose not to implement the obligations contained in the Temporary Agency Work Directive but rather to restrict or even prohibit such work. It is suggested that this situation has negative implications for agency workers who are able to find employment only through employment agencies.

Article 2 of the Temporary Agency Work Directive declares that the aims are to ensure protection of agency workers and improve the quality of their work.[360] This is

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undertakings to work there temporarily under their supervision and direction; (c) 'temporary agency worker' means a worker with a contract of employment or an employment relationship with a temporary-work agency with a view to being assigned to a user undertaking to work temporarily under its supervision and direction; (d) 'user undertaking' means any natural or legal person for whom and under the supervision and direction of whom a temporary agency worker works temporarily."

[358] Article 1(2) of the Temporary Agency Work Directive. The full Article 1 states as follows: "1. This Directive applies to workers with a contract of employment or employment relationship with a temporary work agency who are assigned to user undertakings to work temporarily under their supervision and direction. 2. This Directive applies to public and private undertakings which are temporary-work agencies or user undertakings engaged in economic activities whether or not they are operating for gain. 3. Member States may, after consulting the social partners, provide that this Directive does not apply to employment contracts or relationships concluded under a specific public or publicly supported vocational training, integration or retraining programme."

[359] Article 4(1) of the Temporary Agency Work Directive states "[p]rohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented." On a positive note, however, there is now restriction or prohibition in terms of the agency worker and client deciding to contract directly. This is found within Article 6. However, Horton and Countouris *ILJ* (2009) 336 make the valid point that the Article allows for a transfer fee to be imposed by the agency. Such transfer fee can have negative influence on the agency worker's chances of securing direct employment with a client.

[360] Article 2 of the Temporary Agency Work Directive states that "[t]he purpose of this Directive is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment, as set out in Article 5, is applied to temporary agency workers, and by recognising temporary work agencies as employers, while taking into account

to be achieved through the principle of equal treatment and the recognition of employment agencies as employers. Horton and Countouris raise the valid point that Article 2, when it refers to recognising employment agencies as employers, creates a presumption that the employment agency is always the employer of the agency worker.[361] Article 2 indicates the necessity of allowing flexible forms of working, thereby including both aspects: employee protection and employer flexibility.[362]

Article 4 of the preamble to the Temporary Agency Work Directive indicates the Directive establishes a protective framework for agency workers, which is non-discriminatory, transparent and proportionate, while respecting the diversity of labour markets and industrial relations. The Temporary Agency Work Directive, therefore, promotes agency work and aims to better protect workers. It is asserted that this goal is a social one as opposed to the original economic approach of the EU and that the development is positive in respect of recognising agency workers and furthering attempts to protect them.

The main body of the Directive is dedicated to the principle of equal treatment.[363] In terms of Article 5, agency workers are entitled, for the duration of their employment at a client, to the same basic working and employment conditions as if they had been recruited directly by the client.[364] This results in equal treatment to that of the client's employees. This principle creates the issue of a so-called comparable worker, but to identify a comparable worker at the client is a challenge, if not impossible. However,

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the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working."

[361] Horton and Countouris (2009) 331.

[362] Hayes *Euro. L* (2011) 12 states that the purpose of the Temporary Agency Work Directive is to establish a protective framework for agency workers, while respecting the diversity of labour markets and industrial relations.

[363] Article 5 of the Temporary Agency Work Directive. This Article is also especially mentioned in the Aim of the Temporary Agency Work Directive.

[364] Article 5(1) of the Temporary Agency Work Directive states as follows: "1. The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job. For the purposes of the application of the first subparagraph, the rules in force in the user undertaking on: (a) protection of pregnant women and nursing mothers and protection of children and young people; and (b) equal treatment for men and women and any action to combat any discrimination based on sex, race or ethnic origin, religion, beliefs, disabilities, age or sexual orientation; must be complied with as established by legislation, regulations, administrative provisions, collective agreements and/or any other general provisions."

significantly, the EU did not mention a "comparable worker" in the Temporary Agency Work Directive.

Hayes makes the point that it is a potential defence for an employment agency if it can identify a comparable worker who has the same rights as the agency worker.[365] The inclusion of a comparable worker would have the effect of weakening or complicating legislation, but is not specifically required by the Temporary Agency Work Directive. The United Kingdom has provision for such a comparable worker.[366]

The Article on equal treatment refers to basic terms and conditions of employment: it does not cover contractual benefits not linked directly to work performed, like health care, life cover, occupational sick pay and pension entitlements.[367] Consequently, agency workers and their counterparts who are employed directly by the client may have the same basic terms and conditions of employment, however, the worker employed directly by the client could still be better off. These terms and conditions referred to are the responsibility of the employment agency, which has no obligation to provide benefits, such as health care and life cover. It is submitted that this failure constitutes a shortfall in the Temporary Agency Work Directive.

The Temporary Agency Work Directive provides exceptions where equal treatment is not necessary, for example, there is an exception where there is a permanent contract of employment with the employment agency that provides that the agency worker will receive pay during periods when not working for clients. Also, there is an exception if collective agreements are concluded which regulate terms and conditions of employment.[368] It is noted that collective bargaining in a situation where the employment agency's workers are located at different clients poses a practical challenge.[369] It is suggested that more detailed prescriptions regarding the promotion of collective bargaining makes this a more feasible option.

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[365] Hayes *Euro. L* (2011) 13.
[366] Regulation 5 of the Agency Workers Regulations 2010.
[367] Hayes *Euro. L* (2011) 13. Article 5(4) of the Temporary Agency Work Directive states that in application of Article 3(2) member states shall specify "whether occupational social security schemes, including pension, sick pay or financial participation schemes are included in the basic working and employment conditions referred to in paragraph 1."
[368] Article 5(2) and (3) of the Temporary Agency Work Directive.
[369] Waas *CLLPJ* (2012) 61 refers to the *quid pro quo* which was established by the Temporary Agency Work Directive, being the deregulation of law in respect of agency work on the one hand and

Horton and Countouris state that the Article's exceptions allow considerable leeway and that the result is an instrument which secures effectively only minimal rights and protections for agency workers.[370] It is contended that this view has merit and that these exceptions form a shortcoming of the Temporary Agency Work Directive from the perspective of workers' rights.

Despite the mentioned criticism, Defeis points out that the EU has benefitted from the concept of equality which began as an economic incentive and has evolved into an affirmation of human rights in all areas of EU activity that goes well beyond economic concerns.[371] This development is of particular relevance to the protection of vulnerable workers.

Article 6 of the Temporary Agency Work Directive regulates access to employment, collective facilities and vocational training. The Article states that agency workers must be informed of vacancies at the client and that steps must be taken against prohibiting or preventing the agency worker from entering into an employment contract directly with the client.[372] Furthermore, the employment agency may not

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the establishment of the principle of equal treatment on the other. The author states that "[a]rriving at a feasible compromise of interests has proved to be far more difficult that was expected. In particular, a 'quid pro quo' had serious repercussions in the area of collective bargaining." Waas refers specifically to the German law which was amended to be aligned with the Temporary Agency Work Directive. See Chapter 7 at 2.2 for a discussion on the development of regulation of agency work in Germany.

[370] Horton and Countouris *ILJ* (2009) 329.

[371] Defeis *GJICL* (2004) 98 states that "[a]lthough in the past the equality Directives were viewed from a market integration perspective rather than a social policy perspective, it is clear that human rights is now a complete and comprehensive concern and pillar of the European Union."

[372] Article 6 of the Temporary Agency Work Directive states that: "1. Temporary agency workers shall be informed of any vacant posts in the user undertaking to give them the same opportunity as other workers in that undertaking to find permanent employment. Such information may be provided by a general announcement in a suitable place in the undertaking for which, and under whose supervision, temporary agency workers are engaged. 2. Member States shall take any action required to ensure that any clauses prohibiting or having the effect of preventing the conclusion of a contract of employment or an employment relationship between the user undertaking and the temporary agency worker after his assignment are null and void or may be declared null and void. This paragraph is without prejudice to provisions under which temporary agencies receive a reasonable level of recompense for services rendered to user undertakings for the assignment, recruitment and training of temporary agency workers. 3. Temporary-work agencies shall not charge workers any fees in exchange for arranging for them to be recruited by a user undertaking, or for concluding a contract of employment or an employment relationship with a user undertaking after carrying out an assignment in that undertaking. 4. Without prejudice to Article 5(1), temporary agency workers shall be given access to the amenities or collective facilities in the user undertaking, in particular any canteen, child-care facilities and transport services, under the same conditions as workers employed directly by the undertaking, unless the difference in treatment is justified by objective reasons. 5. Member States

charge the employee a fee for arranging recruitment or employment with the client. The Article also provides that agency workers are entitled to access the client's collective facilities like a staff canteen, child-care facilities and transport services. Measures should be taken to improve access to training between assignments and to allow access to training provided by the client to the client's employees.[373]

The provisions in Article 6 have a positive value. It allows for the further development of agency workers and therefore enhances their career development and employability. It also provides for practical measures like child-care facilities, which enable agency workers to continue working and perhaps seek indefinite employment directly with a client.

The Temporary Agency Work Directive incorporates the possibility of the employment of an agency worker directly by a client. Article 6(2) states that member states shall take any action required to ensure that clauses prohibiting or preventing direct employment with a client are null and void or may be declared null and void. Consequently, agency work can be seen as a bridge or stepping-stone towards indefinite employment, as well as guaranteeing a fair economic environment for businesses.[374] Indefinite employment is a positive advance on agency work which is precarious and temporary in nature, unless the worker prefers agency work as better suited to his or her personal circumstances.

Article 6(3) makes provision for "a reasonable level of recompense" to the employment agency when an agency worker becomes directly employed by a client. Such a transfer fee is borne by the client as employment agencies are prevented from charging agency workers for certain services, such as arranging employment with the client.[375] It is justifiable to charge a transfer fee in circumstances where an

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shall take suitable measures or shall promote dialogue between the social partners, in accordance with their national traditions and practices, in order to: (a) improve temporary agency workers' access to training and to child-care facilities in the temporary-work agencies, even in the periods between their assignments, in order to enhance their career development and employability; (b) improve temporary agency workers' access to training for user undertakings' workers."

[373] Article 6(5) of the Temporary Agency Work Directive.

[374] Horton and Countouris *ILJ* (2009) 336.

[375] Article 6(3) of the Temporary Agency Work Directive. Horton and Countouris *ILJ* (2009) 336 are of the opinion that a transfer fee may be justifiable when a worker is "poached" by a client. However, they raise the argument that it is hard to see why an agency worker should not be able to be directly

employment agency actively arranged for one of its employees to become employed by a client, however, where an agency worker secures employment directly with a client, through any means other than the efforts of the employment agency, a transfer fee should not be charged. In this case a transfer fee might serve to dissuade clients from considering employing agency workers.

2.3 Comparison with the ILO Convention

In order to facilitate a deeper understanding of the Temporary Agency Work Directive and for the sake of the appraisal to be conducted later in this study, a concise comparison of the Temporary Agency Work Directive with its ILO counterpart, the ILO Private Employment Agencies Convention, 1997 ("Private Employment Agencies Convention"),[376] follows below.

The first and most striking difference relates to enforceability of the instruments. The Private Employment Agencies Convention is applicable only when a state voluntarily ratifies it, whereas the Temporary Agency Work Directive is automatically applicable to all member states within the EU. Fourie believes, because of the binding nature of directives, the regulation of non-standard workers in the EU is more successful than regulation by the ILO.[377] Enforcement in the EU is more effective due to its structure. It constitutes a supra-national entity which produces law that takes precedence over the national law of any member state. As discussed in Chapter 3, the weak enforceability of ILO conventions is a point of much criticism against the ILO as the majority of mechanisms for enforcing law are "soft" or based on maintaining the image or reputation of the relevant state.[378]

The second difference relates to the fact that the Temporary Agency Work Directive allows for the restriction or prohibition of the use of agency workers on the grounds of general interest. This term relates in particular to the protection of agency workers, to health and safety and the need to ensure abuses are prevented and the labour

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employed by a client after the fixed-term employment with the employment agency comes to an end. This thesis argues that an agency worker should be at liberty to join the client during or after the placement.

[376] ILO Private Employment Agencies Convention, 1997 (No 181).

[377] Fourie *PER* (2008) 143.

[378] See Chapter 3 at 4.2.6.

market functions effectively.[379] The Private Employment Agencies Convention does not provide reasons under which prohibition is allowed.[380]

A third difference is regarding the naming of the respective instruments. The Temporary Agency Work Directive specifically refers to agency work being "temporary", whereas the Private Employment Agencies Convention does not. It is evident that agency work in the EU is meant to be temporary in nature.

Apart from the differences, there are a number of significant similarities. First, both instruments allow for flexibility in so far as employment agencies are permitted to operate and they are not prohibited.[381] Second, agency workers are provided with protection regarding freedom of association and collective bargaining.[382] Third, the right to equal treatment is protected.[383] Fourth, agency workers should not be precluded from working for the client.[384] Furthermore, social dialogue and tripartism are encouraged.[385] The similarities in regulation at ILO and EU levels provide a good platform on which to conduct an appraisal of South Africa's compliance in Chapter 6.[386]

[379] Article 4(1) of the Temporary Agency Work Directive states "[p]rohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented."
[380] Horton and Countouris *ILJ* (2009) 336.
[381] The preamble and Article 2 of the Temporary Agency Work Directive and the preamble as well as Article 2(3) of the Private Employment Agencies Convention.
[382] Article 7 and 11 of the Temporary Agency Work Directive and Article 4 of the Private Employment Agencies Convention. Horton and Countouris *ILJ* (2009) 336 contend that the Temporary Agency Work Directive, like the Private Employment Agencies Convention, should have introduced a positive duty on the employment agencies not to make their workers available to clients with the purpose of replacing workers who are exercising their right to strike.
[383] Article 5 of the Temporary Agency Work Directive and Article 5 of the Private Employment Agencies Convention.
[384] Article 6(2) of the Temporary Agency Work Directive and Article 15 of the ILO's Private Employment Agencies Recommendation.
[385] Article 6(5) of the Temporary Agency Work Directive and Article 2(1) of the Private Employment Agencies Recommendation.
[386] See Chapter 6 for the appraisal of South Africa's current regulation of agency work against the ILO and EU standards.

3. Policy Developments and "Flexicurity"

3.1 Policy Development and Change

The next part covers the historical development of particular EU labour market policies, with an emphasis on the flexicurity approach. The ongoing debate between the opposing social justice and libertarian points of view is visible in the development of EU labour market policy.[387]

3.1.1 EU Policy Historically

The background to policy developments within the EU is relevant because it clarifies the current approach regarding the regulation of agency work although it was not the intention of the EU to become a regulator of labour issues.[388] From the outset the purpose of the EU was to create a harmonisation of the laws of member states in order to prevent competition. The focus, historically, has been economic[389] and EU labour law was justified as having the aim of protecting states against unfair competition.[390]

In the early 1970s the EU's policy focus began to change. Bell comments that an elaborate body of legislation in the 1970s stimulated debate concerning whether there should be EU regulation of labour.[391] In 1974, a Social Action Programme was included in a Council Resolution which attempted to formulate the EU's mission in terms of social policy.[392] The objectives for social action were placed in three categories. The first was the attainment of full and better employment in the EU Community. The second was the improvement and harmonisation of living and working conditions. The third was the increased involvement of management and labour in the attainment of economic and social decisions of the EU Community and

[387] See Chapter 2 for a discussion on the purpose of labour law. See also Chapter 2 at 3.2 for the libertarian perspective and Chapter 2 at 3.3 for an explanation of the social justice perspective.
[388] De Vos *IJCLLIR* (2009) 211 refers to the birth of EU labour law not being related to market restriction but rather market creation. The author mentions that there were very few provisions related to labour law in the 1957 Treaty of Rome. Such provisions were only included to facilitate the creation of an internal market. See also Davies (2012) 6 regarding the emergence of EU labour law.
[389] Krebber *CLLPJ* (2009) 879. See Riesenhuber (2012) from 45 for a discussion on the history of the inclusion of fundamental rights in the EU.
[390] Bell *ELR* (2012) 31.
[391] As above.
[392] Krebber *CLLPJ* (2009) 879. See Riesenhuber (2012) 18 and 19 for a description of the Social Action Programme.

of workers in the life of undertakings. Bernard points out that the Council Resolution sought to calm fears about social dismantling and to prevent social dumping.[393]

In a positive development the Council Resolution led to the implementation of three directives: the Approximation of the Laws of the Member States relating to Collective Redundancies Directive, 1975 ("Collective Redundancies Directive"), the Equal Pay Directive, 1975 ("Equal Pay Directive") and the Transfer of Undertakings Directive, 1977 ("Transfer of Undertakings Directive").[394] The Equal Pay Directive gave expression to Article 119 of the European Economic Treaty. The Collective Redundancies Directive was due to a rise in unemployment. The Transfer of Undertakings Directive was due to economies becoming "more dynamic".[395]

Today, a chapter within the European Community Treaty of Rome of 1957 is dedicated to social policy which empowers the EU to harmonise social laws. In the 1974 Council Resolution there was no "base of competence" to harmonise laws and it was the mere expression of "political will".[396] Although, the EU's plan regarding social policy is a significant development, Krebber claims the absence of a clear social policy agenda has led to a "patchwork of existing directives."[397] The author

[393] Barnard *ELR* (2000) 67.
[394] Krebber *CLLPJ* (2009) 881. Riesenhuber (2012) 19 points out that towards the end of the 1970s and beginning of the 1980s there was an economic crisis which resulted in social policy projects being put on hold. The three directives are the EU Directive on Collective Redundancies 98/59/EC; the EU Directive on Equal Pay 75/117/EEC; and the EU Directive on Transfer of Undertakings 77/187/EEC.
[395] As above at 882. According to Riesenhuber (2012) 19, there was an anticipation by the European Economic Community that business restructuring would increase in future and therefore measures for protection of employees were put in to place through directives related to redundancies and the transfer of undertakings. Krebber *CLLPJ* (2009) 882 explains that there is the view that besides the three directives, only two aspects of the Social Action Programme have been completed: achieving equality between the sexes in respect of pay; and the harmonisation of occupational health and safety law within the EU. Krebber maintains that besides the aforementioned, the EU has not achieved anything further in terms of social policy. Kok *RET* (2003) 32 expresses that the challenge in a modern society and economy is to develop a well-functioning labour market which is backed by strong social protection systems, which he says will allow for more choice for both individuals and employers. The choice he refers to conjures up ideas of flexibility. It is asserted that irrespective of whether greater social action success could have been achieved or should still be worked towards, the 1970s show a significant change in focus of the EU, from purely economic intentions to the consideration of protection of employees and their well-being. This is a pivotal development.
[396] As above at 885.
[397] As above at 886. Krebber goes on to state at 895 that there was "[n]o concept, no systematic regulation, no recent regulation."

concludes that employee protection remains a responsibility of the member states internally and not a mission of the EU.[398]

However, regulation at the EU level can be particularly effective due to the precedence of EU law over the national laws of member states.[399] Bell comments that there is less questioning of whether there should be market regulation by the EU, attention is focused rather on what are the best forms of market integration.[400] It is asserted, although no concrete social action plan is evident in the account of the history of policy development, there has been progress towards achieving this in the policy concept discussed hereunder.

3.1.2 Development of the "Flexicurity" Policy

The quest for both flexibility and security has been well documented in EU policy discourse since the publication of a 1993 White Paper and a 1997 Green Paper dealing with the topic.[401] The issue of finding a balance between flexibility and security led to a series of EU Summits on the topic and it became a goal of the EU's European Employment Strategy.[402] The element of employee protection became of equal importance to the EU's economic ideals which once took centre stage. In the 1990s regulation was not seen as an economic barrier but possibly as conducive to economic growth.[403]

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[398] As above at 902. The writer goes on to make the following recommendations in respect of EU labour law: there needs to be a "policy process" between the parties and stakeholders; there needs to be a framework based on the Lisbon strategy; and the EU could consider drafting model laws for states.
[399] See Davies (2012) 16 for a discussion on national autonomy. The author refers to the fact that labour law within the EU is a matter of "shared competence" being shared between the EU and the member states. See also Article 2(2) of the Treaty on the Functioning of the European Union which refers to this shared competence. This article also states that "member states shall exercise their competence to the extent that the Union has not exercised its competence."
[400] Bell *ELR* (2012) 31. However, following the results of a referendum in the United Kingdom in 2016 with the decision by vote that the United Kingdom will leave the EU, there are currently questions by member states surfacing regarding whether they wish to be governed by EU regulation.
[401] Wilthagen and Tros *Transfer* (2004) 166. The 1993 White Paper was entitled "Growth, Competitiveness and Employment" and the 1997 Green Paper was entitled "Partnership for a New Organisation of Work". The papers refer to the fact that the key issue for employees, management, social partners and policy makers is finding the right balance between flexibility and security.
[402] As above at 166. The EU Summits were as follows: Essen (1994), Florence (1996), and Amsterdam (1997), Luxemburg (1997) and Lisbon (2000).
[403] As above at 172.

The EU Summit in Lisbon in 2000 resulted in formulation of a new mission for the EU. Wilthagen and Tros point out that the mission sought to create a balance between flexibility and security.[404] In 2001, the European Employment Guideline made reference to taking measures to achieve the balance between flexibility and security.[405] Tangian notes that the number of atypical employees continues to grow disproportionately and the author describes this circumstance as a reason for the development of the policy of flexicurity.[406]

In 2004, the academics Wilthagen and Tros wrote about a new policy concept, entitled flexicurity, and described the origins, conditions and potential of the approach.[407] This period marks the start of the policy shift in the EU from one which was entirely economic from the outset to one which solidified employee protection as part of the official policy of the EU.

A great deal has been written about flexicurity.[408] The interest here is concentrated on the policy shift which occurred and, further, on defining the concept, in order to attain a deeper understanding of the EU regulation of agency workers. De Vos writes that there has been a shift from EU labour law to EU labour policy.[409] At the time, there was equal demand and pressure from various stakeholders, on the one hand, to provide increased flexibility for business or employers and on the other to provide security to employees,[410] especially vulnerable groups of employees.

One of the main questions related specifically to which persons should be protected by employment law norms,[411] another to the duration of social protection. An opinion formulated was that the entire active working-life should be covered, not only periods

[404] As above at 167. The aims include those of economic growth and more and better jobs and better social cohesion.
[405] As above.
[406] Tangian *ETUI Pol. B.* (2010) 1.
[407] Wilthagen and Tros *Transfer* (2004) 166. Note that the term “flexicurity” has been referred to by different academics beforehand who all provided a different understanding of the policy. Flexicurity has been linked to Dutch labour market reforms.
[408] Bekker and Wilthagen *Intereconomics* (2008) 69 refer to the fact that the term flexicurity has been prevalent in European debate.
[409] De Vos *IJCLLIR* (2009) 213.
[410] Wilthagen and Tros *Transfer* (2004) 166.
[411] Popescu *AUDJ* (2010) 217 refers to the public debate of all interested stakeholders, and the opinions which were formulated by the European Parliament and the European Economic and Social Committee.

of employment.[412] Popescu indicates there were questions about the status of different types of individual employment contracts, and comments that without it being expressly mentioned the role of full-time standard employment contracts was somewhat diminished and placed at the same level as other contracts, such as fixed-term contracts.[413] These questions highlight some of the distinctive features of the policy that ultimately was formulated.[414]

3.2 Defining Flexicurity

The aforementioned history led to the emergence of a "paradox":[415] flexibility and regulation do not necessarily go hand-in-hand. The concept of flexicurity has been linked to the Netherlands where legislation was implemented in line with the policy concept.[416] Wilthagen and Tros are clear that flexicurity is not a Dutch-only phenomenon and argue it has no geographical limitations.[417] They define flexicurity as:

> "[a] policy strategy that attempts, synchronically and in a deliberate way, to enhance the flexibility of labour markets, work organisation and labour relations on the one hand, and to enhance security – employment security and social security – notably for weaker groups in and outside the labour market, on the other hand."[418]

Madsen comments that sometimes a state of flexicurity is not achieved through implementing a deliberate policy or political strategy, but rather through a gradual process of "political struggles and compromises with a strong element of dependency". This explanation leads to the second way of defining flexicurity. Rather

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[412] As above.
[413] As above. Regarding characteristics of flexicurity, Klindt *JCMS* (2011) 990 identified that a characteristic of the policy which developed is that in the past social security benefits or unemployment benefits were seen as a disincentive for finding employment, whereas in terms of the policy, unemployment benefits are now called on to be raised as such benefits are seen as allowing for good labour market transitions.
[414] Van Eck *IJCLLIR* (2014) 65 indicates that the ILO's policy shift with the introduction of the "decent work agenda" on the early 2000s paved the way for changes in labour market policy within the EU.
[415] Wilthagen and Tros *Transfer* (2004) 167.
[416] See Wilthagen and Tros *Transfer* (2004) 175 for an example of legislation introduced by the Dutch for the purposes of implementing flexicurity. Tangian *ETUI Pol. B.* (2010) 1 states that the work flexicurity has been linked to Professor Hans Adriaansens, a member of the Dutch Scientific Council of Government Policy.
[417] As above at 172.
[418] Wilthagen and Tros *Transfer* (2004) 167. This definition comes from that definition constructed by Wilthagen and Rogowski in 2002.

than a policy strategy it is defined as a state of affairs.[419] Bredgaard and Larsen explain that the "state of affairs on the labour market" definition is a trade-off between flexibility and security.[420] The third definition of flexicurity consists of an analytical model that can be used to dissect developments in both flexibility and security and to analyse and compare national labour market systems.[421]

It is important to note that there are certain critical elements which must be present. First, for a measure to be included as part of flexicurity there must be synchronised attempts at both the enhancement of flexibility and security for workers. An attempt to improve either one before the other would not be considered as a flexicurity measure. Second, there is reference to the "deliberate" nature of the attempts at creating an enhancement of flexibility and security. The attempts need to be intended and purposeful to qualify as a flexicurity measure. Finally, the enhancement of security must be in relation to "weaker groups". Most certainly this category includes agency workers.

Having considered the various definitions which have been offered on flexicurity, Zirra concludes that it:

> "represents a stage in the evolution of the institutional and legal framework specific for the labour market, which aims at fighting back the negative effects of a score of influences coming from the dynamics of real economy during the past three decades."[422]

[419] Madsen *TLR* (2007-2008) 59.
[420] Bredgaard and Larsen *CLLPJ* (2009-2010) 747 compare Denmark and Japan in their article, as the countries are meant to be "polar opposites". They conclude by identifying three different paths for Japan to reform its labour market, being: unprotected mobility; normalisation of non-regular work; and protected mobility.
[421] Madsen *TLR* (2007-2008) 60.
[422] Zirra *REBR* (2012) 63. At 87 Zirra considers a number of definitions. In 1998, Wilthagen referred to "unbreakable links between the changes occurring in terms of the legal and social rights of core-workers on the one hand, and those of temporary, atypical or flexible contract-based employees, on the other hand". In 2004, Wilthagen and Tros referred to flexicurity as promoting "the idea of compensation of labour market deregulation / flexibilization with advantages in employment and social security / securization". In 2009, Viebrock and Claasen stated that "[f]lexible policies can be analysed as types of combinations between different forms of flexibility and security which might involve individual workers, groups of workers or certain sectors or the economy as a whole". In 2010, Pavelescu stated that flexicurity is "[a] strategy aimed at mitigating the imbalances manifest on the labour market, as well as a specific framework for analysis, which can be used to identify the coordinates underlying the operation of this market".

In 2007, the EU endorsed the "Common Principles of Flexicurity" in the Council Conclusions agreed to by the Working Party on Social Questions.[423] In this context flexicurity established these goals:

> "to reinforce the implementation of the Lisbon Strategy, create more and better jobs, modernise labour markets, and promote good work through new forms of flexibility and security to increase adaptability, employment and social cohesion."[424]

From the above it is clear that flexicurity arose as a tool in the EU's pursuit of creating an adaptable and competitive economy concurrently preserving social cohesion.[425]

3.3 Pathways to Flexicurity

Evidently, the EU strives to fulfil economic as well as social goals through policy however, a critical question arises: how should this task be undertaken? In the 2007 Council Conclusions document alluded to above, the EU made reference to important features of flexicurity which are relevant in the consideration of how it should be achieved.[426] Flexicurity is not about a single labour market or working-life policy strategy: rather "flexicurity approaches" should be tailored to the specific circumstances of each member state and, further, each member state should develop its own flexicurity arrangements.[427] This view illustrates that flexicurity is expressly not a one-size-fits-all policy and the idea was not that the same methods should be implemented in all states.

In 2007 the European Expert Group on Flexicurity developed a list of "pathways" or avenues that countries can implement to improve their labour markets based on "different challenges, priorities and possibilities".[428] The pathways include four policy components: flexible and secure contractual arrangements, efficient active labour-

[423] Council of the European Union "Towards Common Principles of Flexicurity – Draft Council Conclusions" (2007).
[424] As above at Annex 1.
[425] Tural *ABR* (2008) 9.
[426] Council of the European Union "Towards Common Principles of Flexicurity – Draft Council Conclusions" (2007).
[427] Council of the European Union "Towards Common Principles of Flexicurity – Draft Council Conclusions" (2007) Annex 1.
[428] Bekker and Wilthagen *Intereconomics* (2008) 69.

market policies to strengthen transition security, systematic and responsive life-long learning and modern social security provisions that also contribute to good mobility in the labour market.[429]

The first pathway deals with flexible contractual arrangements. It promotes upward transitions in the labour market of non-standard employment and the integration thereof into labour law, collective agreements, social security and systems of life-long learning. The pathway aims to reduce the asymmetries between standard and atypical employee contracts[430] and clearly encompasses the situation of agency workers and their non-standard contracts of employment with agencies. Ideally, this strategy would encourage the migration of agency workers' contracts of employment to the status of standard or indefinite employees' contracts.

Under this pathway the idea is that full protection is built up progressively over time.[431] The initial contract would provide for basic rights and protection usually only reserved for indefinite employees to be attained after some time. It is supported as a positive policy advance which seeks to increase protection of agency workers.

The second pathway relates to security during times of transition and makes provision for successful job-to-job change-over:[432] in respect of jobs at a client or employment agency or in times of redundancies or retrenchments.[433] Transition policies allow for training and retraining facilities. Bovenberg and Wilthagen argue that training facilities should be extended to go beyond the scope of employees of large firms.[434] This pathway is relevant to agency workers as, at times, they may change between jobs at clients, so it is crucial that they, too, be protected during such in-between phases.

[429] As above at 70. To this list the authors add their own fifth element being "the development of a supportive and productive social dialogue."
[430] Bovenberg and Wilthagen *EJSS* (2008) 328.
[431] Bekker and Wilthagen *Intereconomics* (2008) 70. See also Bovenberg and Wilthagen *EJSS* (2008) 328 - 329.
[432] As above.
[433] Tros *ILERA* (2012) 3. This is to enhance employability and transfer of skills.
[434] Bovenberg and Wilthagen *EJSS* (2008) 329.

The third pathway regarding life-long learning relates to the investment in skills and development for workers, which leads to the enhancement of employment and security opportunities.[435] Such investment, in addition, should boost the economy. Tros observes that this pathway especially is relevant to those that are at risk of being excluded from the labour market.[436] Bovenberg and Wilthagen are of the view that governments and social partners should take action to ensure that binding agreements are concluded at branch or regional level to address the employees' needs for training and the employers' needs for flexibility.[437]

This pathway is relevant to agency workers and assists this vulnerable category of workers to move between jobs with greater confidence and also to rise to full employment directly with a client. This results in a win-win situation for both employers and employees. It is asserted that inclusion of this pathway in any policy dealing with agency work is a step in the right direction.

The fourth pathway relates to social security and is intended to address the urgent need to increase employment and job opportunities for persons who are either surviving on social security benefits or who work in the informal sector.[438] This scenario is relevant particularly to agency workers. The idea behind this strategy is to formulate mechanisms within social security systems to prevent long-term dependence on social welfare. Bekker and Wilthagen add that workers in the informal sector could be provided with "flexi-secure contracts", lower payroll taxes and a "skills perspective".[439] The authors further make the point that improved social dialogue at sector and regional level will help to facilitate this idea.[440] The pathway encourages inclusion of non-standard workers when social security systems are developed and, like the other pathways, can form a positive component to include in a policy ultimately to ensure the protection of agency workers.

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[435] Bekker and Wilthagen *Intereconomics* (2008) 70.
[436] Tros *ILERA* (2012) 4. There is a recommendation for strengthening investments in skills and R&D in order to enhance productivity and employment.
[437] Bovenberg and Wilthagen *EJSS* (2008) 329.
[438] Bekker and Wilthagen *Intereconomics* (2008) 71. Also see Tros *ILERA* (2012) 4 who states that active labour market policies and social security should provide sufficient incentives and opportunities to return to work and such policies should also facilitate this transition.
[439] Bekker and Wilthagen *Intereconomics* (2008) 71.
[440] Bovenberg and Wilthagen *EJSS* (2008) 330.

Each pathway is relevant and advantageous, but it is suggested that an ideal would be to have an over-arching policy framework within which to place the pathways. Bekker and Wilthagen provide such a framework. They mention that:

> "the European ideas and principles on flexicurity first and foremost need to be seen as a framework which may offer inspiration and guidance to member states to review and improve their labour markets in terms of establishing a sound balance between flexibility and security."[441]

3.4 Evaluation of the Policy

Apart from defining the flexicurity policy and reflecting on the pathways, it is important to consider the success or failure of EU policy since its inception in 2007. Such analysis is directly relevant, at a later stage the question will be posed as to whether South Africa can gain anything from the EU flexicurity policy and regulation of agency work.

Particular countries can be described as success stories in terms of flexicurity. The Dutch model of flexicurity is one of the stronger models and is regarded as successful based on the normalisation of atypical work while preserving flexibility in the labour market.[442] Legislation and collective agreements which give effect to the policy approach have served as a model for other European states. The Netherlands has maintained low levels of unemployment and low levels of inflation which illustrates, if carefully constructed and implemented, flexicurity can be a successful platform for labour market regulation.

The Danish model of flexicurity is also considered a success story through their "Golden Triangle" model. This entails flexible classic employment with weak protection against dismissal, generous unemployment benefits and an active labour market policy which is aimed at a change of qualification and offers employment

[441] Bekker and Wilthagen *Intereconomics* (2008) 73.
[442] Bovenberg and Wilthagen *EJSS* (2008) 330. Note that the authors do point out that the Netherlands cannot be regarded as a flexicurity utopia. There are aspects of the Dutch flexicurity policy that need to be improved for instance the integration of low-skilled worker, overcoming duality in employment protection in respect of "insiders" and "outsiders", and incorporating older workers and the female labour supply. On the whole however, the Dutch model is one of the most successful in the EU. Lyutov *IJCLLIR* (2012) 337 explains that the Dutch model is based on the extensive use of flexible forms of labour combined with extending classic employment rights to atypical workers.

motivation for the unemployed.[443] In the first half of the decade of the 2000s Denmark's economy performed exceptionally well and employment rates were high. It is believed that the Danish model of flexicurity provided significant inspiration to the European Commission in elaborating the flexicurity concept.[444]

Despite the success stories authors identify weaknesses in the flexicurity policy. First, a weakness of flexicurity relates to exportability of the implementation of the policy from country to country. Van den Berg makes the point that the only pathway to the heralded European Social Model is to look at how flexicurity models in specific countries came about, such as the Danish or Swedish models.[445] In essence, the author believes, though they represent best practice when it comes to flexicurity policy models, they are not able to be implemented in other countries with different histories and circumstances.[446]

Second, the flexicurity policy could create the impression that greater emphasis is placed on flexibility than on security. In this regard Bell tackles the issue whether EU Courts correctly interpret the legislation which gives effect to the flexicurity policy.[447] The author believes, based on the text of the Temporary Agency Work Directive, a stronger accent is placed on flexibility over security.[448] Meardi also asserts that in the case of flexicurity, flexibility has increased more than security.[449]

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[443] Lyutov *IJCLLIR* (2012) 337.
[444] Klindt *JCMS* (2012) 990.
[445] Van den Berg *EJSS* (2009) 265 states that in both Denmark and Sweden there are "encompassing organisations" on both sides of the bargaining table allowing for good social dialogue, which may not be present in other states.
[446] Furthermore, Bredgaard *Bellagio* (2010) 15 adds that one of the impediments for implementation of the Danish model in other jurisdictions is that other states may have a lack of social dialogue and lack of mutual trust. Furthermore, Meardi *IJCLLIR* (2011) 261 states that other countries developed as Denmark with high public expenditure and low unemployment. At 269, the author states that although there have been models identified in different parts of the EU, each individual member state will move in their own direction according to their individual politics. At 265 Meardi provides discussion of the different models of flexicurity by area. The Anglo-Saxon system is characterised by high flexibility and low security. The Mediterranean system has both low flexibility and rather low security. The Eastern European system has high flexibility and low security. The Scandinavian system has flexicurity, as these countries have probably got the best balance between flexibility and security. These accounts are not static and are subject to change along with the circumstances of the particular member states. Bredgaard Bellagio (2010) 15 – 16 states that other challenges in implementing flexicurity include moving from internal towards external combinations of flexibility and security, as well as the financial challenge. There are likely to be budgetary and financial implications for governments, social security funds and employers and workers.
[447] Bell *ELR* (2012) 31 – 48.
[448] As above at 38. At 40, Bell views the Courts' interpretation as one which favours security for the employee over flexibility for the employer, and he states that he believes the Court has moved away

A third weakness, identified by Jensen, is that the trade-off between flexibility and security differs for higher-level employees compared to skilled and unskilled workers, and that employers have less flexibility dismissing highly-paid workers while the level of compensation for skilled or unskilled workers who are discharged is lower.[450] This weakness draws attention to the fact that more vulnerable workers are still more likely to be disadvantaged by employer flexibility. In expressing concern, Sultana states "[a]t the heart of these critiques lies the fear that increased flexibility is not matched or increased by increased security".[451]

A fourth weakness of the flexicurity policy is the concern that it may not be a good policy during times of hardship, such as the economic crisis which began in 2008. Tangian explains that the crisis was more manifest in countries with high flexibility and somewhat less in countries with generous social security. The author argues that a possible reason for such a situation might be that high flexibility encourages risky economic behaviour and increases expenditure during crises.[452] Tangian concludes that flexicurity is not a strategy for bad weather and requires "profound revision and should not be further applied in its current form".[453]

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from an interpretation guided by flexicurity. Similarly, Lyutov *IJCLLIR* (2012) 335 – 364 compares Russian legislation with the flexicurity policy in order to assess whether some elements of the policy are applied in Russia, even though Russia is not part of the EU. Lyutov concludes that whilst there is a thrust towards deregulation in Russia, there is the danger that a lopsided implementation of the flexicurity policy could lead to negative consequences for "the workers, the economy and social stability." It is clear that there needs to be a careful balance of both flexibility and security. Failure to achieve this balance will have negative consequences, most likely for both sides and the economy ultimately.

[449] Meardi *IJCLLIR* (2011) 269. Also see Sultana *BJGC* (2012) 9 who believes that the emphasis of the EU Commission is on creating flexibility and not on security. The author insists that the Commission's flexicurity position reiterates emphasis on economic instead of social goals, and that even the social policy aspect of flexicurity seems to be aimed at increasing flexibility in labour markets rather than providing types of security that make increased flexibility acceptable or its effects mitigated.

[450] Jensen *EID* (2011) 727.

[451] Sultana *BJGC* (2012) 9.

[452] Tangian *ETUI Pol. B.* (2010) 7.

[453] As above. Also Heyes *EJIR* (2013) 1 explains that the economic crisis began in 2008 and caused a substantial shock to labour markets, and governments responded by implementing measures to cushion the impact of the crisis. The European Commission encouraged governments to ensure that such measures were in line with the flexicurity policy. Heyes makes it clear that austerity measures are being implemented in EU countries with the effect of reducing the social protection available to workers and also that employment protections are "under threat or viewed more suspiciously than before". This means there is a reduced emphasis on the security side of flexicurity. At 12, the author adds that neoliberalist tendencies, which existed before the crisis, are now being reinforced. Tros *ILERA* (2012) 1 mentions there is talk of a "double crisis." In this regard, Tros states that while there is the external crisis of the international economy, there is an internal crisis of the concept of flexicurity. Tros draws attention to an inadequacy, stating that there is no best case in which the configuration of

There are the earlier mentioned flexicurity success stories as well as a number of strengths to the policy. A positive aspect of the flexicurity policy is that there is a definition of the strategy according to the 2007 EU Council Conclusions where the EU endorsed and provided a description of the "Common Principles of Flexicurity".[454] Coupled with the aforementioned aspect, it is positive that flexicurity consists of defined pathways.[455]

Another positive aspect of the strategy is that flexicurity pathways can be used particularly in regulating non-standard work. Keller and Siefert explain that the precarious elements of atypical work, such as agency work, can be reduced within a "framework of arrangements combining flexibility for employers and security for employees – so-called Flexicurity".[456] If the framework is properly constructed, flexicurity can be a way to address the risks associated with agency work.

3.5 EU Policy Beyond Flexicurity

The implementation and effectiveness of the flexicurity policy has varied widely between member states within the EU.[457] Using the Temporary Agency Work Directive as an example, some consider it to be "one of the most successful attempts at establishing a system of flexicurity" whilst others believe there is more emphasis on one of the "double objectives".[458] In response to criticism of flexicurity, Tros describes the outlook and future of flexicurity in Europe as follows:

> "[t]he hybrid, multi-sided approach of the concept at least put the interest of both employers and workers and their representatives to the negotiation tables. Alternative concepts, which merely focus on one dimension, can probably not

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labour market policies, social security systems and strategies is changed into an integrated flexicurity policy.

[454] See Chapter 4 at 3.2.

[455] See Chapter 4 at 3.3.

[456] Keller and Siefert *EIRR* (2004) 26. Hakansson *et al* (2012) 166 have stated that workers' perceptions of security are dependent on conditions at both the employment agency and the client. The "entire employment relationship" and not only an open-ended contract is required in order to be able to experience security. This would mean there are numerous factors to take into account in creating a policy approach which will meet the security needs of agency workers.

[457] Arndt *et al* Cupesse Working Paper 02 (2015) 14. For example, Keane *ELLJ* (2016) 310 discusses some of the challenges in attaining adequate worker security under the flexicurity model in Ireland where flexible working arrangements have been on the increase. At 320, Keane concludes that in Ireland the flexibility part of the flexicurity policy has been on the rise.

[458] Sartori *ELLJ* (2016) 124. The double objective refers to the protection of workers versus a more flexible labour market in view of creating jobs.

> achieve this. Flexicurity, with respect to its original idea of social investments, is well in line with Europe's overall ambition to maintain and further develop a competitive social market economy with full employment and high levels of protection, as formulated in the Lisbon Treaty."[459]

These views reflect that flexicurity, or at least a policy which takes into account both the employer's need for flexibility and the employee's need for security, will be relevant in the future in terms of the development of labour market policy.

Following on from the introduction of the flexicurity policy in 2007 and the Temporary Agency Work Directive in 2008, recent case law of the European Court of Justice is an indicator of the development of labour policy in Europe. Whilst there is not yet a large body of precedent in respect of agency work in particular, case law still highlights the issues that form the core of labour market debates in Europe over the past few years. These issues fuel the policy approach in the EU currently. Furthermore, to an extent, the status of agency workers and employment agencies within the EU can be gleaned from the European Court of Justice's decisions.

An example of a major issue in Europe is prominent in the 2011 joined cases of *Vicoplus and Others*.[460] The matter concerned the problem of the movement of agency workers between member states of the EU and whether national legislation could place some restrictions on such movement.[461] Fines were being imposed by the Dutch government in terms of national law on the three appellants, being companies which received Polish workers who were posted to the Netherlands

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[459] Tros *ILERA* (2012) 14. Similarly, Zekic *ELLJ* (2016) 549 states that "[a]lthough heavily criticised by a stream of labour law scholars, flexicurity is still the Commission's guiding principle for the European employment policies." And at 551, "[f]lexicurity is, moreover, still very much 'alive' in labour law literature."

[460] *Vicoplus SC PUH, BAM Vermeer Contracting sp. Zoo, Olbek Industrial Services sp. Zoo v Minister van Sociale Zaken en Werkgelegenheid* C-307/09 to C-309/09. The judgment was delivered by the Second Chamber of the Court in respect of the three joined cases of C-307/09, C-308/09, and C-309/09.

[461] *Vicoplus and Others* at para 21. Dutch national legislation provided that foreign workers, in this case Polish nationals, were required to obtain a work permit in order to enter and work in the Netherlands. For further information on transnational agency work in the EU see Ahlberg *et al* (2008). Article 56 of the Treaty on the Functioning of the European Union ("TFEU") provides that "restrictions on freedom to provide services within the Union shall be prohibited…". Article 57 of the TFEU states that "[s]ervices shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration…". The Court had to decide whether, based on the aforementioned Articles, such national legislation should be precluded or prohibited.

without having first obtained work permits.[462] Around that time there was a fear of existing member states, such as the Netherlands, that there would be a disturbance of the labour market with the immediate arrival of a large number of workers who were nationals of new member states to the EU.[463] The European Court of Justice found that member states should not be precluded or prevented from putting such national requirements in place, during the transitional period following the accession of Poland to the EU, such as foreign agency workers needing a work permit to work in a particular member state.[464] This showed an approach of wanting to avoid an upset in the EU labour market over this topical issue in the region.

Another connected issue forming part of the debate on labour policy is that of the freedom to provide services within the EU. In the same year, the European Court of Justice ruled against unjustified obstacles in national legislation to the activities of foreign employment agencies. The case of the *European Commission v Belgium* regarded national legislation which made the activities of foreign employment agencies subject to particular obligations as an unjustified obstacle to the freedom to provide services.[465] The Court's approach was one of encouraging the facilitation of the freedom to provide services which leans towards flexibility for employers.

The status of agency work,[466] the freedom of movement of workers and the provision of services was tested again in 2014. The *Industries Tabor* joined matter involved two Czech clients which used the services of an employment agency established in

[462] As above at para 2.
[463] As above at para 34 – 35.
[464] As above at para 52. Note that it was found at para 51 that the hiring out of workers constitutes a service as defined under Article 57 of the TFEU.
[465] *European Commission v Belgium* C-397/10. The matter was heard by the Fifth Chamber of the Court. The particular obligations included the need to have as their sole company object, the provision of agency workers, and the obligation to have a particular legal form.
[466] *Oreste Della Rocca v Poste Italiane SpA* C-290/12 was a judgment handed down in 2013 concerning agency work in Italy. The issue concerned the use of successive fixed-term contracts in the supply of staff to Poste Italiane. Italian national legislation did not place any restriction on the renewal of fixed-term contracts by employment agencies. The agency worker claimed that he was in a permanent employment relationship with the client. The Court found that Directive 1999/70/EC and the Framework Agreement on fixed-term work concluded by ETUC, UNICE and CEEP does not apply to the relationship between the employment agency and the agency worker, nor to the relationship between the client and the agency worker. Accordingly national legislation, allowing for successive fixed-term contracts, would regulate the employment of the agency worker. Unfortunately such finding, whilst allowing for flexibility for a client, does not assist an agency worker in gaining protection or security.

the Slovak Republic.[467] The Czech revenue office was of the belief that it was obliged to withhold income tax of the agency workers.[468] The question before the European Court of Justice was whether Czech national legislation was consistent with the freedom to provide services.[469] It was found that the Czech national legislation was a restriction on the freedom to provide services and as such the legislation was precluded or prohibited.[470] Similar to the Court's earlier approach, this showed an emphasis on upholding the freedom to provide services.[471]

In 2015 the European Court of Justice issued its first ruling on the Temporary Agency Work Directive in the *AKT* judgment.[472] In this matter a trade union contended that a client was utilising agency workers to perform the same tasks as its direct employees and accordingly it called for a penalty under Finnish law for the improper usage of agency work.[473] The client contended that the Finnish law was contrary to the Temporary Agency Work Directive in that the limitation was not justified on grounds of general interest.[474] In essence the Court needed to address whether national barriers to agency work were justified. The Court found that Article 4(1) of the Temporary Agency Work Directive regarding prohibitions or restrictions on the use of agency work, does not impose an obligation on national courts not to apply any national rule of law containing prohibitions or restrictions on the use of agency work.[475] Only competent authorities of member states must review potential prohibitions or restrictions on the use of agency work.[476] Trade unions interpreted

[467] *Strojirny Prostejov a.s., ACO Industries Tabor s.r.o. v Odvolaci financni reditelstvi* C-53/13 and C-80/13. The matter was heard by the First Chamber of the Court and was delivered in terms of cases C-53/13 and C-80/13.
[468] *Industries Tabor* at para 11 and 15.
[469] As above at para 34.
[470] As above at para 60. The national legislation was inconsistent with the freedom to provide services in terms of Article 56 of the TFEU.
[471] As above at para 28. The Court confirmed that such national legislation would affect the freedom of establishment of employment agencies wishing to provide their services in the Czech Republic while maintaining their seat in another member state. At para 37 it was stated that such legislative requirement was an "additional administrative burden".
[472] *Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Öljytuote ry, Shell Aviation Finland ry* C-533/13. The matter was heard by the Grand Chamber.
[473] *AKT* at para 14.
[474] As above at para 15. The grounds for the use of agency work were to replace workers on sick leave and annual leave.
[475] As above at para 34.
[476] As above. In 2016, in *Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH* C-216/15 the European Court of Justice ruled on the scope of the Temporary Agency Work Directive. It was found that the Temporary Agency Work Directive applies even where the worker does not have the status of a "worker" under the relevant member state's national law.

this outcome as meaning that social partners have autonomy in regulating agency work through collective agreements.[477] Whilst unions celebrated this aspect of the finding, there is also the belief that as national courts are not entitled to set aside restrictions to agency work, the achievement of the objectives of the Temporary Agency Work Directive may be delayed. This is because the social partners, and political will of governments, may not be focused on the aims of the Temporary Agency Work Directive.[478]

The aforementioned cases of the European Court of Justice have shown a policy of prohibiting restrictions on the movement of workers and the provision of services. This leans towards increased flexibility for employers. Furthermore, restrictions on the use of agency work must be justified on the grounds of general interest – but only competent authorities and not national courts of member states are to review and enforce this. The EU's stance on the protection of employees, and agency workers in particular, then comes into question.[479]

Besides case law, a clearer indicator of future policy at EU level is the EU Commission's Europe 2020 Strategy,[480] described as Europe's ten-year jobs and growth strategy in terms of which the priorities are "job creation and poverty reduction".[481] The five targets of the strategy include increasing employment, investment in research and development, increase in energy efficiency and sustainability, education, and fighting poverty and social exclusion.[482] These targets reflect a policy that encompasses both economic and social goals. The term

[477] Available at https://www.etuc.org/press/court-justice-european-union-guarantees-autonomy-social-partners-regulate-use-temporary-agency accessed on 4 February 2017.
[478] Available at https://eulawanalysis.blogspot.co.za/2015/03/the-protection-of-temporary-agency.html/ accessed on 4 February 2017.
[479] Pecinovsky *ELLJ* (2016) 301 – 309 mentions that there is a view however that in very recent years, the European Court of Justice has evolved somewhat to a more balanced and socially-friendly approach
[480] http://ec.europa.eu/europe2020/index_en.htm accessed on 19 August 2015. See Popescu *AUDJ* (2015) for a history on flexicurity leading up the evolution of the European labour market and the EU Commission's actions.
[481] http://ec.europa.eu/europe2020/europe-2020-in-a-nutshell/priorities/index_en.htm accessed on 19 August 2015.
[482] http://ec.europa.eu/europe2020/europe-2020-in-a-nutshell/targets/index_en.htm accessed on 19 August 2015.

"mobication" has been used to describe the EU Commission's actions as a strategy which incorporates both mobility and education of workers.[483]

In the preface to the Europe 2020 Strategy document, the EU Commission's Jose Manuel Barroso stated the following regarding the ultimate aim of the strategy:

> "It's about more jobs and better lives. It shows how Europe has the capability to deliver smart, sustainable and inclusive growth, to find the path to create new jobs and to offer a sense of direction to our societies."[484]

In 2010 the EU Commission, as part of the Europe 2020 Strategy, launched one of seven "flagship initiatives", being an Agenda for New Skills and Jobs.[485] In terms of this agenda the EU Commission has set out to "define and implement the second phase of the flexicurity agenda, together with European social partners, to identify ways to better manage economic transitions and to fight unemployment and raise activity rates". In doing so, member states shall "implement their national pathways for flexicurity, as agreed by the European Council, to reduce labour market segmentation and facilitate transitions as well as facilitating the reconciliation of work and family life".[486] From the agenda, it is clear that flexicurity will be relevant for Europe in the future.

The Mobility in Europe programme was established by the EU Commission to support the implementation of the objectives of the EU and to contribute to the achievement of Europe 2020 Strategy goals. The programme focuses especially on monitoring the trends of the movement of workers between EU member states,

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[483] Popescu *AUDJ* (2015) 84 – 85 concludes that "[r]egardless of the concepts, social policy strategies adopted at the international or national level, the labour (social) legislation must remain a legislation oriented towards the protection of the employee, of course, with the observance of the interests of the other party, respectively of the employer."

[484] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF accessed on 31 August 2016.

[485] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF at 18 accessed on 31 August 2016.

[486] As above at 19 accessed on 31 August 2016. The EU Commission has expressed that "[f]lexicurity is a crucial element of the Employment Guidelines and the European Employment Strategy as a whole. Integrated flexicurity policies play a key role in modernising labour markets and contributing to the achievement of the 75% employment rate target set by the Europe 2020 Strategy." Available at http://ec.europa.eu/social/main.jsp?catId=102&langId=en accessed on 31 August 2016.

which immigration issue has become a major debate in Europe over the recent years.[487]

More recently, the EU Commission has also taken steps to increase the social security aspect within the EU. This comes through the priority policy of creating a European Pillar of Social Rights.[488] A conference in 2017 in Brussels has been planned in order to move closer to establishing a European Pillar on Social Rights.[489] In the first preliminary outline, the European Pillar on Social Rights is divided into three categories being equal opportunities and access to the labour market, fair working conditions, and adequate and sustainable social protection.[490] The three categories are further divided into various policy domains. The labour market access category includes the policy domains of flexible and secure contracts, secure professional transitions, active support to employment, gender equality and work-life balance, and equal opportunities.[491]

4. Conclusion

The purpose in this chapter has been to identify labour market policy in the EU and to distil norms in respect of the protection of agency workers in terms of EU instruments.

The issues addressed in this chapter reflect significant policy developments at EU level from a policy perspective in respect of the EU's attempts to protect agency workers and regulate agency work. At the forming of the EU the original goals were purely economic in nature and there was little or no intention to formulate EU labour law. Over time social policy became integral to the goals of the EU and it was accepted that social policy has implications for economic growth as well.

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[487] European Job Mobility Laboratory for the EU Commission "Mobility in Europe 2013" (2013). At 29 – 33, the report provides an overview of the increases and decreases of inward and outward migration from particular member states from the start of the financial crisis.
[488] Available at ec.europa.eu/priorities/deeper-and-fairer-economic-and-monetary-union/towards-european-pillar-social-rights.en accessed on 30 January 2017.
[489] Press release available at europa.eu/rapid/press-release_IP-17-114_en.htm accessed on 30 January 2017.
[490] Available at europa.eu/rapid/press-release_IP-16-544_en.htm accessed on 30 January 2017.
[491] As above.

Shortly after the ILO's adoption of the decent work agenda, in 2007 the EU formally endorsed the Common Principles Towards Flexicurity. This endorsement marks the pinnacle of the policy shift at EU level from an economically-inclined approach to one which places more emphasis on social goals. There are now several EU instruments relating to labour law, including those relevant to non-standard forms of work.

What emerges from the evaluation of flexicurity is that the ideal and the most useful framework are country-specific. What is evident is that flexicurity is not a "cut and paste" policy: each member state needs to find its own mechanisms according to its unique circumstances and resources through which to attain flexicurity. Fortunately, through the pathways to flexicurity, the EU Commission provides guidance with regard to achieving its goals.

In recent years, challenges around the freedom to provide services and the freedom of movement of workers between member states have become prominent. These difficulties have led the European Court of Justice to adopt an approach which upholds the freedom to providing services, which is perhaps at the expense of workers. Despite this, the Europe 2020 Strategy and the newly proposed European Pillar of Social Rights re-emphasise a more social and balanced perspective in the EU. In the Europe 2020 Strategy's flagship initiative Agenda for New Skills and Jobs, the EU Commission reinforces that member states implement flexicurity pathways with the purpose of improving both flexibility and security in the labour market.

The Temporary Agency Work Directive aims to establish a protective framework for agency workers, which is non-discriminatory, transparent and proportionate, while respecting the diversity of labour markets and industrial relations. The instrument is positive in that it allows for the existence of agency work, it provides measures to ensure equal treatment for agency workers as compared to workers of clients and it provides for agency workers to have access to collective facilities and vocational training. The Temporary Agency Work Directive has more persuasive power in terms of protection for agency workers than ILO instruments.

Of particular importance in the protection of agency workers is that the nature of agency work within the EU is viewed as temporary and as a stepping-stone towards

secure and indefinite employment. There is a focus on facilitating a transition from unemployment into employment and from precarious work into secure employment.

Accordingly, based on the study in this chapter, it is asserted that the following principles can be considered current norms of the EU in terms of the protection of agency workers:

First, agency work is promoted and employment agencies are allowed to operate, second, agency work should be temporary in nature, third, agency workers must be provided with the right of equal treatment by employment agencies, fourth, agency workers should have access to direct employment at clients and, lastly, agency workers should have access to collective facilities provided by clients and vocational training.

The following chapter traverses South Africa's labour market policy and legislative approach, namely "regulated flexibility".

Chapter 5
The South African Concept of "Regulated Flexibility"

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1. Introduction

In this chapter the South African policy concept of "regulated flexibility" will be analysed and evaluated. According to South African government officials this policy consideration gave rise to the way in which agency work is regulated.[492] It dictates the level of protection provided to agency workers and forms a core component in

[492] In May 2013 the Deputy Director-General for Labour and Policy Relations in South Africa stated that in the run-up to the finalisation of the labour law overhaul at the time government was "committed to a policy and legislative approach that is captured by the concept of regulated flexibility." Available at Esterhuizen "Changing SA's labour law not the answer, says DDG" (31 July 2013) Polity.org.za www.polity.org.za accessed on 2 September 2013.

appraising the country's compliance with international norms. A fuller understanding of the notion of regulated flexibility could assist in developing an appropriate model for the protection of precarious workers. Whereas this chapter focuses on labour policy, the next chapter analyses the most recent legislative amendments regarding agency work.[493]

The chapter commences with the historical background to South Africa's policy approach. In seeking to unravel the meaning of regulated flexibility, it will become apparent that at no stage did policy-makers develop a clearly formulated policy document that gives expression to the concept.[494] However, authors have identified a number of characteristics associated with this policy framework and these will be analysed.[495] This chapter additionally seeks to provide guidance on how regulated flexibility could have been formulated more clearly.

2. Labour Policy Developments in South Africa

2.1 Background

Subsequent to the historical event of the first fully democratic elections on 27 April 1994 South African labour law has experienced three major overhauls: first, the promulgation of a new Labour Relations Act 66 of 1995 ("LRA"),[496] second, almost seven years after the enactment of the LRA significant amendments were implemented in 2002,[497] and, third, the latest set of amendments came into effect with the enactment of the Labour Relations Amendment Act 6 of 2014 ("LRAA of 2014").[498] The policy debates that preceded each of these sets of amendments are analysed in the paragraphs that follow.

[493] See Chapter 6 for an analysis of the changes brought about by the Labour Relations Amendment Act 6 of 2014 ("LRAA of 2014").
[494] See Chapter 5 at 3.
[495] See Chapter 5 at 3.3. See Cheadle *ILJ* (2006) 668; and Van Eck *De Jure* (2013) 604.
[496] See Chapter 5 at 2.2.
[497] See Chapter 5 at 2.3. Changes in legislation were brought about by the Labour Relations Amendment Act 12 of 2002 ("LRAA of 2002"); and the Basic Conditions of Employment Amendment Act 11 of 2002 ("BCEAA of 2002").
[498] See Chapter 5 at 2.4.

2.2 Policy Debate Preceding the Labour Relations Act 66 of 1995[499]

On 8 August 1994 a Ministerial Task Team was set up to develop a new set of labour laws.[500] In preparing the drafts for post-apartheid labour legislation, an Explanatory Memorandum was published which highlighted the innovations contained in the Labour Relations Bill, 1995.[501] The Explanatory Memorandum mentions, amongst others, the Ministerial Task Team was tasked to prepare a "Labour Relations Bill which would give effect to government policy as reflected in the Reconstruction and Development Programme" ("RDP").[502]

Part 3.11 of the White Paper to the RDP was published in 1994 and it made early mention of government policy in respect of the "[l]abour market and human resource

[499] See Standing *et al* (1996) 12 – 16 for a summary of labour market regulation and policy approach in South Africa before the end of apartheid. At 12, the authors state that the labour market under apartheid began with a highly flexible phase which became increasingly rigid. At 13, the authors state that in the years following the formal imposition of apartheid in 1948, an attempt was made to "create what might have been described as a system of regulated rigidity." There was a type of selective regulated rigidity in that there were protective regulations for part of the country's people. However, "repressive and market regulation" applied to others.

[500] The ministerial task team was appointed by the Minister of Labour on the 8th of August 1994. It consisted of: Professor H Cheadle (Convenor); Mr R Zondo; Ms A Armstrong; Ms D Pillay; Mr A van Niekerk; Associate Professor W le Roux; Professor A Landman (President of the Industrial Court); Mr D van Zyl (State Law Adviser seconded to the team).

[501] The Explanatory Memorandum (1995) 278 sets out the purpose of the document in stating that "[i]n July 1994 the Cabinet approved the appointment of a Ministerial Legal Task Team to overhaul the laws regulating labour relations and to prepare a negotiating document in draft Bill form to initiate a process of public discussion and negotiation by organized labour and business and other interested parties".

[502] Explanatory Memorandum (1995) 279. Other aims in the brief included drafting a Labour Relations Bill which would: "give effect to public statements and decisions of the President and the Minister of Labour, which commit the government to International Labour Organization (ILO) Conventions 87, 98 and 111, among others, and the findings of the ILO's Fact Finding and Conciliation Commission (FFCC); comply with the Constitution; be simple and, wherever possible, written in a language that the users of legislation, namely workers and employers, could understand, and provide procedures that workers and employers were able to use themselves; be certain and, wherever possible, spell out the rights and obligations of workers, trade unions, employers and employers' organizations so as to avoid a case-by-case determination of what constitutes fair labour practices; contain a recognition of fundamental organizational rights of trade unions; provide a simple procedure for the certification of trade unions and employers' organizations and for the regulation of specific aspects of these organizations in order to ensure democratic practices and proper financial control; promote and facilitate collective bargaining in the workplace; promote and facilitate collective bargaining at industry level; provide simple procedures for the resolution of disputes through statutory conciliation, mediation and arbitration and the licensing of independent alternative dispute resolution services; provide a system of labour courts to determine disputes of right in a way which would be accessible, speedy and inexpensive, with only one tier of appeal; entrench the constitutional right to strike subject to limitations which are reasonable and justifiable in an open and democratic society based on values of freedom and equality, and regulate lock-outs in a similar manner; and provide for the decriminalization of labour legislation."

development".[503] In this regard it stated that there was an urgent need for South Africa to develop "an active labour market policy" that would ensure "effective competition" in the global market.[504] The White Paper added that the policy "must be geared to maximising quality employment and minimizing unemployment and underemployment, and while doing so improve efficiency, equity, growth and social justice".[505]

The White Paper drew attention to the need for a labour policy, but it only alluded to vague government "programmes and policies". The White Paper merely provided hints regarding the content of such policies and failed to provide details on any government programmes. The White Paper mentioned that the Labour Relations Bill, 1995 should cater for conciliation and mediation of disputes, a framework for collective bargaining and a more expeditious procedure to access the Courts.[506] However, it was silent on the regulation of non-standard employment.

The Explanatory Memorandum to the Labour Relations Bill, 1995 did contain a summary of the proposed provisions on agency work. It provided that:

> "[a] definition of labour broker is provided and a person whose services have been procured by a labour broker is deemed to be an employee of the labour broker; the labour broker is deemed to be the employer of such person; the labour broker and his or her client are jointly and severally liable for any contraventions of this Act, the Basic Conditions of Employment Act, an arbitration award, court order or a wage determination or for any breach of a collective agreement."[507]

In 1996, within a year after the LRA had been promulgated, the Minister of Labour produced a policy document and Green Paper in the form of a General Notice on policy proposals for a statute on employment standards.[508] This document provided early indications of the government's policy considerations prior to the enactment of

[503] White Paper on Reconstruction and Development, Government Gazette No. 16085, 23 November 1994 26.
[504] As above.
[505] As above.
[506] As above at 27.
[507] Explanatory Memorandum (1995) 332.
[508] Ministry of Labour General Notice 156 of 1996, Employment Standards Statute: Policy Proposals available at http://www.gov.za/sites/www.gov.za/files/17002_gen156_0.pdf accessed on 27 July 2016.

the Basic Conditions of Employment Act 75 of 1997 ("BCEA"). The Green Paper to the BCEA stated that it sought:

> "to balance the protection of minimum standards with the requirements of labour market flexibility. A model of 'regulated flexibility' is proposed. This has two main aspects:
> - the protection and enforcement of a revised body of basic employment standards;
> - rules and procedures to vary these standards through collective bargaining, sectoral determinations for unorganised sectors and administrative variations."[509]

In respect of agency work, the Green Paper stated that there were increasing numbers of workers supplied by employment agencies. In order to improve the protection of workers in non-standard employment, it was proposed that "part-time employees should be entitled to the same protections as full-time employees on a proportional basis."[510] The Green Paper suggested that "employers who engage labour contractors should be jointly and severally liable for violations of employment standards by the contractor."[511]

It is clear that the policy of regulated flexibility was used in the Green Paper before the enactment of the BCEA. However, Cheadle confirms, in terms of the drafting of the LRA after apartheid, regulated flexibility was never properly considered by policy-makers.[512] The author says political imperatives for demonstrating results spurred the conclusion of the BCEA before the task team had completed its work.[513]

This haste meant that the reform took place without a "thorough labour market evaluation".[514] Furthermore, linkages were not drawn with other labour market disciplines, such as skills development and social security. Additionally, the negotiations and social dialogue around the legislative reform consisted mainly of

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[509] Ministry of Labour General Notice 156 of 1996, Employment Standards Statute: Policy Proposals at 4 in the Green Paper dated 23 February 1996 available at http://www.gov.za/sites/www.gov.za/files/17002_gen156_0.pdf accessed on 27 July 2016.
[510] As above at 4 and 5.
[511] As above.
[512] Cheadle *ILJ* (2006) 665. This is because the process of reforming the LRA was initiated before the Presidential Commission into the Labour Market was even appointed.
[513] As above.
[514] As above.

"piecemeal negotiations".[515] Cheadle points out that the policies underlying the LRA were being formulated at a time when the final Constitution, 1996 was not yet in place.[516] Had it been adopted, it may have impacted on the policy approach.

The legislation was a product of compromise and concessions. Brassey notes the concessions cut both ways with unions winning statutory rights to strike and to organise and, in exchange, employers secured a ban on strikes over dismissals and a cap on compensation for unfair labour practices.[517]

It is clear that there was no clear application of a coherent labour policy framework during the era leading up to the enactment of the country's post-apartheid labour legislation. At best a patchwork of government programmes and policies existed, which included the concept of regulated flexibility: it consisted of two aspects, namely, protection and enforcement of basic employment standards and the establishment of rules and procedures to vary those standards. Godfrey and Witten confirm that the BCEA was the "most complete statement of the government's concept of 'regulated flexibility'".[518]

2.3 Policy Debate Preceding the 2002 Amendments

Less than eight years after the enactment of the LRA during 1995, circumstances led to new policy considerations for the government and amendments to law in the early 2000s. At the time research showed that legislation in South Africa was relatively flexible.[519] After examining data from research studies conducted in 1997 on regulation and protection under South African labour law, Bhorat and Cheadle state the following:

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[515] Cheadle *ILJ* (2006) 666.
[516] As above at 667.
[517] Brassey *ILJ* (2012) 4 states that both sides, however, did agree that minimum wages in terms of employment should continue to be set at industry level and be statutorily imposed on all who fall within that industry.
[518] Godfrey and Witten *ILJ* (2008) 2406 - 2407.
[519] Bhorat and Cheadle (2007) 18 refer specifically to hiring and firing laws. The authors provided the results of research conducted on changing levels of regulation and protection. In order to do so, the authors aimed to provide empirically-backed results on regulation and protection as compared to other countries in the world. Two sets of data were used in their research, namely that of Botero *et al Quarterly Journal of Economics* (2004) 1339 - 1382 and also that of the World Bank in its Cost of Doing Business Survey of 2006 access available through http://www.worldbank.org/publications accessed on 22 July 2016.

> "South Africa has relatively low levels of regulation with regard to individual employment relations. While this is counterpoised by higher levels of regulation in terms of collective rights, the upshot is an overall regulation index which places South Africa in the bottom one third of the global distribution of labour market regulation."[520]

The authors found that the fairly flexible legislation shortly after apartheid in respect of non-standard forms of employment, which provided limited protection for agency workers, may have been one of the contributing factors in South Africa for the rapid rise in non-standard forms of employment.[521]

Similarly, at the time Clarke mentions that "[e]xternalization (shifting work from an employment relationship to an unprotected commercial contract) is also casualizing the workforce" and that "[n]on-standard employment is increasing in all sectors".[522] It is submitted that the increase in casualisation was a catalyst for change. The government in the early 2000s identified the need to amend some of the post-apartheid legislation, Clarke states the following in this regard:

> "[i]n September 2000, Mr Membathisi Mdladlana, the minister of labour, observed that 'there has been a worldwide increase in the use of temporary workers, homeworkers, subcontractors, and so on.' He added, 'the increase in atypical workers is a reality which we cannot reverse'. Whatever the government's reluctance, the labour movement had achieved a set of amendments to labour legislation that tighten existing loopholes."[523]

Amendments were made to both the BCEA and to the LRA in the Basic Conditions of Employment Amendment Act 11 of 2002 ("BCEAA of 2002") and the Labour

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[520] Bhorat and Cheadle (2007) 11.
[521] As above at 8. The authors argue that the "fairly flexible legislation governing these types of individual employment arrangements, has been a contributory factor in the early post-apartheid period in the rapid growth of non-permanent employment in the South African labour market. The upshot of these individual indices, is that the aggregate labour regulation and aggregate protection indices for South Africa remain fairly low in international terms."
[522] Clarke (2004) 107.
[523] As above at 113. Godfrey and Witten *ILJ* (2008) 2408 – 2409 explained that "[t]he negotiated amendments were substantially different to the set of amendments proposed by the department the year before. Whereas the proposed amendments announced in July 2000 were almost all about greater flexibility for employers, to the extent that the model of 'regulated flexibility' was severely undermined, the final amendments were more of a mixed bag, with some balance being restored to the combination of flexibility and 'core' conditions. The final amendments therefore represented a significant victory for labour."

Relations Amendment Act 12 of 2002 ("LRAA of 2002").[524] The amendments sought to increase protection of vulnerable workers and to address the increase of non-standard employment.[525] Regarding this legislative regime, Mills states that:

> "the imperative on the state to balance labour market …'flexibility' to enhance competitiveness, … with the commitment of the constitutional democracy to social justice and equality in the labour market, has led to the adoption of a legislative regime that seeks the solution in a model that combines collective bargaining with a flexible floor of rights approach. This has resulted in a sometimes incoherent approach to addressing the plight of atypical or marginal workers".[526]

The 2002 amendments did not make specific changes concerning agency workers; however a helpful addition to the legislation for vulnerable workers was the introduction in the LRA and the BCEA of a presumption regarding who is an employee.[527] This provision directs that workers are presumed to be employees until the contrary is proved if one or more listed factors are present[528] and leans towards greater protection for employees on the periphery of traditional standard employment relationships.

According to the Department of Labour's Guide on the LRA Amendments of 2002, the amendments to legislation at that time covered aspects such as: the right to strike during retrenchments; increased powers afforded to bargaining councils and their officials; better protection of vulnerable workers; one stop conciliation and arbitration processes and one stop final and binding disciplinary enquiries.[529]

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[524] The LRA was amended in 2002 by the LRA Amendment Act 12 of 2002. The BCEA was amended in 2002 by the BCEA Amendment Act 11 of 2002.
[525] For a summary of the changes from a policy perspective, see Clarke (2004) 113 – 114.
[526] Mills *ILJ* (2004) 1206. This was "evidenced by the legislative innovations introduced in key Acts such as the Labour Relations Act 66 of 1995 and the Basic Conditions Act 75 of 1997. Recent amendments to these Acts evidence a more proactive attempt to deal with the problems of atypical work."
[527] s 200A of the LRAA of 2002 and s 83A of the BCEAA of 2002.
[528] The factors include: "(a) the manner in which the person works is subject to the control or direction of another person; (b) the person's hours of work are subject to the control or direction of another person; (c) in the case of a person who works for an organisation, the person forms part of that organisation; (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months; (e) the person is economically dependent on the other person for whom he or she works or renders services; (f) the person is provided with tools of trade or work equipment by the other person; or (g) the person only works for or renders services to one person."
[529] Department of Labour "Know your LRA" (2002) 2nd edition available at http://www.labour.gov.za/DOL/downloads/documents/useful-documents/labour

In respect of the 2002 amendments, the Department of Labour expressed that the changes "demonstrate the flexible approach adopted by government in relation to labour law"[530] and added that the "most noteworthy example were the amendments made to section 200A of the LRA and section 83A of the BCEA in relation to the problem of independent contractors".[531] Furthermore, in explaining the reasons for the amendments, the Department of Labour stated that they were "mainly triggered by changes in the nature of work in recent years that have spawned the rise of atypical employment relations such as casualisation and externalisation" with externalisation being of greater concern "as it includes practices of subcontracting, outsourcing and the use of labour brokers".[532]

It is evident that the government considered the protection of vulnerable employees in the formulation of the amendments in the early 2000s, but there was still a lack of a clear and defined labour policy concept or framework at that stage. It is also clear that agency workers gained hardly any additional protection during that round of amendments.

2.4 Policy Debate Preceding the 2014 Amendments

Subsequent to the 2002 amendments two lines of thought developed regarding the balance between regulation and flexibility. In 2006, Bhorat and Cheadle pointed out, compared to other countries, South Africa "had become a less flexible labour market" and that this process seemed "to be driven by the legislative provisions in hiring and firing".[533] On the same lines the World Bank rated South Africa low on labour market

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relations/Useful%20Document%20-%20LRA%20-%20Know%20Your%20LRA%202002.pdf accessed on 26 July 2016.

[530] Address made by Membathisi Mdladlana at 19th Annual Labour Law Conference, Sandton Convention Centre on 6 July 2006. Available at http://www.labour.gov.za/DOL/media-desk/speeches/2006/19th-annual-labour-law-conference-1/?searchterm=regulated flexibility accessed on 26 July 2016.

[531] As above.

[532] As above.

[533] Cheadle and Bhorat (2007) 18. Referring to Botero *et al Quarterly Journal of Economics* (2004) 1339 - 1382, the following is stated "Figure 4, therefore, presents the global distribution, across 175 countries, of rigidity in hiring, hours of work and firing. It is South Africa's hiring and firing rigidity, in corroboration with the mean results above, which on this more recent data, are positioned fairly high in the distribution: the economy is thus positioned at the 65th percentile for hiring rigidity and at about the 60th percentile for the difficulty of firing index. In addition, in comparison with upper middle country sample, South Africa ranks at the 73rd percentile for difficulty in hiring, and at the 63rd for firing rigidity."

flexibility and stated "[i]nflexible labor markets stifle new job creation and push workers into the informal sector".[534]

At the same time Clarke argues that there was greater flexibility for employers than security or protection for employees and that the employers appear to have "won" the "flexibility battle".[535] The author referred to the government's policy approach that seemed to be one of "flexible regulation".[536]

The conclusion can be drawn that subsequent to the 2002 amendments there was strict regulation in respect of dismissal law, but this did not apply in respect of the protection of non-standard forms of employment.[537] This state of affairs was confirmed in an ANC 2007 paper in which it was stated that:

> "[t]he findings continue to point out that with regards to 'the legislative regime governing part-time work, contractual employment and so on - South Africa yields an extremely low measure of labour regulation'. This not only talks to the levels of flexibility in our labour market regime which research now tells us have shown 'an extremely low measure of labour regulation', but it equally explains what in 2003 research identified as an 'exponential rise in atypical forms of employment'."[538]

In 2007, the ANC held its 52nd National Conference in Polokwane. During this event the trade union federation COSATU placed significant pressure on the ruling party in respect of the protection of agency workers.[539] In its capacity as one of the ANC's

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[534] Doing Business (2006) 21. It is important to note that the views expressed by the authors of such studies are typically in favour of deregulation. Van Niekerk *ILJ* (2013) 30 states that, "[p]roponents of deregulation invariably rely on surveys conducted by the World Bank and World Economic Forum, which regularly rate South Africa low on the table of labour market flexibility."

[535] Clarke (2004) 114. Also see Mills *ILJ* (2004) 1207 where the author argues that the LRA model constituted one which has a *laissez-faire* approach due to an emphasis on collective bargaining which is combined with a flexible floor of minimum rights adopted within the BCEA. Mills stated that the laws were "inherently unequal to the task of adequately addressing the plight of atypical workers."

[536] As above at 115. The author referred to the legislative amendments in the early 2000s as an "apparent legislative victory" and "incremental reforms unlikely to reverse the deeper trends that have dominated the evolution of the labour market in post-Apartheid South Africa."

[537] See, for example, Cheadle *ILJ* (2006) 664, where the author stated that "the statutory unfair labour practice has become a charter of rights for middle and senior management while the most vulnerable workers are left without protection."

[538] ANC paper "The Role of the Working Class and Organised Labour in Advancing the National Democratic Revolution" dated 30 March 2007 available at http://www.anc.org.za/docs/discus/2007/labour_ndr.html accessed on 29 July 2016.

[539] In the Resolutions document compiled following the ANC's 52nd National Conference available at http://www.anc.org.za/docs/res/2013/resolutions53r.pdf accessed on 27 July 2016, reference is made to COSATU in respect of vulnerable workers in stating that "[m]arginalised workers that are outside

tripartite strategic partners, COSATU was influential on government in the development of its approach to the regulation of agency work in particular.

In 2009, the ANC's election manifesto highlighted that one of the ANC's main goals for the next few years would be "the creation of decent work opportunities and sustainable livelihoods".[540] A way to realise this goal was seemingly through an overhaul of the country's labour legislation.[541] Emphasis was placed on the labour market problems experienced in the years leading up to the 2009 election manifesto, and, in particular, on the rise in casualisation and informalisation of more and more workers.

In 2010 COSATU stated the following regarding the planned amendments by the government in respect of agency work in particular: "[w]e welcome the publication of these amendments" and that "[w]e are studying all of them to satisfy ourselves that they deliver only one outcome: doing away with the third man in the relationship that should exist between a worker and the employer".[542] COSATU stated that they wanted a "total ban of the system that has condemned so many to [a] new [form of] slavery".[543]

Agency workers have historically been particularly prone to exploitation. From the agency workers' perspective such abuse includes lesser pay and no or less benefits than employees directly employed by clients, and contracts for short periods that are

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the current system of labour relations must be mobilised to realise their constitutional rights and join trade unions affiliated to COSATU."

[540] Text of the ANC's 2009 election manifesto Speech delivered by the country's President available at http://www.politicsweb.co.za/party/text-of-the-ancs-2009-election-manifesto accessed on 12 October 2015.

[541] In a Budget Vote Address in the National Assembly the following statement was referred to in respect of the labour legislation changes required in South Africa: "[t]his is in keeping with the promises made in the African National Congress election manifesto in 2009 which promised that 'In order to avoid exploitation of workers and ensure decent work for all workers as well as to protect the employment relationship, (we will) introduce laws to regulate contract work, subcontracting and out-sourcing, address the problem of labour broking and prohibit certain abusive practices. Provisions will be introduced to facilitate the unionisation of workers and conclusion of sectoral collective agreements to cover vulnerable workers in these different legal relationships and ensure the right to permanent employment for affected workers." Budget vote Address by National Assembly in May 2013 http://www.labour.gov.za/DOL/media-desk/speeches/2013/budget-vote-address-by-the-hon-minister-of-labour-ms-mildred-n-oliphant-mp-national-assembly accessed on 2 September 2013.

[542] COSATU's year-end speech for 2010 at http://www.politicsweb.co.za/iservice/total-ban-needed-on-labour-broking--cosatu accessed on 12 October 2015.

[543] As above.

irregular in nature.[544] COSATU has also argued that agency work contributes to the progressive de-skilling of workers due to the nature of the work contracts, as well as it allows for employers to evade their obligations under labour legislation.[545]

The Minister of Labour published the first of a number of drafts of the labour amendment bills at the end of 2010.[546] The amendments are analysed more fully in Chapter 6 and what follows here is limited to a discussion of the labour policy considerations in respect of agency work.

The LRA Amendment Bill of 2010 stated that the purpose of the amendments was "to align the employment laws to ensure decent work by regulating sub-contracting, contract work and outsourcing".[547] The influence of COSATU is evident in the LRA Amendment Bill of 2010. Had this Bill been implemented, agency work would have been prohibited.[548]

Following the publication of the raft of labour amendment bills in 2010, an influential Regulatory Impact Assessment was conducted by Benjamin *et al* on the potential effects of the proposed changes.[549] The study highlighted the potential

[544] As above.
[545] As above.
[546] See Chapter 6 at 3.2. The Bills published in 2010 included the LRA Amendment Bill [B – 2010] ("LRA Amendment Bill of 2010"); the Basic Conditions of Employment Amendment Bill [B – 2010] (BCEA Amendment Bill of 2010); the Employment Equity Amendment Bill [B – 2010] (EEA Amendment Bill of 2010); and the Employment Services Bill [B – 2010] (Employment Services Bill of 2010).
[547] Preamble to LRA Amendment Bill of 2010.
[548] The first draft Amendment Bill proposed the deletion of s 198 in its entirety. Employment agencies would then not be considered an employer under the law. This would mean that the clients would be regarded as the employer, which would then do away with the purpose of using an employment agency in the first place. This would have spelt an end to agency work altogether. COSATU formulated several reasons behind its persistence in the call to ban agency work. For a list of COSATU's reasons for desiring a ban on agency work see the arguments on its website available at http://www.cosatu.org.za/show.php?ID=6359 accessed on 29 July 2016. There, it is stated that: "[l]abour brokering is equivalent to the trading of human beings as commodities. Labour Brokers do not create jobs but merely act as intermediaries to access jobs that already exist, and which in many cases would have existed previously as permanent full-time jobs. Labour Brokers destroy permanent jobs as they lead to insecure contractual relations and downgrading of wages and employment terms. Labour Brokers do not practise the principle of equal pay for work of equal value." Furthermore "[a] total ban will be easy to enforce. Most of the workers employed by the labour brokers do not enjoy pension fund/provident funds, medical aid benefits". Additionally they argued that "[l]abour brokers contribute to the progressive de-skilling of workers, especially as a result of the short-term and irregular nature of the contracts associated with labour brokering and other forms of atypical labour."
[549] Benjamin *et al* Regulatory Impact Assessment (2010) available at http://www.labour.gov.za/DOL/downloads/documents/useful-documents/labourrelations/RIA13Sept2010.pdf accessed on 29 July 2016.

consequences of implementing an outright ban in terms of the LRA Amendment Bill of 2010.[550] Despite objections by COSATU, the government altered its stance and revised its proposal in respect of agency work. At the time the Regulatory Impact Assessment stated that the policy objective should be "to regulate non-standard work in a way that recognises its legitimate role in a modern economy but seeks to prevent it being used as a vehicle for exploitation".[551]

Lengthy discussions took place at the National Economic Development and Labour Council ("NEDLAC") which resulted in new legislative proposals.[552] NEDLAC fulfils the role of bringing together government, business and labour, and policy decisions are made through social dialogue at the Council. NEDLAC is established in law through the National Economic Development and Labour Council Act, Act 35 of 1994, and operates in terms of its own constitution.[553] Among other aspects, the mandate of NEDLAC requires it to "[c]onsider all significant changes to social and economic policy before it is implemented or introduced in Parliament".[554]

The LRA Amendment Bill of 2012 was the second draft and made further provision for changes in respect of agency work in particular.[555] One of the debated aspects of the LRA Amendment Bill of 2012 was the period of time in terms of which an agency worker could be employed before they would be deemed to be employed directly by the client on an indefinite basis.[556] The initial period was six months.[557] This was a

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[550] As above at 34.
[551] Benjamin *et al* Regulatory Impact Assessment (2010) available at http://www.labour.gov.za/DOL/downloads/documents/useful-documents/labourrelations/RIA13Sept2010.pdf at 3 accessed on 29 July 2016.
[552] Memorandum of Objects Labour Relations Amendment Bill 2012 at 1.
[553] NEDLAC Annual Report 2013 / 2014 Founding Declaration 4.
[554] As above at 5. The mandate includes to "[s]trive to promote the goals of economic growth, participation in economic decision-making and social equity; seek to reach consensus and conclude agreements on matters pertaining to social and economic policy; consider all proposed labour legislation relating to labour market policy before it is introduced in Parliament; encourage and promote the formulation of coordinated policy on social and economic matters" and "[c]onsider Socio Economic Disputes in terms of Section 77 of the Labour Relations Act".
[555] LRA Bill [B16A – 2012].
[556] s 198A of the LRA Bill [B16A – 2012] stated as follows: "Application of section 198 to employees earning below earnings Threshold 198A. (1) In this section, 'temporary services' means work for a client by an employee— (a) for a period not exceeding six months; (b) as a substitute for an employee of the client who is temporarily absent; or (c) in a category of work and for any period of time which is determined to be temporary services by a collective agreement concluded in a bargaining council, a sectoral determination or a notice published by the Minister, in accordance with the provisions of subsections (6) to (8)."
[557] s 198A(1)(a) of the LRA Bill [B16A – 2012].

significant change from the LRA Amendment Bill of 2010 which would have had the effect of prohibiting employment by an employment agency altogether.

Debates in parliament resulted in a third draft of the amendments with the publication of the LRA Amendment Bill of 2013.[558] Whereas the social partners at NEDLAC agreed to six months, in parliament the time period was reduced to three months[559] and which eventually was included in the final draft of the amendments.[560] It is disappointing that social dialogue was undermined by parliamentary processes and through the close relationship between COSATU and the ANC. Rycroft explains that the course of the amendments represented "a serious disregard of the intended purpose of NEDLAC, a representative, specialist and state-funded body created out of the realisation that labour legislation is unique and requires a collaborative tripartite initiative".[561]

With regard to the labour policy underlying the legislative proposals the Department of Labour's Deputy Director-General for Labour and Policy Relations, in July 2013, expressed the following with reference to imminent changes:

> "[a]s government, we are committed to a policy and legislative approach that is captured by the concept of regulated flexibility. Regulated flexibility accepts the necessity of regulation, but also accepts the need for flexibility. The key issue is finding the right balance."[562]

The government's labour market policy in respect of the most recent legislative changes was influenced by the notion of regulated flexibility. However, as was the problem in the past, no official definition or explanation for the term was provided. Although it is not the function of the judiciary to formulate policy, the courts, on occasion, have referred to the term regulated flexibility. However, they too have lacked an official meaning of the term and accordingly their remarks have been

[558] LRA Bill [B16B – 2012].
[559] s 198A(1) of the LRA Bill [B16B – 2012] provided that "[i]n this section, a 'temporary service' means work for a client by an employee (a) for a period not exceeding three months".
[560] LRAA of 2014.
[561] Rycroft *ILJ* (2015) 4.
[562] Esterhuizen "Changing SA's labour law not the answer, says DDG" (31 July 2013) Polity.org.za www.polity.org.za accessed on 2 September 2013.

limited to aspects concerning levels of flexibility in relation to the law of unfair dismissal.[563]

The current policy appears to be one which aims to protect agency workers while allowing for employment agencies to operate. The government often uses the term regulated flexibility to describe its labour market policy but, contrary to the situation in the EU, an enduring shortcoming in the policy is that a clear definition and strategy of implementation have not been developed.[564]

3. The Concept of Regulated Flexibility

3.1 Background

The preceding historical overview of labour policy developments in South Africa confirms, since gaining power in 1994, the government has used the term regulated flexibility consistently. In the part that follows the chapter explores the origin of the concept and seeks to identify a conceptual framework for the policy that could provide practical guidance to future policy-makers.

3.2 Origin of the Concept

Shortly after the elections in 1994 the Minister of Labour invited the ILO to conduct an independent country review of labour market trends and policy developments.[565] At the time the country was described as having a high poverty rate combined with extreme inequality of income and chronically high unemployment.[566] The ILO's Country Review suggested that "the most promising macroeconomic strategy for

[563] In *Nitrophoska (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2011) 32 ILJ 1981 (LC) at para 17, Steenkamp J noted that, specifically in respect of the Code of Good Practice on Dismissal, the element of flexibility is not always recognised by arbitrating commissioners. However, the Court makes no further mention or explanation of regulated flexibility. In *Mogothle v Premier of the North West Province & another* (2009) 30 ILJ 605 (LC) at para 31 Van Nierkerk J refers to the element of flexibility in the labour law, which has been introduced by the regulated flexibility concept. JuVan Niekerk J also does not make any particular reference to the meaning of the policy. Similarly, in *Burger and SA Post Office Ltd* (2008) 29 ILJ 2305 (CCMA) at 2317, Commissioner Jansen van Vuuren does not make any statements regarding the meaning of regulated flexibility or its application of the law, but rather refers only to the fact that the Commissioner endorses a reference made by Cheadle *ILJ* (2006) regarding the flexibility element in dismissal law.
[564] See Chapter 4 at 3.2.
[565] Standing *et al* (1996) Preface at v.
[566] As above at 1.

South Africa" would be to adopt a policy of "trade liberalisation" supported by selective industrial strategies that would protect workers.[567]

The ILO Country Review identified different forms of security, as well as flexibility, applicable to employers and employees.[568] The ILO Country Review is the origin of the notion of regulated flexibility.[569] Cheadle states that Benjamin developed the concept of regulated flexibility and that it was "based on the approach to flexibility outlined in the ILO Country Review".[570]

Although the ILO Country Review was not binding on policy- or law-makers, it did influence the mind-set in the Labour Market Commission and the Minister of Labour's approach to labour market reform.[571] In grappling with the meaning of regulated flexibility, the ILO Country Review provides useful insight.[572] The document refers to balancing the protection of minimum standards against the background of labour market flexibility.[573] These two aspects, namely, protection and flexibility, comprise competing interests.

The ILO Country Review lists three main types of flexibility.[574] The first form relates to employment flexibility and refers to the idea that employers ideally want to be in a position to change conditions of employment with relative ease. The second form concerns wage flexibility[575] and the third type applies to work-process flexibility.[576]

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[567] As above.
[568] As above at 7 – 8. At 9 the authors state that "[w]e understand that the primary objective of regulations is protection against insecurity and exploitation. But it would be a mistake to neglect the efficiency-enhancing character of many forms of regulation."
[569] As above at 16. Particular reference is made to the 1995 Labour Relations Act and a 1996 draft of the Employment Standards Statute. The authors refer to the forms of labour security as well as at the same time the promotion of economic development, dynamic efficiency and restructuring.
[570] Cheadle *ILJ* (2006) 668. The Labour Market Commission was tasked with making recommendations to the Minister of Labour on labour law reform in the country.
[571] As above.
[572] As above, the author confirms that in respect of regulation in the 1990s, the ILO review influenced the government's approach to labour market reform.
[573] Ministry of Labour General Notice 156 of 1996 Employment Standards Statute: Policy Proposals at 4 in the Green Paper dated 23 February 1996 available at http://www.gov.za/sites/www.gov.za/files/17002_gen156_0.pdf accessed on 29 July 2016.
[574] Standing *et al* (1996) 6 – 7.
[575] Cheadle *ILJ* (2006) 668 describes this to mean the freedom to determine wage levels without restraint.
[576] As above.

These measures offer obvious advantages to employers, who are able to structure employment relationships in such a way so as to restructure, dismiss, change processes of work, and even wages. In response to these strategies, Mills states "[l]abour flexibility, if it is to be accepted as a permanent feature of our labour landscape, must not be achieved at the expense of equity."[577] The author argues convincingly, in order for labour law to fulfil its historical role, it should identify new types of non-standard employment and "interrogate such employment to provide workers with [appropriate] protection".[578]

On the other side of the scale, the ILO Country Review identified a list of seven forms of security.[579] The first form relates to labour market security and refers to a "widespread opportunity for effective labour market participation, which basically means that there must be a low, or a falling, level of unemployment".[580] A second concerns employment security and protection against "arbitrary loss of employment".[581] The third form foresees protection against arbitrary transfers between sets of work tasks and the loss of job-based rights: workers should have a sense of occupation.[582]

The fourth form relates to security of health and safety standards in employment. The fifth applies to access to the acquisition of skills and re-training.[583] The sixth form covers protection against arbitrary reduction of income which contributes to a sense of "economic equity".[584] The seventh form of security relates to representation

[577] Mills *ILJ* (2004) 1235. The author writes especially about the challenges in balancing flexibility for employers with equity for employees, making special reference to the difficulties of this with regards to atypical workers.
[578] As above. The historical role of labour law which is referred to is presumably the role that labour law seeks to act as a countervailing force to the employer's stronger bargaining position.
[579] Standing *et al* (1996) 8 – 9.
[580] As above.
[581] As above.
[582] As above. This refers to "a realistic opportunity to have a career, moving from time to time with rising status, competence and income."
[583] As above. This training is to ensure that workers' skills do not become "obsolescent or inadequate".
[584] As above. This refers to the assurance of at least "subsistence wages". Emphasis is placed on protection of those at the edge of the labour market and those workers which are lower-income earning.

security which is a secure capacity to bargain and to influence the character of employment.[585]

The aforementioned types of flexibility and forms of security offer tools to policy-makers in seeking to establish and implement a conceptual framework for the regulated flexibility strategy. However, these suggestions did not include useful detail regarding the regulation of agency work in particular.

3.3 Seeking a Conceptual Framework

3.3.1 Background

Despite a lack of a clear conceptual framework from government, Van Eck suggests that two principles underpin the country's "brand" of regulated flexibility:

> "[f]irstly, it is recognised that lower earning employees are generally in a more precarious position than higher earning employees, who, through education or experience may have earned a level of security in employability. Secondly, smaller undertakings should not be burdened with obligations that could potentially introduce rigidities and costs which would ultimately inhibit job creation."[586]

Broadly speaking, the strategy seeks to protect by means of a floor of rights and it also establishes mechanisms for flexibility. Although not pertinently enumerated by policy-makers, the mechanisms are collective (and individual) agreements, differential rights depending on the level of remuneration and additional flexibility for smaller undertakings. These mechanisms have gained greater prominence since the 2002 amendments.

[585] As above. This form of security relates to having an adequately strong "voice to ensure that distributive justice is pursued consistently."
[586] Van Eck *De Jure* (2013) 604. Du Toit and Ronnie *ILJ* (2014) 1812 describe it: "flexibility within this model is narrowly circumscribed, aimed at enabling employers to vary minimum employment standards rather than addressing the divergent conditions prevailing in different sectors, and non-industrial sectors in particular." At 1813, the authors recommend that a "workable model" of regulated flexibility should be capable of responding to the diversity of the different sectors and workplaces in existence in the country, especially those with high levels of non-standard work or informal work

3.3.2 A Floor of Minimums and Agency Work

As can be deduced from the initial model of regulated flexibility referred to by the Minister of Labour in 1996, a "floor" of basic minimum rights or conditions of employment has been used in South Africa to achieve regulated flexibility.[587] In this regard, the BCEA has provided these minimums. The conditions refer to aspects of employment such as annual leave,[588] sick leave,[589] family responsibility leave,[590] maternity leave,[591] working hours,[592] night work[593] and notice periods.[594] The BCEA has been referred to as the most "notable example of the implementation of the regulated flexibility policy".[595]

Cheadle, writing on regulated flexibility and the conceptual underpinnings of the labour reforms in the 1990s, suggests, instead of intensifying regulation in favour of those who are already protected, labour law reform should rather look to extend protection to those not covered by it.[596] In this regard there is a point to be made that instead of raising the floor of minimums for those covered by the relevant legislation, the BCEA and all workers included in the definition of "employee", such a floor of minimums should rather or also be extended to those not currently covered.

Agency workers are a vulnerable group in this regard. Cheadle called for an amendment to the LRA and BCEA to extend protection to all forms of dependent labour.[597] On a positive note, as will be discussed in the next chapter, it will be seen that the latest amendments improve this floor of minimums.[598]

There is another manner in which the floor of minimums, usually reserved for traditional employees, is extended to agency workers by the 2014 amendments. It

[587] Mills *ILJ* (2004) 1222.
[588] s 20 of the BCEA.
[589] s 22 of the BCEA.
[590] s 27 of the BCEA.
[591] s 25 of the BCEA.
[592] s 9 of the BCEA.
[593] s 17 of the BCEA.
[594] s 37 of the BCEA.
[595] Godfrey and Witten *ILJ* (2008) 2406. And highlighted too by Van Eck *De Jure* (2013) 604.
[596] Cheadle *ILJ* (2006) 664 states that the "main argument made in this paper is that the concept of regulated flexibility may be put to good use in extending protection to those who need it and limiting intervention, particularly judicial intervention, where there is no appreciable gain in protection."
[597] As above at 701.
[598] See Chapter 6 at 3.3.

included provisions on the right of agency workers to equal treatment with employees of a client where the agency worker is placed.[599]

3.3.3 Collective (and Individual) Agreements and Agency Work

As can be deduced from the General Notice in 1996, collective bargaining is another method through which to achieve a balance of competing interests.[600] Rights provided to employees through the BCEA can be varied by collective bargaining or individual agreements,[601] however, certain core rights cannot be changed.[602]

According to Cheadle, who refers to the ILO's review findings, collective bargaining is a method to address the competing interests of the parties.[603] Mills, referring to the LRA, states that the legislation "commits itself to social justice, and collective agreements reached through collective bargaining are envisaged as a fair mechanism for setting the distribution of wealth and power in society".[604]

However, with reference specifically to those workers largely excluded from the collective bargaining system, such as agency workers, the mechanism of collective

[599] s 189 of the LRA Amendment Act. Note that this is discussed in further detail in the following chapter. See also Mills *ILJ* (2004) 1217 where the author stated that joint and several liability between the agency and the client does little to "achieve parity in working conditions, wages and benefits between subcontracted workers and permanent workers".
[600] Ministry of Labour General Notice 156 of 1996 Employment Standards Statute: Policy Proposals at 4 in the Green Paper dated 23 February 1996 available at http://www.gov.za/sites/www.gov.za/files/17002_gen156_0.pdf accessed on 29 July 2016.
[601] s 49 of the BCEA provides that "(1) A collective agreement concluded in a bargaining council may alter, replace or exclude any basic condition of employment if the collective agreement is consistent with the purpose of this Act and the collective agreement does not- (a) reduce the protection afforded to employees by sections 7, 9 and any regulation made in terms of section 13; (b) reduce the protection afforded to employees who perform night work in terms of section 17 (3) and (4); (c) reduce an employee's annual leave in terms of section 20 to less than two weeks; (d) reduce an employee's entitlement to maternity leave in terms of section 25; (e) reduce an employee's entitlement to sick leave in terms of sections 22 to 24; (f) conflict with the provisions of Chapter Six. (2) A collective agreement, other than an agreement contemplated in subsection (1), may replace or exclude a basic condition of employment, to the extent permitted by this Act or a sectoral determination. (3) An employer and an employee may agree to replace or exclude a basic condition of employment to the extent permitted by this Act or a sectoral determination. (4) No provision in this Act or a sectoral determination may be interpreted as permitting- (a) a contract of employment or agreement between an employer and an employee contrary to the provisions of a collective agreement; (b) a collective agreement contrary to the provisions of a collective agreement concluded in a bargaining council."
[602] s 49(1)(a) to (f) of the BCEA sets out the rights which cannot be altered by way of collective or individual agreement.
[603] Cheadle *ILJ* (2006) 668. See Standing *et al* (1996) 10 on "voice regulation".
[604] Mills *ILJ* (2004) 1222 identifies the particular difficulties with this mechanism in respect of those workers which fall within the category of atypical employment.

bargaining has its limits.[605] Ironically, those workers with limited power in collective bargaining are often also the most vulnerable. The fact that agency workers are not physically located at their employers but rather are based at different premises of clients makes bargaining collectively ineffective.

In considering a history of collective bargaining as a mechanism to achieve regulated flexibility, Hepple states that:

> "[s]adly, over the past 16 years the aim of regulated flexibility has only partially been achieved. … [T]he growth of sectoral bargaining has been patchy. Employers in some sectors have pulled out of bargaining councils and in others show no enthusiasm for multi-employer sectoral bargaining; on the other hand, sectoral bargaining is becoming stronger in the mining sector, and it is now the predominant form of regulation in the public sector."[606]

3.3.4 Additional Protection for Lower-Income Earners and Agency Work

Van Eck asserts that the architects of the 2014 amendments were mindful of the fact that lower-earning employees usually are in a more vulnerable position than higher earning employees.[607] It is submitted that this form of differentiated protection for different categories of workers is consistent with the approach of regulated flexibility.

In respect of the need for additional protection for lower-earning employees, this notion gained prominence in the 2002 amendments. A number of protections provided for in the BCEA are afforded only to workers earning below the threshold amount in the BCEA[608] and include the floor of rights provided for in chapter 2 of the

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[605] As above. Subcontracting, outsourcing, labour broking and casual labour are all listed as examples of excluded workers, which the author states are often low-paid, black, female and unskilled. At 1207 the author states that "[i]t is argued that, notwithstanding the commitment to social justice evidenced in the preamble to the LRA and the BCEA, the collective laissez-faire model of labour law adopted by the LRA, with its emphasis on collective bargaining, combined with the 'flexible' floor of rights approach adopted by the BCEA, is inherently unequal to the task of adequately addressing the plight of atypical workers, and that the workers most affected by atypical work arrangements and least able to bargain themselves into a more equitable position, tend to coincide with the socially and economically marginalized in society, such as women, migrant workers, and, generally, black unskilled workers previously disadvantaged by apartheid policies."

[606] Hepple (2012) 14 adds that this fragmentation has negative consequences for the labour market and that a diminishing core of workers are protected only by the BCEA. It is submitted that agency workers fall within this diminishing group.

[607] Van Eck *De Jure* (2013) 604.

[608] s 6(3) of the BCEA provides for a threshold amount which is determined by the Minister and updated from time to time. The earnings threshold first became applicable as from 21 March 1998 in terms of the BCEA.

BCEA pertaining to working time, overtime, ordinary hours of work, rest periods and night work among others.

Furthermore, the rebuttable presumption of employment applies only to those earning under the threshold.[609] The 2014 amendments include additional protections, especially for agency, fixed-term and part-time workers earning under the threshold amount. These changes increased the prominence of this mechanism. As discussed in the following chapter, increased protection has been included in the LRA, particularly through the deeming of direct employment with the client, and there is a re-emphasis on the joint and several liability of the employment agency and the client.[610]

3.3.5 Additional Flexibility for Smaller Undertakings

Another mechanism which seeks to give effect to the government's regulated flexibility approach is by means of lessening the regulatory burdens placed upon smaller undertakings. A number of South African labour laws refer to the number of employees employed by an employer in order to determine which obligations such an employer has.[611] Labour legislation also refers to how long the undertaking has been in operation: start-up undertakings presumably would be less able to comply with onerous employer obligations which often bear associated costs.[612]

The size of the undertaking is a significant feature of the BCEA as well. Chapter 4 of the BCEA, which regulates particulars of employment and remuneration, excludes the application of parts of the chapter to employers with less than five employees.[613] Particular reference to the size of an undertaking is also made in the LRA, for example, section 198B(1)(b) of the LRA in respect of fixed-term contracts, applies, among other conditions, to an employer that employs less than 10 employees, or that employs less than 50 employees if the business has been in operation for less than two years.

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[609] This is found within s 200A of the LRA and in s 83A of the BCEA.
[610] See Chapter 6 at 3.3.
[611] The Employment Equity Act 55 of 1998 ("EEA") and the BCEA.
[612] The LRA.
[613] s 29(1)(n), (o), (p), and s 30, 31, and 33 of the BCEA do not apply to employees who work for employers with less than five employees.

Similarly, the Employment Equity Act 55 of 1998 ("EEA") provides that those employers who employ 50 employees or more are defined as a "designated employer" in the legislation.[614] An employer in this category has additional obligations and smaller businesses have greater flexibility.

Van Eck states that "[a]t least some thought goes into the notion that different categories of workers need different levels of protection and that start-up undertakings should not be burdened by regulations to the same extent as larger undertakings."[615] However, Cheadle identifies that more can be done to clarify the position of smaller businesses. He proposes that there should be a code of good practice for small businesses.[616] This mechanism is not new to South Africa's post-apartheid labour law, however, the 2014 amendments place greater emphasis on flexibility.

4. Future Labour Policy

The question arises whether there are any indications that South Africa's labour market policy may change in the near future, whether adaptations will influence the regulation of agency work. In this regard it is submitted that the South African National Development Plan 2030 ("NDP 2030") provides some guidance.[617] The Introduction of the NDP 2030 states that:

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[614] Employment Equity Act 55 of 1998 as amended. See definitions for full definition of a "designated employer". The definition has been extended by the 2014 amendments.
[615] Van Eck *De Jure* (2013) 604.
[616] Cheadle *ILJ* (2006) 686 makes specific reference to the pre-dismissal regulations with which employers comply. The author states that "the characteristic features of a small business, particularly a start up, such as the limits on internal expertise, the limits on resources, the lack of systems and the close nature of working relationships, may justify a departure from the norms."
[617] NDP 2030, Executive Summary can be found at http://www.gov.za/sites/www.gov.za/files/Executive%20Summary-NDP%202030%20-%20Our%20future%20-%20make%20it%20work.pdf accessed on 7 November 2015. The summary to the NDP 2030 provides that "President Jacob Zuma appointed the National Planning Commission in May 2010 to draft a vision and national development plan. The Commission is an advisory body consisting of 26 people drawn largely from outside government, chosen for their expertise in key areas. The Commission's Diagnostic Report, released in June 2011, set out South Africa's achievements and shortcomings since 1994. It identified a failure to implement policies and an absence of broad partnerships as the main reasons for slow progress, and set out nine primary challenges: 1. Too few people work; 2. The quality of school education for black people is poor; 3. Infrastructure is poorly located, inadequate and under-maintained; 4. Spatial divides hobble inclusive development; 5. The economy is unsustainably resource intensive; 6. The public health system cannot meet demand or sustain quality; 7. Public services are uneven and often of poor quality; 8. Corruption levels are high; 9. South Africa remains a divided society. South Africans from all walks of

> "[t]he National Development Plan aims to eliminate poverty and reduce inequality by 2030. South Africa can realise these goals by drawing on the energies of its people, growing an inclusive economy, building capabilities, enhancing the capacity of the state, and promoting leadership and partnerships throughout society."[618]

The introduction goes on to emphasise the fact that "[t]o eliminate poverty and reduce inequality, the economy must grow faster and in ways that benefit all South Africans". The NDP 2030 sets out ways in which to increase employment, including reducing the cost of regulatory compliance especially for small and medium-sized companies and a "labour market that is more responsive to economic opportunity".[619] These strategies lean towards increased flexibility for employers, at the same time, it is stated that there is a need to strengthen the application of minimum standards, amongst others, to "recruitment agencies and brokers".

Another sign of a future policy approach can be gleaned from the pronouncements by NEDLAC.[620] Alistair Smith, the Executive Director of NEDLAC, wrote in the 2014 Annual Report that "twenty years into our democracy … all social partners may agree that there is an urgent need to accelerate growth and address the challenges of unemployment, inequality and poverty in South Africa".[621]

Although the social partners seem to acknowledge that the attempts in the past 20 years to reduce unemployment have not been successful, there is no consensus on how to achieve this goal. The NEDLAC Executive Director in the same report states that "[a] new vision for new times" is required and that social dialogue could be the key in going forward.

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life welcomed the diagnostic as a frank, constructive assessment. This led to the development of the draft national plan, released in November 2011. Building on the diagnostic, the plan added four thematic areas: rural economy, social protection, regional and world affairs, and community safety. The Commission consulted widely on the draft plan. Our public forums drew in thousands of people; we met with parliament, the judiciary, national departments, provincial governments, development finance institutions, state-owned entities and local government formations; and we held talks with unions, business, religious leaders and non-profit organisations. South Africans have broadly supported the draft plan, proposing modifications and making suggestions to implement it effectively. Their input has informed this plan."

[618] As above.

[619] As above at 30.

[620] For further information on NEDLAC see http://new.nedlac.org.za/ accessed on 8 November 2015.

[621] NEDLAC Annual Report 2013 / 2014, Overview from Executive Director 7.

During a Labour Relations Indaba held in South Africa in 2014 it was decided to establish two NEDLAC technical task teams. One dealt with wage inequality and the other with labour relations.[622] In August 2015 NEDLAC reported that the task teams had reached consensus regarding the need for a Code of Good Practice on Collective Bargaining and Industrial Action and also that there is need for a national minimum wage.[623] The results of the Labour Relations Indaba reinforced the idea of social dialogue and economic growth as being central to attaining South Africa's labour market goals. These arguments point in the direction that labour policy in respect of the regulation of agency workers ideally should be adapted.

5. Conclusion

This chapter traverses South Africa's labour policy developments from the post-apartheid era to the present day and tracks the emphasis on regulated flexibility: to provide content and meaning to the policy of regulated flexibility by considering the different mechanisms used in South Africa to achieve this goal. During the course of this policy analysis it became evident that the meaning of regulated flexibility is unclear. Policy-makers have failed to develop a coherent definition of the concept or to conceptualise practical mechanisms to implement that strategy. Despite this lack of detail, the study identified a number of key characteristics that can be associated with regulated flexibility.

First, the policy strives to protect workers and, simultaneously, leave a measure of flexibility for employers within which to conduct their businesses. Workers are provided with a floor of rights pertaining to their conditions of service however, their rights are not accorded at all costs. Mechanisms have been devised to differentiate between different categories of workers and employers.

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[622] NEDLAC press statement of 21 February 2015 on the Labour Relations Indaba. http://new.nedlac.org.za/ accessed on 8 November 2015. The South African Deputy President, speaking at the 2014 Labour Relations Indaba, stated that "[p]ersistent inequality, weak economic performance, high unemployment and other socio-economic factors place pressure on the parties to collective bargaining and strain our labour relations regime. Labour market vulnerability and job insecurity add to these pressures. There is a risk that our labour relations regime, which has been a positive force for change and which has attracted international praise, will be gravely weakened."
[623] As above.

Second, the main strategies in terms of which the South African legislature provides leeway for flexibility are threefold: employers and workers are permitted to conclude agreements to vary some of the basic rights, more rights and stricter regulation apply to lower-earning and vulnerable workers and less burdensome regulations apply to smaller and start-up businesses.

Looking ahead it is clear that the labour market policies contained in the NDP 2030 documentation do not seek to alter the notion of regulated flexibility in any significant way. It aims to protect workers and to leave room for flexibility for employers. However, policy-makers emphasise the need for constructive social dialogue as a prerequisite to enhance job creation.

It is suggested that the South African government should take the initiative in developing a more detailed and coherent labour market policy in conjunction with organised labour and organised business through a process of social dialogue. NEDLAC is the ideal platform on which these strategies can be developed.

Furthermore, it is proposed that background and guidance can be gained from the ILO's decent work agenda and the EU's flexicurity approach in devising South Africa's labour market strategy as a whole. In the next chapter South Africa's legislative changes are examined and the appraisal of compliance against international norms is conducted.

Chapter 6

An Appraisal of the Protection of Agency Workers in South Africa[624]

1. Introduction

South African labour law experienced significant changes in the recent past with the introduction of several amendments to: the Labour Relations Amendment Act 6 of 2014 ("LRAA of 2014"),[625] the Basic Conditions of Employment Amendment Act 20

[624] Parts of this chapter are based on a paper prepared by the author entitled "International Labour Standards and Private Employment Agencies – are South Africa's Recent Legislative Amendments Compliant?", presented at the 21st World Congress of the International Society for Labour and Social Security Law on the 18th of September 2015 in Cape Town, South Africa. Furthermore, an adapted version of the paper was published as Aletter and Van Eck *SA Merc LJ* (2016) 285.

[625] For discussions on the content of the changes see Bosch *ILJ* (2013); Le Roux *Contemporary Labour Law* (2012) 91; Grogan *Emp Law* (2013) 4 - 9; Van Eck *De Jure* (2013) 600; Benjamin *ILJ*

of 2013 ("BCEAA of 2013") and the Employment Equity Amendment Act 47 of 2013 ("EEAA of 2013").[626] In addition, the Employment Services Act 4 of 2014 ("ESA")[627] amongst other aspects, regulates the registration of employment agencies.

This chapter commences with a brief exposition of the history of the regulation of agency work in South Africa and then explores the legislative amendments in respect of the regulation of agency work introduced by the LRAA of 2014. It analyses the early decisions that followed the labour amendments and considers changes in regulation of agency work brought about by the ESA, followed by an evaluation of whether the LRAA of 2014 succeeded in resolving the shortcomings of the law before the recent law reforms. The purpose in this chapter is to appraise whether South Africa's regulation of agency work is aligned with the International Labour Organisation ("ILO") and European Union ("EU") standards identified in earlier chapters. In doing so, it analyses the country's compliance with the distilled international norms to reveal shortcomings and areas for improvement.

2. History of Regulation of Agency Work in South Africa

2.1 Background

The history of the regulation of agency work in South Africa is assessed for two eras: the period before majority democracy, and the post-apartheid era. The law regulating agency work in South Africa during the former period is analysed from when it was first included in legislation until the end of apartheid, then the law in the latter period until the most recent amendments by the LRAA of 2014 is considered.

2.2 Pre-Democracy

Shortly before agency work was first regulated by legislation in South Africa, there were a number of amendments to labour legislation effected by means of the Industrial Conciliation Amendment Acts 94 of 1979 and 95 of 1980, the Labour

(2016) 28; and Benjamin *et al* Regulatory Impact Assessment (2010) available at http://www.labour.gov.za/DOL/downloads/documents/useful-documents/labour-relations/RIA13Sept2010.pdf accessed on 10 May 2016.

[626] For a discussion of the content of the changes see Benjamin *et al* Regulatory Impact Assessment (2010) available at http://www.labour.gov.za/DOL/downloads/documents/useful-documents/labour-relations/RIA13Sept2010.pdf accessed on 10 May 2016.

[627] See Van Niekerk *et al* (2015) 73 – 74.

Relations Amendment Act 57 of 1981, the Labour Relations Amendment Act 51 of 1982 and the Labour Relations Amendment Act 2 of 1983.[628] The last-mentioned piece of legislation first included regulations pertaining to agency work.[629]

Brassey and Cheadle, writing at the time of the introduction of the regulation of agency work in South Africa, described agency work as "burgeoning" and stated that this category of workers often was left without any statutory protection to which other employees were entitled.[630] Benjamin explained that the justification given for enacting the amendments was that employment agencies were structuring their employment relationships to prevent agency workers receiving the protection of statutory wage-regulating measures and other minimum conditions of employment.[631]

Several provisions were introduced into the law to protect agency workers. Significantly, employment agencies, referred to as "labour brokers" in the legislation,

[628] Du Toit *et al* (2015) 6 – 11 summarise the changes which took place around the time when agency work was first mentioned in legislation in South Africa as follows: "By the late 1970s the dual system of industrial relations had become practically unworkable. Statutory structures for African workers were largely ignored while plant-level bargaining by the new, unregistered unions was unregulated. In 1977 the government appointed the Wiehahn Commission of Inquiry into Labour Legislation which, in 1979, recommended a number of reforms that would fundamentally change the system. Most far-reaching was the proposal that African workers be allowed to join registered trade unions and be directly represented on industrial councils or conciliation boards, thus ending the dual system. Another important proposal was to replace the industrial tribunal with an industrial court that would have an extensive unfair labour practice jurisdiction. Access to the court would be linked to mediation by industrial councils and conciliation boards, but individual as well as collective disputes would fall within its jurisdiction. The commission also recommended that a statutory advisory body, the National Manpower Commission (NMC), be appointed by the Minister, including representatives of the state, business and labour. Its functions would be, amongst other things, to continually survey and analyse the labour market, evaluate the effectiveness of labour legislation and make recommendations to the Minister on any other matter affecting labour policy. The government accepted most of the recommendations." During this time the name of the act which governed industrial relations changed to the Labour Relations Act.

[629] The Labour Relations Amendment Act 2 of 1983 amended the Labour Relations Act 28 of 1956. Brand *ILJ* (1981) 246 states that the Guidance and Placement Act 62 of 1981 applied to "personnel consultants" but that it specifically excluded the regulation of agency work. "Personnel consultants" meant persons who solicit and screen prospective employees for certain positions on instructions from employers. The author provides an overview of the legislation pertaining to this practice, and criticises the unlimited powers provided to the Director General and Minister of the Department of Manpower.

[630] Brassey and Cheadle *ILJ* (1983) 36 – 37. The reason that agency workers were often excluded from statutory protections was that employment agencies would ensure they fall outside the "statutory wage-regulating measures" and would often structure the relationship in such a way so that agency workers were classified as independent contractors.

[631] Benjamin Sector Working Paper No. 292, International Labour Office Geneva (2013) 2. However, the author also states that the 1983 legislation enabled employers to avoid aspects of labour law such as collective bargaining and protection against unfair dismissal.

were "deemed" to be the employers of agency workers whom they placed to work with clients.[632]

This provision had the effect of confirming that an employment relationship and no other type of arrangement existed between the employment agency and the agency worker and ensured that the agency worker could not be classified as an independent contractor. What the legislation attempted to do was to deem all acts or omissions by the client in relation to the agency worker as acts or omissions of the employment agency.[633] Brassey and Cheadle pointed out that this had "the effect of requiring the labour broker to comply with all the obligations of an employer contained in the Act".[634]

In interpreting section 1(3) of the Labour Relations Act 28 of 1956 ("LRA 28 of 1956") the Labour Appeal Court in *Boumat v Vaughan*[635] stated that:

> "the workers of a labour broker are not to be regarded as employees of the clients for whom they physically work or of those whom they actually assist in the carrying on of their business. It is clear that ss (3) was included in the Act to prevent the workers concerned from being the employees of such clients for the purposes of the Act."[636]

In *Buthelezi & Others v Labour for Africa (Pty) Ltd*[637] the Industrial Court held that termination of employment for non-disciplinary reasons must be in accordance with legislation and any attempts to contract out of these requirements were void and constituted an unfair labour practice. The Industrial Court also held that an

[632] s 1(3)(a) of the Labour Relations Act 28 of 1956 stated that "the labour broker concerned shall be deemed to be the employer of such workers, any service rendered to the client or work performed for him shall be deemed to have been rendered to or performed for the labour broker, and the workers concerned shall be deemed in respect of such service or work to be the employees of the labour broker." Also see Benjamin Sector Working Paper No. 292, International Labour Office Geneva (2013) 2. Benjamin points out that South Africa adopted a rule permitting employment agencies to be classified as the employers of those whom they placed to work with a client more than a decade prior to this type of arrangement being reflected in international standards with the adoption of ILO Private Employment Agencies Convention, 1997 (No 181) ("Private Employment Agencies Convention").
[633] s 1(3)(b) – (e) of the Labour Relations Act 28 of 1956. For example, s 1(3)(d) stated that "anything done or omitted by or in respect of the client in relation to the workers concerned, shall, subject to paragraph (b), if such act or omission is required or permitted to be done or omitted under any such provision by or in respect of any employer, be deemed to have been done or omitted in relation to the workers by or in respect of the labour broker concerned as their employer".
[634] Brassey and Cheadle *ILJ* (1983) 37.
[635] *Boumat Ltd v Vaughan* (1992) 13 ILJ 934 (LAC).
[636] As above at 939.
[637] *Buthelezi & others v Labour for Africa (Pty) Ltd* (1991) 12 ILJ 588 (IC) at 596.

employment contract between an employment agency and an agency worker did not terminate automatically when the contract between the employment agency and the client came to an end.[638]

The LRA 28 of 1956 contained the requirement for employment agencies to register with the Department of Manpower.[639] Under this same section it was an offence to operate as an employment agency without being registered.[640] The Industrial Court held that failure to register in terms of section 63 of the LRA 28 of 1956 did not affect the legality of contracts entered into by the employment agency.[641] These requirements have the effect of employment agencies being forced to comply with the new regulation, which in turn bolstered the protection for agency workers.

2.3 Post-Apartheid

South African labour law underwent significant reform after the elections in 1994.[642] The Explanatory Memorandum to the Labour Relations Bill, 1995 ("Explanatory Memorandum 1995") alludes to the reasoning behind the reforms.[643] Agency work

[638] *Buthelezi* (1991) 12 ILJ 588 (IC) at 595 held that "[t]he clause frustrates the provisions of the Act which dictate the manner of terminating employment for non-disciplinary reasons. The clause in question is in my opinion void. The contracts of employment of those applicants in whose contracts the clause was inserted did not terminate on cancellation of the broking contract by the Nathan Group."

[639] s 63 of the LRA 28 of 1956. In this regard, s 63(1) of the LRA 28 of 1956 provided that "[n]o person shall, after the expiry of a period of three months after the coming into operation of the Labour Relations Amendment Act, 1983, conduct or carry on a labour broker's office, or hold himself out as conducting or carrying on a labour broker's office, or receive, charge or recover any reward in respect of or in connection with a labour broker's office, unless that labour broker's office is registered under this Act."

[640] In *Pienaar v Tony Cooper & Associates* (1995) 16 ILJ 192 (IC) the Industrial Court held that failure to register in terms of s 63 of LRA 28 of 1956 as amended meant the employment agency was *prima facie* guilty of offence.

[641] *Pienaar* (1995) 16 ILJ 192 (IC).

[642] Du Toit et al (2015) 23 described the process leading to the reform as follows: "In August 1994 the government appointed a Ministerial Legal Task Team to draft a new Labour Relations Bill. …The Task Team, comprising eminent labour lawyers cognisant of employer interests as well as trade union concerns, set to work immediately. It was supported by the ILO with expert advisers and resources. On 2 February 1995 the Task Team produced a Draft Negotiating Document in the Form of a Labour Relations Bill (Draft Bill). …To inform the debate, the Draft Bill was provided with a detailed 'Explanatory Memorandum' which highlighted the innovations in the Bill."

[643] The Explanatory Memorandum 1995 16 *ILJ* 278 at 281 listed the problems with the legislation at the time that gave rise to the need for the changes. The problems included "[t]he multiplicity of laws; the lack of an overall and integrated legislative framework for regulating labour relations; the contradictions in policy introduced by layer after layer of amendments, year after year; the reliance on after-the-event rule-making by the courts under the unfair labour practice jurisdiction; the extensive discretion given to administrators and adjudicators; the haphazard nature of collective bargaining institutions; the ineffectiveness of the conciliation machinery and procedures; the expense of dispute resolution; the criminal enforcement of labour law and collective agreements; the lack of compliance

did not feature as one of the main reasons for legislative change. However agency work was mentioned as a side-issue that needed to be addressed.[644] The Labour Relations Act 66 of 1995 ("LRA") emerged at the time when South Africa re-joined the ILO and when the Constitution of the Republic of South Africa, 1996 ("Constitution, 1996")[645] was adopted. There is no indication that ILO instruments in place at the time played any role in the crafting of the 1996 provisions dealing with employment agencies.[646]

Since 1996 the LRA has regulated agency work and it defined agency work in section 198(1) as follows:

> "[i]n this section, 'temporary employment services' means any person who, for reward, procures for or provides to a client other persons—
> *(a)* who render services to, or perform work for, the client; and
> *(b)* who are remunerated by the temporary employment service."

Furthermore, section 198(2) and (3) of the LRA confirms that:

> "[f]or the purposes of this Act, a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer.
> (3) Despite subsections (1) and (2), a person who is an independent contractor is not an employee of a temporary employment service, nor is the temporary employment service the employer of that person."

The issue of whether someone is an employee or an independent contractor was topical at the time and resulted in many decisions which assisted in clarifying the

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of our labour law with public international law; in certain respects, the lack of compliance of labour law with the new Constitution; and the fact that the present LRA does not take into account the objectives of the RDP."

[644] The Explanatory Memorandum 1995 at 332 stated in summary of the envisaged provisions on agency work that "[a] definition of labour broker is provided and a person whose services have been procured by a labour broker is deemed to be an employee of the labour broker; the labour broker is deemed to be the employer of such person; the labour broker and his or her client are jointly and severally liable for any contraventions of this Act, the Basic Conditions of Employment Act, an arbitration award, court order or a wage determination or for any breach of a collective agreement; and provision is made for the regulation of labour brokers operating within the registered scope of two or more bargaining councils by the conclusion of agreements between councils within whose combined scope the broker operates."

[645] The Constitution, 1996.

[646] Van Eck *IJCLLIR* (2012) 36 refers particularly to the 1933 and 1949 ILO conventions which have since then been replaced by the ILO Private Employment Agencies Convention, 1997 (No 181).

distinction.[647] Despite the employment agency being the employer in terms of the LRA, and therefore having employer obligations regarding the agency worker, the LRA in section 198(4) created a situation of joint and several liability, in terms of which the client could also be held liable for particular contraventions. Section 198(4) states that:

> "[t]he temporary employment service and the client are jointly and severally liable if the temporary employment service, in respect of any of its employees, contravenes—
> (a) a collective agreement concluded in a bargaining council that regulates terms and conditions of employment;
> (b) a binding arbitration award that regulates terms and conditions of employment;
> (c) the Basic Conditions of Employment Act; or
> (d) a determination made in terms of the Wage Act."

In accordance with section 198(4) of the LRA, only the employer, being the employment agency, is liable for any unfair labour practice or the unfair dismissal of an agency worker. However, in respect of transgressions of wage regulations or basic conditions of employment both the agency and the client are jointly and severally liable.

The remainder of section 198 pertains to collective bargaining in respect of agency work and states that an employment agency, a client and agency workers are bound to a collective agreement if two or more bargaining councils agree to do so and if the

[647] The decisions illustrated how companies wished to avoid an employment relationship as that triggered employer obligations in terms of labour law. In this regard see *Oak Industries (SA) (Pty) Ltd v John NO and another* 1987 (4) SA 702 (N); *Boumat Ltd v Vaughan* (1992) 13 ILJ 934 (LAC); *Borcherds v CW Pearce & J Sheward t/a Lubrite Distributors* (1993) 14 ILJ 1262 (LAC); *Camdons Realty (Pty) Ltd & another v Hart* (1993) 14 ILJ 1008 (LAC); *McKenzie v Econ Systems and another* [1995] 1 BLLR 64 (IC); *Liberty Life Association of Africa Ltd v Niselow* (1996) 7 BLLR 825 (LAC) 831; *SAAPAWU v Premier (Eastern Cape) and others* [1997] 9 BLLR 1226 (LC); *SABC v McKenzie* (1999) 1 BLLR 1 (LAC) para 7; *Board of Executors Ltd v McCafferty* 2000 (1) SA 848 (SCA); *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) at para 50; *Church of the Province of Southern Africa, Diocese of Cape Town v Commission for Conciliation, Mediation & Arbitration & others* 2002 (3) SA 385 (LC) at 387; *Rumbles v Kwa Bat Marketing (Pty) Ltd* (2003) 24 ILJ 1587 (LC) at para 17; *Footwear Trading CC v Mdlalose* [2005] 5 BLLR 452 (LAC); *Salvation Army v Minister of Labour* (2005) 26 ILJ 126 (LC) at para 15; *Rieck v Crown Chickens (Pty) Ltd t/a Rocklands Poultry* [2005] 3 All SA 583 (SE); *Wyeth SA (Pty) Ltd v Manqele* (2005) 26 ILJ 749 (LAC) at para 52; *Hydraulic Engineering Repair Services v Ntshona* (2008) 29 ILJ 163; *City of Tshwane Metropolitan Municipality v SA Local Government Bargaining Council & others* (2012) 33 ILJ 191 (LC) at 194; and *President of the Republic of South Africa and others v Reinecke* 2014 (3) SA 205 (SCA).

applicable parties fall within the combined registered scope of the bargaining councils.[648]

Section 198 of the LRA had a number of shortcomings. Policymakers[649] and academics[650] identified a number of important reasons for reforming the regulatory framework in respect of agency workers. These issues gave rise to a long process which culminated in recent reforms of the law regarding agency work.[651]

The most significant of these problems are, first, agency workers find it difficult to identify the employer, second, employers externalise permanent employees to an employment agency in order to avoid employer obligations and, third, the employment agency was responsible for unfair dismissal and unfair labour practices without the client being jointly and severally liable.[652]

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[648] s 198(5) – (8) of the LRA stated as follows: "(5) Two or more bargaining councils may agree to bind the following persons, if they fall within the combined registered scope of those bargaining councils to a collective agreement concluded in any one of them— (a) temporary employment service; (b) a person employed by a temporary employment service; and (c) a temporary employment service client. (6) An agreement concluded in terms of subsection (5) is binding only if the collective agreement has been extended to non-parties within the registered scope of the bargaining council. (7) Two or more bargaining councils may agree to bind the following persons, who fall within their combined registered scope, to a collective agreement— (a) a temporary employment service; (b) a person employed by a temporary employment service; and (c) a temporary employment service's client. (8) An agreement concluded in terms of subsection (7) is binding only if— (a) each of the contracting bargaining councils has requested the Minister to extend the agreement to non-parties falling within its registered scope; (b) the Minister is satisfied that the terms of the agreement are not substantially more onerous than those prevailing in the corresponding collective agreements concluded in the bargaining councils; and (c) the Minister by notice in the Government Gazette, has extended the agreement as requested by all the bargaining councils that are parties to the agreement."

[649] Benjamin *et al* Regulatory Impact Assessment (2010) available at http://www.labour.gov.za/DOL/downloads/documents/useful-documents/labourrelations/RIA13Sept2010.pdf accessed on 10 May 2016. At 12 it is stated that "[t]he need to adapt labour legislation in response to the increased scale and exploitation of 'atypical' workers was identified."

[650] Bosch *ILJ* (2013); Le Roux *Contemporary Labour Law* (2012) 91; Grogan *Emp Law* (2013) 4 - 9; Van Eck *De Jure* (2013) 600; and Benjamin *ILJ* (2016) 28.

[651] Van Eck *IJCLLIR* (2012) 37 - 38.

[652] As above. The author also lists the issues of differences in pay between agency workers and those employed directly at the client; as well as the fact that agency work has been used for indefinite durations, however it is meant to be temporary in nature. Bosch *ILJ* (2013)1632 echoes this as he refers to the fact that there was no joint and several liability for unfair dismissal or unfair labour practice and this was "one of the main reasons it is attractive for a client to use workers supplied" by an employment agency. See also Grogan *Emp Law* (2013) 4 – 9 for a discussion on case law under the previous regulation of agency workers. The author confirms that agencies are typically used to avoid labour legislation obligations and that if an agency worker is dismissed at the behest of a client, that the agency usually carries the resulting responsibilities. The author also anticipated that the problems with dismissals in the agency work sector will probably be addressed by the then upcoming amendments to legislation.

LAD Brokers (Pty) Ltd v Mandla[653] is an example of a case which relates to difficulty in identifying the employer. Mandla was recruited for an off-shore oil rig by a client, which asked LAD Brokers (Pty) Ltd ("the employment agency") to facilitate his employment. The employment agency provided Mandla with an independent contractor agreement between Mandla and the client. The employment agency paid Mandla's salary and the client paid the employment agency an agreed fee. Rather than requesting the employment agency to do so, the client terminated the independent contractor agreement it had with Mandla.

The Labour Court had to determine whether Mandla was employed as a worker or whether he was an independent contractor.[654] The Court found that there was an employment relationship between the employment agency and Mandla and that the legislature had intended such entities who pay remuneration to be held liable as employers under the LRA.[655]

In an appeal to the Labour Appeal Court ("LAC") the employment agency contended that the employment relationship existed between the agency worker and the client. In clarifying the issue the LAC stated that it is only where services are rendered to one party, but another pays the remuneration, that there is room for uncertainty.[656] Faced with this problem where both an employment agency and a client denied that they were the employer of an agency worker, the LAC held that the agency worker was not an independent contractor.[657] The LAC also found that Mandla was an employee of the employment agency and that the termination of employment was an unfair dismissal.[658] The appeal by the employment agency was dismissed with costs.

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[653] *LAD Brokers (Pty) Ltd v Mandla* [2001] 9 BLLR 993 (LAC).
[654] *LAD Brokers* at para 2.
[655] *LAD Brokers* at para 28.
[656] *LAD Brokers* at para 27.
[657] *LAD Brokers* at para 29 and 30. The LAC stated that "[t]o interpret section 198(1)(3) to include independent contractors who are such in relation to temporary employment services would ignore the attribute that the contractors must render services or perform work for the client (not the temporary employment service who pays). To determine whether the service provider is an independent contractor of the temporary employment service is therefore as an end in itself a futile exercise. Even if he is, should he not also act as independent contractor *viz à viz* the client, the exclusionary subsection (3) does not apply."
[658] *LAD Brokers* at para 32.

The second problem pertaining to the LRA's regulation of agency work is highlighted in the matter of *National Union of Metalworkers of South Africa and others v Abancedisi Labour Services.*[659] The facts of the case illustrate the issue of externalisation of permanent staff through an employment agency and the avoidance of employer obligations. At the outset of the judgment the Supreme Court of Appeal ("SCA") stated that agency work may operate as a "stratagem" in order to avoid employer obligations and circumvent the unfair dismissal protections afforded to employees under labour legislation.[660]

In this case the agency workers were members of the National Union of Metalworkers of South Africa ("NUMSA") and were former employees of Kitsanker (Pty) Ltd ("Kitsanker"). Kitsanker decided that the employees were to be managed through an employment agency. Consequently, in 1999, Abancedisi was formed specifically for this purpose. During January 2001, Kitsanker's holding company and Abancedisi concluded a contract in terms of which Abancedisi would provide agency workers to Kitsanker. In February 2001 the employees were retrenched by Kitsanker and they were immediately re-employed as agency workers by Abancedisi. The agency workers were required to sign a new employment contract as employees of Abancedisi to render services to Kitsanker. In July 2001 the agency workers embarked upon a two-hour work stoppage at Kitsanker's premises. Subsequently, Kitsanker required the agency workers to sign a code of conduct designed mainly to regulate industrial action. Those who refused to do so were denied entry and were replaced with new workers.[661]

The agency workers referred the matter to the Labour Court. Abancedisi opposed the proceedings stating that the referral of the dispute was premature because it had not dismissed the agency workers as they remained on its payroll. The Labour Court found that a "holistic consideration of the employment contract" showed that it envisaged the continuation of the relationship between the agency workers and Abancedisi even after the conclusion of the assignment at Kitsanker. However, the

[659] *National Union of Metalworkers of South Africa and others v Abancedisi Labour Services* [2014] 2 SA All 43 (SCA).
[660] *Abancedis*i at para 1.
[661] *Abancedisi* at paras 3 – 6.

Labour Court held that NUMSA had failed to prove that Abancedisi dismissed the agency workers and dismissed their claim with costs.[662]

On appeal the LAC accepted Abancedisi's argument that the proceedings brought by NUMSA were premature. However, the LAC found that the agency workers' situation amounted to an "indefinite suspension" which they could have contested at the bargaining council as an unfair labour practice or they could have resigned and sued for constructive dismissal. The appeal was dismissed with no order as to costs. Upon further appeal to the SCA, the Court had to determine whether the agency workers were unfairly dismissed when they were excluded from the premises of the client and replaced with new workers.[663]

The appeal succeeded and the agency workers were found to have been unfairly dismissed.[664] The *Abancedisi* matter casts light on the abusive practices carried out under the LRA in South Africa and draws attention to the fact that section 198 was in urgent need of reform for the sake of the protection of agency workers. The SCA stated that employment agencies should bear in mind that it is the intention of the LRA that "employment may only be terminated upon the employee's misconduct, incapacity or operational requirements and these reasons must meet the requirements of substantive and procedural fairness".[665]

The third problem which relates to a lack of joint and several liability for unfair dismissal and unfair labour practices, is illustrated in *Nape v INTCS Corporate Solutions (Pty) Ltd.*[666] Nape, a sales consultant and agency worker, sent an offensive e-mail to a colleague and the client insisted that Nape had to be removed from its premises. The employment agency held a disciplinary hearing and issued Nape with a final written warning. The client refused to permit Nape to return to its

[662] *Abancedisi* at paras 7 – 9.
[663] *Abancedisi* at para 2.
[664] *Abancedisi* at para 20 held that "1 The appeal succeeds with costs. 2 The order of the Labour Court is set aside and replaced with the following: '(a) The second and further applicants' dismissal is unfair in terms of s 188(1) of the Labour Relations Act 66 of 1995. (b) The respondent is ordered to pay the second and further applicants 12 months' compensation calculated at their rate of remuneration on the date of dismissal. (c) The respondent is ordered to pay the costs of the application.'"
[665] *Abancedisi* at para 18.
[666] *Nape v INTCS Corporate Solutions (Pty) Ltd* [2010] 8 BLLR 852 (LC).

premises. Subsequently, the employment agency consulted with Nape and retrenched him. Nape claimed that he had been unfairly dismissed and sought compensation.

The *Nape* decision illustrates the unsatisfactory situation where employment agencies terminate employment with agency workers on the ground that the employment agency has no alternative but to do so in terms of the arrangement between the employment agency and the client. In this instance the employment agency argued that it "was powerless and could do nothing in response".[667]

The Labour Court recognised, in terms of the LRA, it is only the employment agency which is liable for unfair dismissal,[668] and that agency workers are the most vulnerable in the triangular relationship. Additionally, the Court made the point that employment agencies and clients may not structure their contractual relationship in such a way that it undermines the agency worker's constitutionally guaranteed right to fair labour practices.[669] This, the Court found, is against public policy and undermines "the right not to be unfairly dismissed".[670] The Court added, "[i]t is axiomatic that an employer should not be allowed to invoke such a clause to justify a dismissal for operational requirements."[671]

[667] *Nape* at para 47.
[668] *Nape* at para 58 stated that "[l]abour broking arrangements affect three parties: the client, the broker and the employee. As this case shows, it is almost inevitable in the way the relationship is structured that the client will wield the most bargaining power and gets the best end of the deal. The labour broker is in the middle. The labour broker gets paid for procuring the labour and earns a profit but, as this case shows, the labour broker is the one liable in the case of an unfairly retrenched employee." Also see *Walljee & others v Capacity Outsourcing & another* [2012] JOL 28413 (LC) where the Labour Court confirmed that in terms of the LRA, the client cannot be held jointly and severally liable for unfair dismissal and cannot be joined in an unfair dismissal claim by agency workers. Furthermore, in *NEHAWU & another v Nursing Services of South Africa* [1997] 10 BLLR 1387 (CCMA), the CCMA held that despite the absence of a specific provision, an employment agency remains liable to its agency workers for any unfair dismissal or other unfair labour practice, whether committed by the employment agency or the client. Therefore, where a client unfairly dismissed an agency worker the termination is deemed under the LRA to have been effected by the employment agency.
[669] *Nape* at paras 59 to 61.
[670] *Nape* at para 70.
[671] *Nape* at para 71. See also para 102 where the Court reiterated that the dismissal was substantively unfair.

The Court concluded that the conduct by the agency worker did not justify dismissal.[672] Furthermore, it held, insofar as the contract between the employment agency and its client allowed the client to arbitrarily require the removal of an agency worker from its premises, such provision was unlawful.[673] Nape's claim was successful as his dismissal was found to be substantively unfair and he was awarded compensation.

3. South Africa's Legislative Changes in Respect of Agency Work

3.1 Background

Prior to legislative reform a fierce debate took place between relevant stakeholders.[674] Representatives of government, business and labour were part of the discussions regarding changing regulations pertaining to agency workers.[675]

In respect of the arguments from the various stakeholders, Benjamin explains that:

> "[a] 2008 report commissioned by the Department of Labour drew attention to this and suggested that labour brokers who act as employers of sub-contracted lower-paid workers should be outlawed. This proposal quickly gained traction and was embraced by the then Minister of Labour, and was adopted as a campaign by the labour movement, particularly the Congress of South African Trade Unions (COSATU)."[676]

The official policy of the ANC remained that agency work should be regulated in order to avoid the abuse of workers. In contrast, the Confederation of Associations in the Private Employment Sector ("CAPES"), in which employment agencies are represented, argued in favour of self-regulation. It adopted the view that the

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[672] *Nap*e at para 84.
[673] *Nape* at para 85.
[674] The stakeholder engagement culminated in the drafting of the Regulatory Impact Assessment on the Department of Labour's proposed new labour laws. The assessment was conducted only in respect of particular provisions, such as those which regulate agency work. The purpose of the assessment was to assess whether legislation contributed to government's socio-economic objectives. Benjamin *et al* Regulatory Impact Assessment (2010) available at http://www.labour.gov.za/DOL/downloads/documents/useful-documents/labourrelations/RIA13Sept2010.pdf accessed on 10 May 2016.
[675] As above at 17.
[676] Benjamin *ILJ* (2016) 31 – 32.

legislative model was adequate and that the problem lay more broadly with the enforcement of labour legislation.[677]

According to Du Toit *et al,* the reasons for the reform of labour laws lay in the political and economic contexts in the country in recent years.[678] On the one hand, COSATU exerted political pressure on the ANC government in respect of their "long-standing demands",[679] on the other the country had been experiencing an ongoing economic crisis and this had to be addressed.[680]

Du Toit *et al* describe government's approach to the regulation of agency work at the time as "one in which worker rights and the existing institutions of collective bargaining would be reinforced and industrial democracy deepened in order to secure labour's support for economic regeneration".[681] They explain that it was envisaged that labour market reform would encourage greater productivity and flexibility in the workplace.[682]

It is submitted that the government aimed to balance the competing interests of agency workers' protection and employers' flexibility in the 2014 amendments. This approach is in accordance with the notion of regulated flexibility which underlies South African labour law.[683]

3.2 Labour Relations Amendment Bills

The first Labour Relations Amendment Bill ("LRA Amendment Bill of 2010") in respect of proposed changes to the LRA was published in December 2010.[684] The process to finalisation extended over four years.[685] The second amendment was

[677] Benjamin *ILJ* (2016) 31 – 32.
[678] Du Toit *et al* (2015) 16 – 18.
[679] As above.
[680] As above. In this regard the author mentions that there has been the belief that the prevailing system of industrial relations has been an impediment to economic recovery.
[681] As above at 19.
[682] As above.
[683] Writing at the time, Bosch *ILJ* (2013) 1631 expressed his belief that the amendments were a "careful attempt to balance interests, something which is the essence of our labour law". For a discussion on regulated flexibility see Chapter 5.
[684] Labour Relations Amendment Bill [B – 2010] in Government Gazette 33873, 17 December 2010, Notice 1112 of 2010. See Cooper *ILJ* (2011) 53 for a summary of the four labour Bills.
[685] For an overview of the legislative process and the Bills see https://pmg.org.za/bill/144/ accessed on 16 June 2016.

published in 2012 ("LRA Amendment Bill of 2012"),[686] a third in 2013 ("LRA Amendment Bill of 2013")[687] and the final Bill ("LRA Amendment Bill of 2014")[688] was published in 2014.[689] This process culminated in significant amendments being made to the law regulating agency work in the LRA which came into force on 1 January 2015.[690]

According to Benjamin, the LRA Amendment Bill of 2010, included new definitions for "employer"[691] and "employee",[692] it proposed making employers liable for the labour practices of any sub-contractors that they utilised and the accompanying draft Employment Services Bill would prevent employment agencies placing their employees to work for others.[693] It is submitted that the proposed changes were radical in nature. The intention was to prohibit triangular employment relationships and effectively prevent employment agencies from being employers.[694]

The Regulatory Impact Assessment stated that the proposals sought:

> "to prevent any form of triangular employment relationship by providing that only a person who directly supervises the work of an employee may be that person's employer. It is envisaged that this will preclude the operation of TES because the essence of 'labour broking' is the supply of employees to work under the supervision of another (the client)."[695]

The Regulatory Impact Assessment identified a constitutional violation of the right to choose a trade, occupation or profession freely as one of the risks associated with

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[686] Labour Relations Amendment Bill [B16A – 2012].
[687] Labour Relations Amendment Bill [B16B – 2013].
[688] Labour Relations Amendment Bill [B16 - 2012]. Published in Government Gazette 37921, 18 August 2014
[689] Rycroft *ILJ* (2015) 4.
[690] See Chapter 5 in respect of the policy underlying the legislative proposals.
[691] "'Employer' means any person, institution or organisation, including government who employs and provides work to an employee, directly supervises, remunerates or tacitly or expressly undertakes to remunerate such employee for services rendered by such an employee."
[692] "'Employee' means any person who is employed by or works for an employer and who receives or is entitled to receive any remuneration and who works under the direction and supervision of an employer."
[693] Benjamin *ILJ* (2016) 32.
[694] As above.
[695] Benjamin *et al* Regulatory Impact Assessment (2010) available at http://www.labour.gov.za/DOL/downloads/documents/useful-documents/labourrelations/RIA13Sept2010.pdf at 34 accessed on 10 May 2016.

the proposals.[696] Due to opposition to the Bill it was withdrawn. The view is supported that the LRA Amendment Bill of 2010 would have been inconsistent with the Constitution, 1996 and contrary to the ILO norm of allowing employment agencies to operate.

A LRA Amendment Bill of 2012 was crafted during 2011 and was submitted to parliament in early 2012. In a positive development the LRA Amendment Bill of 2012 provided for a new section 198A, applicable specifically to employees earning below a threshold amount. The Memorandum of Objects stated that:

> "[t]he main thrust of the amendments is to restrict the employment of more vulnerable, lower-paid workers by a TES to situations of genuine and relevant 'temporary work', and to introduce various further measures to protect workers employed in this way."[697]

The reason for this threshold is to provide greater protection for workers who are deemed to be less qualified and who receive a lower income.[698] This provides a measure of flexibility and is well-known elsewhere in legislation.[699]

Apart from the additional protection for lower-earning agency workers that is discussed below, the LRA Amendment Bill of 2012 added the following rights that apply to all agency workers: an agency worker bringing a claim for which an employment agency and a client are liable may institute proceedings against either party or both; a labour inspector acting in terms of the BCEA may secure and enforce compliance against the employment agency or the client as if it were the employer; an employment agency may not employ an agency worker on terms and conditions of employment not permitted by the LRA, a sectoral determination or a collective agreement concluded at a bargaining council that is applicable to a client for whom an agency worker provides services; the Labour Court may rule on whether a contract between an employment agency and an agency worker complies

[696] As above at 34 - 40. The other risks identified by the authors included: a risk to existing employee rights; the issue that the employer would need to be determined on a case-by-case basis; a risk to the stability of the labour market; reduced flexibility for employees; a risk of job losses and increased unemployment; increased administrative burden for employers and employees; and increased informality and casualisation.
[697] Memorandum of Objects Labour Relations Amendment Bill 2012 22.
[698] See Chapter 5 at 3.3.4.
[699] As above.

with the LRA or sectoral determination or applicable collective agreement; an employment agency must be registered but the fact that it is not is no defence to any claim instituted in terms of section 198; and an employment agency must provide an agency worker assigned to a client with written particulars of employment that comply with section 29 of the BCEA.[700]

In a significant development, the LRA Amendment Bill of 2012 provided that agency workers earning below a threshold determined by the Minister of Labour, who are not performing temporary services for the client, are deemed to be the employees of the client for the purposes of the LRA.[701] The LRA Amendment Bill of 2012 provided for a maximum duration of six months after which time services would no longer be considered temporary.[702] These changes have the effect of avoiding the proposal to ban agency work completely in favour of regulating agency work and keeping it temporary in nature. It is submitted that this was a positive development. In describing this provision, the Memorandum of Objects stated that for the purposes of the LRA employees would be "treated as employees of the client if they work for a period in excess of six months".[703]

In respect of the LRA Amendment Bill of 2012 Bosch is of the opinion that:

> "[t]he amendments relating to TESs are obviously an attempt to allow employers the flexibility to use suppliers of temporary labour where the need for the labour is actually temporary. Clients may no longer use labour supplied by another employer indefinitely. The only basis for doing that is to avoid responsibilities vis-à-vis the employees which ought quite properly to vest in the client. The response of the labour brokers to the proposed amendments has been to threaten large-scale job losses."[704]

The LRA Amendment Bill of 2012 introduced major new categories of protection for agency workers who earn below the threshold amount. As a result agency workers

[700] Memorandum of Objects Labour Relations Amendment Bill 2012 22 – 23.
[701] s 198A(3) of the LRA Amendment Bill of 2012.
[702] Bosch *ILJ* (2013) 1640. s 198A(1) of the LRA Amendment Bill of 2012 provided that "temporary services" are for a period of less than six months; unless the agency worker is a substitute for an employee of the client who is temporarily absent for more than six months; or the agency worker provides services in a category of work for any period which is determined to be a temporary service in a bargaining council agreement, sectoral determination or a notice published by the Minister of Labour.
[703] Memorandum of Objects Labour Relations Amendment Bill 2012 23.
[704] Bosch *ILJ* (2013) 1641.

not rendering temporary services were deemed to be employees of the client and the contract would be of an indefinite nature. In addition the LRA Amendment Bill of 2012 provided that should an employment agency terminate the assignment of an agency worker to a client in order to avoid the operation of the section that deems the worker to be an employee of the client, the termination would be deemed to be a dismissal. Furthermore, in terms of the LRA Amendment Bill of 2012, unless there is a justifiable reason to do so, an agency worker deemed to be the employee of a client must, on the whole, not be treated less favourably than an employee of the client doing similar work.[705]

The LRA Amendment Bill of 2012 was followed by the LRA Amendment Bill of 2013. The main difference between the two Bills in respect of the regulation of agency work is the period during which work is considered to be a temporary service. Section 198A(1) defined a temporary service as one that lasted for a period of three months rather than six months.

In parliamentary discussions held in October 2013 on the subject of the time period under which an employee is considered to be performing a temporary service and not deemed to be an employee of the client, Mr Mkalipi, Chief Director of Labour Relations at the Department of Labour made the point that if a three-month period was implemented "it would allow those who were employed through a labour broker to achieve higher pay and an increase in living standards faster".[706] The argument might be valid but it is submitted that a three month time period is too short and in fact would have the consequence of deterring clients from the use of employment agencies, which may place agency workers in a more vulnerable position.[707] Furthermore, it may also have the consequence that assignments are kept intentionally short so as to avoid the operation of the section, which lands agency workers in a situation where they are able only to secure very short assignments without the security of knowing what their future work-life will entail.

[705] Van Eck *DJ* (2013) 606.
[706] Basic Conditions of Employment Amendment Bill & Labour Relations Amendment Bill: Department response to public submissions 3 October 2013 available at https://pmg.org.za/committee-meeting/16431/ accessed on 16 June 2016.
[707] See Chapter 7 at 2.2.4 where a discussion of the anticipated legislative amendments in Germany shows that the German government suggests an 18 month period.

Du Toit *et al* explain that the justification for the 2013 change from six months to three months can be ascribed to "an apparent shift to the left within the ANC in the early stages of the presidency of Jacob Zuma".[708] Rather than banning employment agencies, the government elected to regulate the practice of employment agencies more closely.

The LRA Amendment Bill of 2013 also introduced the protection of equal treatment. Section 198A(5) of the LRA Amendment Bill of 2013 stated that:

> "[a]n employee deemed to be an employee of the client in terms of subsection (3)(b) must be treated on the whole not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment."

The LRA Amendment Bill of 2014 was published in August 2014. Increasing pressure on government, especially from the trade union movement, resulted in the President signing the LRA Amendment Bill of 2014 on 2 September 2014.

3.3 Labour Relations Amendment Act

The amendments to the LRA became effective on January 2015.[709] The preamble to the LRAA of 2014 states, among other things, the purpose of the legislation is to provide greater protection for agency workers. The changes envisaged by the LRAA of 2014 in respect of agency work are contained in the amended section 198 and the newly inserted section 198A of the LRA.

Section 198 of the LRA defines the term "temporary employment services", explains who the employer is, addresses the issue of independent contractors, describes joint and several liability and regulates written contracts of employment and employment agencies.

The current definition of an employment agency in terms of the LRA provides that "'temporary employment service' means any person who, for reward, procures for or provides to a client other persons- (a) who perform work for the client; and (b) who

[708] Du Toit *et al* (2015) 42.
[709] Government Notice 629 in Government Gazette 37921, 18 August 2014.

are remunerated by the temporary employment service".[710] This definition applies to agency workers, irrespective of the rate at which they are remunerated or the size of the employer. As in the past, and in line with ILO and EU instruments, the point of departure is that the agency worker is the employee of the employment agency. Section 198(2) of the LRA confirms this by providing that:

> "[f]or the purposes of this Act, a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer."

Independent contractors are distinguished from agency workers: "a person who is an independent contractor is not an employee of a temporary employment service, nor is the temporary employment service the employer of that person".[711]

An employment agency and a client are jointly and severally liable for contravention of a collective agreement that regulates terms and conditions of employment, a binding arbitration award that regulates terms and conditions of employment, or the BCEA and/or a sectoral determination made in terms of the BCEA.[712] To this stipulation, the LRAA of 2014 adds that where the client is "deemed" to be the employer, an employee can claim against either party or both and also enforce an order or award against either party or both.[713] The explanation of joint and several liability in the LRA will aid in allowing agency workers to bring claims and enforce orders against either or both parties, thereby broadening their cover of protection.

What the LRA fails to provide is joint and several liability of the employment agency and client in respect of unfair dismissal and unfair labour-practice disputes. However,

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[710] s 198(1)(a) of the LRA.
[711] s 198(3) of the LRA. This was confirmed in the matter of *LAD Brokers (Pty) Ltd v Mandla* [2001] 9 BLLR 993 (LAC), as discussed in Chapter 6 at 2.3.
[712] s 198(4A) of the LRA.
[713] As above. If the client of a temporary employment service is jointly and severally liable in terms of s 198(4) or is deemed to be the employer of an employee in terms of s 198A(3)(b):
"(a) the employee may institute proceedings against either the temporary employment service or the client or both the temporary employment service and the client;
(b) a labour inspector acting in terms of the Basic Conditions of Employment Act may secure and enforce compliance against the temporary employment service or the client as if it were the employer, or both; and
(c) any order or award made against a temporary employment service or client in terms of this subsection may be enforced against either."

in respect of lower-income earning employees there have been amendments which will be discussed below.[714]

In addition, agency workers are protected in respect of the written particulars of employment.[715] Section 198(4B)(a) of the LRA now states that "employment agencies must provide an employee with written particulars of employment that comply with section 29 of the BCEA when the employee commences employment".[716]

The amendments also seek to improve the position of agency workers with regards to collective bargaining. Section 21(8)(v) of the LRA provides that when a trade union wishes to exercise organisational rights and if there is a dispute about representivity, the commissioner must consider:

> "the composition of the work-force in the workplace taking into account the extent to which there are employees assigned to work by temporary employment services, employees employed on fixed-term contracts, part-time employees or employees in other categories of non-standard employment."

This means that agency workers placed at a client are now counted when considering the composition of the workforce at a client. Furthermore, the LRA now provides that a trade union is entitled to claim organisational rights in a workplace of

[714] See Chapter 6 at 3.3.
[715] s 198(4B) of the LRA.
[716] s 29(1) of the BCEA provides as follows: "(1) An employer must supply an employee, when the employee commences employment, with the following particulars in writing (a) the full name and address of the employer; (b) the name and occupation of the employee, or a brief description of the work for which the employee is employed; (c) the place of work, and, where the employee is required or permitted to work at various places, an indication of this; (d) the date on which the employment began; (e) the employee's ordinary hours of work and days of work; (f) the employee's wage or the rate and method of calculating wages; (g) the rate of pay for overtime work; (h) any other cash payments that the employee is entitled to; (i) any payment in kind that the employee is entitled to and the value of the payment in kind; (j) how frequently remuneration will be paid; (k) any deductions to be made from the employee's remuneration; (l) the leave to which the employee is entitled; (m) the period of notice required to terminate employment, or if employment is for a specified period, the date when employment is to terminate; (n) a description of any council or sectoral determination which covers the employer's business; (o) any period of employment with a previous employer that counts towards the employee's period of employment; (p) a list of any other documents that form part of the contract of employment, indicating a place that is reasonably accessible to the employee where a copy of each may be obtained." Furthermore, s 198(4C) of the LRA provides that an agency worker may not be employed on terms and conditions of employment not permitted by the LRA, or any employment law, sectoral determination or collective agreement applicable to the employees of the client to whom the agency worker renders services.

either the employment agency or the client.[717] This provision is a significant improvement in enabling and facilitating participation by agency workers in collective bargaining.

Since January 2015 the legislature has included far-reaching protective measures for low-earning agency workers in a new tailor-made section 198A of the LRA. The threshold amount is determined from time to time in terms of s 6(3) of the BCEA. At the time of writing, the threshold amount per annum is R205 433,30.[718] It is significant that the protective measures discussed below do not apply to agency workers earning above the threshold.

Low-earning agency workers have received improved protection in respect of three noteworthy aspects. First, an agency worker earning below the threshold amount and who is no longer engaged in a "temporary service" is deemed to be the employee of the client.[719] A temporary service refers to work for a client for a period of time not exceeding three months.[720] An important aspect introduced into the LRA is the endorsement of the temporary nature of agency work, which emulates a foundation of the EU's regulatory framework.[721] It is evident that it is the intention that agency work should remain temporary in nature and should not be an arrangement used for an extended period. It remains to be seen whether the introduction of the three-month period is appropriate for this purpose.[722]

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[717] s 21(12) of the LRA. The rights referred to which are conferred in Part A include those found in ss 11 to 22 of the LRA. These include trade union access to the workplace; deduction of trade union subscription or levies; entitlement to elect trade union representatives; leave during working hours for trade union activities; access to all relevant information that will allow the trade union representative to effectively perform his functions; right to conclude a collective agreement establishing a threshold of representativeness.

[718] In Euro this is approximately an annual gross salary of €13, 035.11 based on an exchange rate of 1 Euro equivalent to R15.76 as on 8 September 2016.

[719] s 198A(3) states that "[f]or the purposes of this Act, an employee— […] (b) not performing such temporary service for the client is— (i) deemed to be the employee of that client and the client is deemed to be the employer".

[720] s 198A(1) of the LRA states that "[i]n this section, a 'temporary service' means work for a client by an employee— (a) for a period not exceeding three months; (b) as a substitute for an employee of the client who is temporarily absent; or (c) in a category of work and for any period of time which is determined to be a temporary service by a collective agreement concluded in a bargaining council, a sectoral determination or a notice published by the Minister, in accordance with the provisions of subsections (6) to (8)."

[721] See Chapter 4 at 4.

[722] See the definition of "temporary service" in s 198A(1) of the LRA. See Chapter 6 at 3.2 for a discussion on what should be considered an appropriate length. See also Chapter 7 at 2.2.4 for a discussion on anticipated amendments in Germany which suggest 18 months as suitable.

Second, agency workers may not be treated less favourably than employees of the client who perform same or similar work unless such differentiation is justifiable.[723] The right to equal treatment may go a long way in rectifying past practices under the LRA before the 2014 amendments when agency workers experienced lower pay and fewer or no benefits compared to employees employed directly by a client. It remains to be seen whether agency workers will be sufficiently protected in this regard.

Third, all agency workers not performing temporary services and earning below the threshold amount will be deemed to be indefinitely employed workers of the client to whom they have been assigned.[724] The effect of employment becoming indefinite in nature is major progress for agency workers who, in terms of the LRA, will be able to move from the position of fulfilling an assignment at a client into standard employment.

As may have been expected the deeming provision in section 198A(3)(b) has led to interpretational problems as to which party, the employment agency or the client (or both), becomes the employer of the agency worker. A critique of case law on this issue follows.

3.4 Early Case Law Following the Legislative Changes

3.4.1 Introduction

Months after the changes referred to above came into operation it became clear that there is no certainty about the interpretation of the "deeming provision" in particular. The early case law sheds light on some of the inadequacies of the wording of the amendments.

[723] s 198(5) of the LRA states that "[a]n employee deemed to be an employee of the client in terms of subsection (3)(b) must be treated on the whole not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment."
[724] s 198A(3)(ii) of the LRA provides that agency workers shall be "employed on an indefinite basis by the client."

3.4.2 The *Refilwe Esau Mphirime* Decision

In the first decision pertaining to the deeming provision the bargaining council in *Mphirime and Value Logistics Ltd & Another*[725] had to rule on the interpretation of sections 198 and 198A of the LRA.[726]

The facts of the case are summarised as follows: Mphirime was employed by BDM Staffing (Pty) Ltd ("the employment agency") on a fixed-term contract from 30 June 2014 until 30 June 2015. He was placed at Value Truck Rental ("the client") in the position of a "checker" and earned below the threshold per annum of R205, 433.30 His contract was terminated on 2 April 2015 after he had received one week's notice of his termination. Mphirime was employed for more than three months, he did not replace a temporarily absent employee of the client and he was not employed in a category which is determined to be a temporary service.[727]

In respect of the interpretation of the general section 198 the Arbitrator at the bargaining council emphasised that for the purposes of the LRA that:

> "the person whose services have been procured is the employee of the TES [employment agency] and the TES is that person's employer. The TES is therefore the duty-bearer when it comes to the duties and obligations towards an employee for purposes of the LRA."[728]

Regarding section 198(4) of the LRA, which regulates joint and several liability, the Arbitrator noted that the instances of joint and several liability are limited to transgressions of the BCEA.[729] For example, the Arbitrator highlighted that the amendments did not adapt section 198 to cover joint and several liability for unfair dismissal or other contraventions of the LRA.[730]

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[725] (2015) 36 ILJ 2433 (BCA).
[726] *Refilwe* at para 3. The Commissioner ruled that "[i]n the interpretation of section 198A(3)(b)(i) the particular section cannot be interpreted in isolation and therefore this ruling would consist of an interpretation of the amended section 198 and section 198A of the LRA holistically."
[727] *Refilwe* at para 51. See s 198A(1) of the LRA which provides these requirements.
[728] *Refilwe* at para 10.
[729] *Refilwe* at para 11. s 198(4) of the LRA relates to contraventions of a collective agreement concluded in a bargaining council that regulates terms and conditions of employment, a binding arbitration award that regulates terms and conditions of employment, the BCEA; or a sectoral determination made in terms of the BCEA.
[730] *Refilwe* at para 13. At para 16.2 the Arbitrator states again that "the joint and several liability in section 198(4) is not extended to a claim for unfair dismissal under the LRA."

In respect of the interpretation of section 198A of the LRA the Arbitrator held that the provision seeks to provide improved regulation to non-standard workers.[731] Regarding the issue of the liability of the employment agency or the client in respect of agency workers performing temporary work, the Arbitrator stated that:

> "as long as the employee is performing genuinely temporary work the duties and obligations as described in section 198(2) and (4) will apply i.e. the TES is the employer for the purposes of the LRA and there will be joint and several liability for the TES and the client where there is any contravention by the TES of the BCEA, sectoral determinations, collective agreements and awards that regulate terms and conditions of employment."[732]

However, the interpretation challenge begins with section 198A(3)(b) which provides that "for the purposes of the LRA" an employee who is not performing temporary work for the client is "deemed to be the employee of that client and the client is deemed to be the employer". The section further provides that the agency worker is deemed to be employed on an indefinite basis after the three month period.

The Arbitrator held that the "crux" of the interpretation lies in which party is responsible for the obligations in terms of the LRA.[733] The Arbitrator held that the wording is "clear and unambiguous". Once the agency worker is no longer performing a temporary service the client is deemed to be the employer in terms of the LRA and therefore has responsibilities under the LRA.[734]

In reaching this finding the Arbitrator argued that abusive practices against agency workers are a direct result of the triangular relationship in which the client has been precluded from any responsibility in terms of the LRA.[735] Therefore, the Arbitrator held, should the amendments be interpreted to mean joint and several liability for the purposes of the LRA, then abusive practices would not be tackled.[736] The Arbitrator concluded that the correct interpretation of s198A(3)(b)(i) must be that the client bears the totality of the duties and obligations for the purposes of the LRA and

[731] *Refilwe* at para 24. At para 23 it is emphasised that the "new section 198A introduces key additional protections for more vulnerable workers."
[732] *Refilwe* at para 28.
[733] *Refilwe* at para 34.
[734] *Refilwe* at para 34.
[735] *Refilwe* at para 36.
[736] *Refilwe* at para 37.

therefore any claim brought in terms of the LRA must be brought against the client.[737]

The Arbitrator held that the deeming provision was triggered in the specific set of facts and the client was deemed to be the employer of Mphirime. Consequently, the onus rests on the client to prove that the termination of employment was fair.[738]

3.4.3 The *Assign Services* Decision by the CCMA

The second decision relating to the deeming provision was *Assign Services (Pty) Ltd and Krost Shelving & Racking (Pty) Ltd with National Union of Metal Workers of South Africa (NUMSA)*[739] where the CCMA dealt with a similar matter involving the same interpretational problem. In this matter Assign Services (Pty) Ltd ("the employment agency") had placed 22 workers with Krost Shelving and Racking (Pty) Ltd ("the client") for a period of more than three months on a full-time basis.[740] The employment agency and the client held opposite views regarding the meaning of the deeming provision.

The employment agency believed that the deeming provision has the effect that agency workers remain employees of the employment agency for all purposes and that they are also deemed to be workers of the client for purposes of the LRA. The CCMA referred to this position as the "dual employment" approach.[741] The trade union NUMSA advanced an opposing argument. It was their view that the client becomes the only employer. The CCMA referred to this point of view as the "sole employment" position.[742]

Counsel for the employment agency contended that the word "deemed" does not have a precise technical meaning and that its meaning and effect must be

[737] *Refilwe* at para 40.
[738] *Refilwe* at paras 52 and 53.
[739] *Assign Services (Pty) Ltd and Krost Shelving & Racking (Pty) Ltd with National Union of Metal Workers of South Africa (NUMSA)* (2015) 36 ILJ 2408 (CCMA).
[740] *Assign Services* at para 2.3.
[741] *Assign Services* at para 3.2. In other words it is argued by the employment agency that the employment agency and the client both are employers for purposes of the LRA.
[742] *Assign Services* at para 3.3. In other words it is argued by the trade union that the client is the sole employer for purposes of the LRA.

determined from the legislative context.[743] The employment agencies' second argument in favour of dual employment was that subsequent to the three-month period the deeming provision does not end the agreement between the employment agency and the client nor does it sever the employment relationship between the employment agency and the workers. This context, they said, establishes improved protection for the agency workers in so far as the worker has two employers.[744]

The employment agencies' third argument related to section 198(4A) of the LRA. They raised the point that in terms of this provision the employment agency and the client are jointly and severally liable for breaches of the LRA and the BCEA and that such liability can only arise in a situation of dual employment.[745] Consequently, the employment agency argued in favour of dual employment as section 198(4A) allows employees to institute proceedings against either the employment agency or the client or both. Agency workers may enforce any order or award made against the employment agency or client or against either of them.

NUMSA raised arguments in favour of sole employment. In respect of the wording of the deeming provision counsel contended that:

> "the word 'deem' is often used in legislation in a 'very loose sense', and thus could easily be substituted with the word 'is'. According to him the Pocket Oxford Dictionary defines the verb 'deem' as 'regard as being'. Thus he argued that the use of the word 'deemed' in s 198A(3)(b)(i) creates a legal fiction, in other words a legal rule that in the circumstances specified in s 198A(3)(b)(i) the client is the employer of the placed workers, irrespective of what the situation would have been if the legal rule had not been enacted by the legislative provision."[746]

NUMSA's second argument also related to the wording of section 198(4A) of the LRA. They stated that the section merely provides the option for an employee to

[743] *Assign Services* at para 4.1. Furthermore, the Commissioner "referred to the case of *R v Haffejee & another* 1945 AD 345, where the court held that in determining the meaning of 'deemed', it must examine 'the aim, scope and object of the legislative enactment in order to determine the sense of its provisions'. Counsel for the applicant accordingly argued that the word 'deemed' does not have a uniform meaning, that its meaning and especially its effect, depends on the context in which it is used in a statute and the purpose of the statutory provision. For purposes of this matter the statute was s 198 and s 198A of the LRA."
[744] *Assign Services* at para 4.4.
[745] *Assign Services* at para 4.5.
[746] *Assign Services* at para 4.2.

institute proceedings against a party that is liable and as such does not create new liabilities for the employment agency or the client.[747] The submission was made that section 198(4A) applies to all agency workers and not just those deemed employees under section 198A(3)(b)(i).[748]

In considering the arguments for and against sole and dual employment, the CCMA based its decision upon a call for the protection of vulnerable workers. This approach is rooted in a social justice perspective in respect of the purpose of labour law. The Commissioner stated that the correct interpretation in terms of the alternatives presented is the one that provides greater protection for the vulnerable group of employees identified by section 198A of the LRA as amended.[749] It is submitted that this is the correct approach in order to ensure the advancement of protection for agency workers. The Commissioner held that, "after the three-month period has elapsed" the client is the sole employer of the agency workers.[750]

3.4.4 The *Assign Services* Decision by the Labour Court

The *Assign Services* decision was taken on review to the Labour Court.[751] The employment agency initiated the application and anticipated an order that the agency workers were employed dually by the employment agency and the client for the purposes of the LRA.[752] Brassey AJ reviewed and set the CCMA decision aside. However, the Court did not make an order to substitute the CCMA award.[753]

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[747] *Assign Services* at para 4.7.
[748] As above. The argument advanced was that "s 198(4A) does not refer to joint and several liability in terms of s 198A(3)(b)(i) but rather in terms of s 198(4). He further argued that while s 198A(3)(b)(i) does not expressly mention that the client becomes the employer, the wording of s 198A(3)(b)(ii) supports the sole employment argument, when it reads 'subject to the provision of section 198B, employed on an indefinite basis by the client."
[749] *Assign Services* at para 5.8.
[750] *Assign Services* at paras 5.17 and 6.1. At para 6.2 the Commissioner stated that "with effect from 1 April 2015 the placed workers supplied by Assign Services (Pty) Ltd (Applicant) to Krost Shelving & Racking (Pty) Ltd (First Respondent) who earn below the threshold in terms of Sec 6(3) of BCEA and who have been placed for a period in excess of three months on a full time basis, are deemed to be the employees of the first respondent on an indefinite basis for the purposes of the LRA and the first respondent is deemed to be their sole employer for the purposes of the LRA."
[751] *Assign Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2015) 36 ILJ 2853 (LC).
[752] *Assign Services* at para 26.
[753] As above. Brassey AJ stated that "the expression is a fertile source of confusion and, even were I willing to make an order on an issue framed in such abstract terms, I should want it to be far more precise than this. In my view, therefore, it is highly undesirable to make an order substituting the commissioner's award with a substantive order of my own."

The employment agency argued that statutory rights and obligations apply equally to both the employment agency and the client. NUMSA contended on the other hand that the statutory rights and obligations that inform the relationship governing the employer–employee relationship under the LRA, apply only in respect of the client.[754] Based on these opposing perspectives, the Labour Court confirmed that the issue was whether the employment agency continues to be an employer and therefore bears the statutory rights and duties contained within the LRA.[755]

The Labour Court found that there was no reason why the employment agency should be relieved of its statutory rights and obligations towards the agency worker, because the client has acquired a parallel set of such rights and obligations.[756] This finding alluded to a situation of dual employment as being plausible.

The Labour Court later stated that no man can serve two masters,[757] which leans towards an argument for sole employment. Brassey AJ avoided favouring one side by stating that "to consider these matters is to succumb, once more, to the meretricious lure of gratuitous speculation and this is culpably to travel beyond my judicial remit".[758] In concluding, he remarked that the expression "dual employment" was "a fertile source of confusion".[759]

The Labour Court did not replace the CCMA award because it did not consider it a factual dispute. It is submitted that the Labour Court failed to pronounce on the issue as to whether both the employment agency and the client become employers for the purposes of the LRA in terms of section 198A(3)(b)(i). It is argued that the issue of sole and dual employment remains unclear.[760]

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[754] *Assign Services* at para 5.
[755] *Assign Services* at para 12.
[756] *Assign Services* at para 12.
[757] *Assign Services* at para 17.
[758] *Assign Services* at para 18. Adding to this in the following paragraph, Brassey AJ states that "[i]n a case such as this, framed as it is to consider a point of legal construction, speculation is all but inevitable, for it is by such means that the lawyer generates hypothetical scenarios by which to test interpretative conclusions provisionally entertained. That the court is confronted by the siren-song of unwise speculation says much about the legitimacy of this case."
[759] *Assign Services* at para 26.
[760] Benjamin *ILJ* (2016) 29 makes the point that the comments on the issues covered in the decision are not binding rulings.

3.4.5 The *Pecton Outsourcing Solutions* Decision

Pecton Outsourcing Solutions CC v Pillemer NO & others was heard in the Labour Court shortly after the *Assign Services* decision.[761] This matter did not cover section 198A of the LRA nor did it consider the issue of dual versus sole employment. However, it is submitted that it is indirectly applicable to the issue in discussion.

Pecton Outsourcing Solutions CC ("the employment agency") had supplied agency workers to Unilever for ten years.[762] Each agency worker signed a fixed-term contract of employment with the employment agency. The workers' contract period was linked to the continuation of the service agreement between the employment agency and Unilever ("the client").[763] The service agreement between the parties was cancelled and the employment agency provided the agency workers with notice of cancellation and stated that their employment contracts were duly terminated.[764]

The CCMA Commissioner found the dismissal of the agency workers by the employment agency to be procedurally unfair and awarded the agency workers compensation.[765] The employment agency approached the Labour Court regarding the issue of whether in fact there was a dismissal and, if so, whether the CCMA had the jurisdiction to entertain the fairness of the dismissal.[766]

A novel view was put forward by Whitcher J, with regards to whether the reason for a termination of agency workers' employment contracts is due to the employment agency or the client. It was stated that the correct approach is to examine whether the underlying cause for the dismissal of the agency worker was due to misconduct, incapacity, operational requirements or no reason at all. The Court held that courts

[761] *Pecton Outsourcing Solutions CC v Pillemer NO & others* (2016) 37 ILJ 693 (LC). Judgment of the Court was delivered on 12 November 2015.
[762] *Pecton Outsourcing Solutions* at para 2.
[763] *Pecton Outsourcing Solutions* at para 3. The relevant clause of the contract provided that "[o]n cancellation of the service contract between Pecton Outsourcing Services and the client (Unilever), this employment contract shall automatically terminate. Such termination shall not be construed as a retrenchment, but shall be a completion of the contract."
[764] *Pecton Outsourcing Solutions* at paras 7 – 9.
[765] *Pecton Outsourcing Solutions* at para 12.
[766] *Pecton Outsourcing Solutions* at para 13.

should recognise the content of the reason for dismissal over the "form of the contractual device covering it".[767]

By linking the *Pecton* decision to the *Assign Services* and *Refilwe* decisions, it is suggested, if the interpretation of the deeming provision is that dual employment is created (and the resultant problem is that there is confusion as to which employer is liable), then courts should turn to the content of the reason for the termination and which party caused the termination. This suggestion introduces a third theory outside of the sole and dual employment debate, which entails that decision-makers should adopt a case-by-case approach in all claims involving agency work.

3.4.6 Arguments For and Against Sole Employment

It is submitted that the Labour Court in *Assign Services* failed to establish a clear precedent and it remains unclear whether the deeming provision establishes a sole or dual employment relationship.[768] That being the case, there is much room for debate as binding precedent is waited on. It also remains unclear whether there are only one or two contracts of employment and who the parties to those contracts are.

This thesis argues that the legislature envisioned that one employment relationship and contract of employment should exist after the initial three month period. The reasoning for this conviction follows. First, if two relationships were intended, the legislator would surely have provided a clearer division of duties between the employment agency and the client in respect of the agency worker. Before the amendments agency workers were uncertain whether the employment agency or the client was responsible for the obligations of the employer. Benjamin makes a sound argument that "a single employer should be identified to exercise the rights and responsibilities in respect of each aspect of the employment relationship".[769] This identification would remove the uncertainty that exists.

[767] *Pecton* at para 43.
[768] Benjamin *ILJ* (2016) 29 states that the Labour Court's assumption that contracts between agencies and workers are common-law contracts of employment is contrary to binding Labour Appeal Court authority and that it was not necessary to review the arbitrator's finding.
[769] Benjamin *ILJ* (2016) 36.

Second, the amendments by way of the LRAA of 2014 were brought about to curb abusive practices and to increase the protection of agency workers as a vulnerable group of employees.[770] It seems to be logical when the assignment no longer constitutes "temporary service" direct and indefinite employment ensues with the client. Hence, the agency worker is transitioned out of non-standard employment and into standard employment. Indefinite employment provides greater security to the agency worker.

Third, in respect of the discussions in the *Refilwe* and *Assign Services* decisions regarding joint and several liability, section 198(4A)(a) accounts for liability in the situation where the client is deemed the employer. In this regard, when the client is deemed to be the employer of the agency worker, the provision provides that the agency worker may still institute proceedings against either the employment agency or client or both. As a result the agency worker, even though not dually employed, has the protection of being able to claim against either or both parties.

As was alluded to in the discussion on the *Pecton* matter it is possible to adopt a case-by-case approach to agency work related matters.[771] In doing so, one would not engage in the debate of sole versus dual employment.

4. Other Legislative Amendments Regulating Agency Work

It should be noted besides the LRA's regulation of agency work in South Africa other pieces of legislation also contribute to the overall framework of agency work. In this regard the most significant enactment is the new ESA.[772]

The ESA seeks, among other things, to provide for the registration and regulation of private employment agencies. Section 2(2) stipulates how the purpose of the ESA is to be achieved, which is through:

> "(a) providing comprehensive and integrated free public employment services;
> (b) coordinating the activities of public sector agencies whose activities impact

[770] Memorandum of Objects Labour Relations Amendment Bill 2012 22.
[771] See Chapter 6 at 3.4.5.
[772] The date of commencement of the ESA was 9 August 2015.

> on the provision of employment services; (c) encouraging partnerships, including in the provision of employment services, to promote employment; (d) establishing schemes and other measures to promote employment; and (e) providing a regulatory framework for the operation of private employment agencies."

In general, the ESA places a strong emphasis on employment, work-seekers, and education and training, with a view to promoting employment. It provides for the establishment of criteria to register as a "temporary employment services", the designation of a government official as the registrar of agencies, a prescribed manner in which to register, as well as the display of a certificate of registration.[773]

The ESA explicitly prohibits employment agencies from charging agency workers placement fees.[774] An agreement between an employment agency and a client is required which states the remuneration that the agency worker will receive and the fee that the client is paying to the employment agency.[775] It is suggested that these provisions are far-reaching in terms of granting additional protection to agency workers.

Moreover, the registrar, in terms of the ESA, may decide to cancel the registration of an employment agency should it fail to comply with the requirements of the ESA.[776] Finally, there is the added threat of a monetary fine which can be imposed by the Labour Court for certain contraventions, such as the failure to display a certificate of registration, committing a prohibited act, charging a fee, or deducting an amount from an agency worker's pay for employment services rendered.[777]

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[773] In respect of the regulation of agency work by the ESA, it must be pointed out that s 13 of the ESA, which deals with the registration of employment agencies, is still to come into effect. Government Gazette 39079, 7 August 2015. The proclamation specifically excludes only s 13 of the ESA from coming into operation. The date of commencement is at this stage unknown. s 13 of the ESA states that "(1) The Minister may, after consulting the Board, prescribe criteria for the registration of private employment agencies." and that "(4) Any person wishing to provide employment services must apply to the registrar in the prescribed form and manner in order to register as a private employment agency." "(6) The registration certificate of a private employment agency must specify whether or not the private employment agency is permitted to perform the functions of a temporary employment service."

[774] s 15 of the ESA.

[775] As above.

[776] s 18 of the ESA.

[777] Sch 3 of the ESA, which refers to s 49(2), states that "[t]he Labour Court may, on application by the Director-General, impose a fine not exceeding R50 000 on an employer that contravenes any of the provisions listed in Schedule 3."

In this regard there are definite advantages to a system of registration or licensing of employment agencies. A registration model "exemplifies a stronger enforcement policy and a more rigorous compliance regime"[778] and it can aid in combating exploitation as a "clear distinction in the labour supply market between legal and illegal" employment agencies would be created.[779] There is a belief that the abuses associated with agency work will be minimised by the requirement to register an employment agency.[780] Registration is also a "necessary safeguard" which can "ensure legitimate operation and enforce standards" in respect of the employment of agency workers.[781] Furthermore, the risk of deregistration would likely prompt employment agencies to comply with legislation and "make an effort to ensure that their clients do as well."[782]

The BCEA also contains some amended provisions pertaining to the regulation of agency workers. Section 82 of the BCEA confirms that the employment agency is the employer of the agency worker. Furthermore, it clarifies that independent contractors are to be distinguished from agency workers. Additionally, there is a reinforcement of the joint and several liability of the employment agency and client should the employment agency fail to comply with the BCEA or a sectoral determination.

5. Appraisal of Compliance with International Norms

In Chapter 3 particular ILO norms pertaining to the regulation of agency work were identified[783] and in Chapter 4 a study of EU regulation led to the identification of

[778] Wynn *ILJ* (2009) 69.
[779] Vermeulen (2007) 90.
[780] Cohen *ILJ* (2014) 2619.
[781] Wynn *ILJ* (2009) 69 discusses regulating "rogue" employment agencies in the United Kingdom and mechanisms of enforcement of legislation and standards.
[782] Botes *SAMLJ* (2014) 128.
[783] See Chapter 3 at 6. The ILO norms identified were: first, employment agencies should be allowed to operate and fees or costs may be charged from clients but should not be charged from agency workers. Second, agency workers need to be protected and they should be provided with the rights of freedom of association and collective bargaining. Third, agency workers should be provided with the right to equal treatment. Fourth, agency workers should not be prohibited from working for the client subsequent to placement by the employment agency. This establishes greater opportunities for agency workers to secure decent employment and income and social protection. Fifth, tripartism and social dialogue should be strengthened. Lastly, the responsibilities of the employment agency and client should be allocated respectively.

particular EU standards.[784] In the part that follows South Africa's current regulation of agency work is appraised against the standards that were implemented by the ILO and the EU. For this purpose, and in so far as there is considerable similarity between the ILO and EU norms identified, a combined list of international standards is utilised.

The international norms are as follows: first, employment agencies should be allowed to operate, second, agency work should be temporary in nature, third, agency workers should be entitled to equal treatment, fourth, agency workers should be afforded the rights of freedom of association and collective bargaining, fifth, tripartism and social dialogue should be strengthened, sixth, fees and costs should not be charged to agency workers, seventh, there should be a clear allocation of the respective responsibilities of the employment agency and the client, eighth, agency workers should be entitled to access collective facilities and vocational training at the client and, ninth, agency workers should not be prohibited from direct employment with a client.

For the most part South Africa's current regulation on agency work does align with the international standards identified in the study. In a positive development the LRAA of 2014 has gone a long way in achieving this. Subsequent to the elections in 1994 South Africa re-entered the international labour arena and it is only prudent that the country comply with generally accepted values. Cohen confirms this compliance in stating that:

> "[t]he amendments are consistent with international conventions regulating agency work, such as the ILO's Private Employment Agencies Convention (not yet ratified by SA) and the European Union's Temporary Work Directive, both of which seek to regulate non-standard working relationships and prevent abuse, while allowing scope for labour market flexibility."[785]

[784] See Chapter 4. The EU norms identified were: first, employment agencies should be allowed to operate, second, agency work should be temporary in nature and, third, agency workers should be entitled to equal treatment by private employment agencies. Fourth, agency workers should have access to employment at clients and, fifth, they should also have access to collective facilities and vocational training.
[785] Cohen *ILJ* (2014) 2619.

However, a careful appraisal against particular international principles reveals points of non-compliance and illustrates that there is room for improvement of the country's regulation of agency work.

First, regarding the standard that employment agencies should be allowed to operate, it is submitted that South Africa recognises the role that agency work fulfils in providing flexibility and a source of employment. Agency work is allowed to operate, and was not proscribed in the latest round of amendments.

Second, regarding the international norm of agency work being temporary in nature it is submitted that the LRAA of 2014 has brought about a clear limit to the duration in terms of which agency work persists for those earning under the threshold amount. Accordingly, it can be said, at least in so far as lower-earners are concerned, that the country is compliant with this standard.

Third, in respect of the international norm of providing agency workers with equality rights the recent amendments to South African law have made significant progress in providing agency workers with the right to equal treatment.[786] However, it is important to note that the right to equal treatment is reserved for lower-income earners and this may be viewed as a shortcoming of the law when compared to international standards.[787]

Fourth, in respect of the norm of providing agency workers with the rights of freedom of association and collective bargaining these rights are accounted for. The amendments to the LRA have sought to facilitate collective bargaining insofar as agency workers are concerned. In particular, agency workers placed at a client are counted when considering the composition of a workforce at a client.[788] Also, organisational rights can be exercised at either the employment agency or a client's workplace.[789] This ruling applies to all agency workers irrespective of their level of earnings.

[786] s 198(5) of the LRA as discussed in Chapter 6 at 3.3.
[787] s 198A(5) of the LRA as discussed in Chapter 6 at 3.3.
[788] s 21(8)(v) of the LRA as discussed in Chapter 6 at 3.3.
[789] s 21(12) of the LRA as discussed in Chapter 6 at 3.3.

Fifth, in respect of the principle that social dialogue and tripartism should be strengthened there are enabling structures in South Africa. NEDLAC is the foremost forum where discussions are meant to be held involving government, labour and business. In addition, collective bargaining between stakeholders at bargaining councils offers another forum for social dialogue. However, such "dialogue" is often adversarial in nature. Furthermore, as was the case with the negotiations around the definition of "temporary service" in the LRA, there have been times when social dialogue processes have been undermined in parliament.[790] There can be no doubt social dialogue is an aspect that warrants government attention and action. It should promote and engage in the facilitation of open and effective communication, especially regarding agency work but also pertaining to other aspects of employee protection.

Sixth, regarding the standard that fees or costs should not be permitted to be charged against agency workers the LRA does not cover this aspect. However, the ESA provides for such prohibition[791] and when appraised against this international value current legislation in South Africa is compliant.

Seventh, concerning the allocation of respective responsibilities of employment agencies and clients South African amendments fail to address this standard. Article 12 of the ILO Private Employment Agencies Convention[792] requires clear allocation of responsibilities, particularly in relation to collective bargaining, minimum wages, working time and other working conditions, statutory social security benefits, access to training, protection in the field of occupational safety and health, compensation in case of occupational accidents or diseases, compensation in case of insolvency and protection of workers claims, maternity protection and benefits and parental protection and benefits. South Africa's current regulation fails to provide a clear apportioning of responsibilities between the employment agency and the client.

The allocation of responsibilities is particularly blurred with the introduction of the deeming provision. After three months the client is deemed to be the employer of the

[790] See Rycroft *ILJ* (2015) 4 and Du Toit *et al* (2015) 42. Furthermore, see the discussion at Chapter 6 at 3.2.
[791] s 15 of the ESA as discussed in Chapter 6 at 4.
[792] ILO Private Employment Agencies Convention, 1997 (No 181).

lower-earning agency workers and such employment is deemed to be of an indefinite nature. This provision apparently means, once the requisite conditions are met, all employer obligations in respect of the agency worker shift to the shoulders of the client. However, as was illustrated in the *Assign Services* case earlier in this chapter, the term could be interpreted to mean that there should be a situation of "dual employment". The legislature plainly failed to establish a rational divide and allotment of employer responsibilities during the last round of amendments.[793]

This omission, it is submitted, will result in uncertainty and a lower degree of protection for agency workers as is envisaged by international standards. One hopes that the courts, through setting precedents, will bring agency workers closer to the realisation of this international standard.

Related to this norm, is the issue of joint and several liability of the respective parties. The LRA lists the instances where the employment agency and the client are jointly and severally liable and also clarifies the agency worker's options where joint and several liability occurs.[794] In respect of unfair dismissal and unfair labour practices, Aletter and Van Eck state that:

> "the legislature has dismally failed in its attempt to provide clarity as to the question where the employer responsibilities lie in respect of unfair dismissal and unfair labour practices. It is not clear whether only the client or both the client and the employment agency are deemed to be employers in respect of unfair dismissal and unfair labour practice disputes."[795]

Eighth, international values dictate that agency workers should have access to collective facilities and vocational training. In a disappointing development, section 198 of the LRA is silent on these aspects. However, section 198A of the LRA, which applies to agency workers earning under the threshold amount, does provide for the right of equality between employees of the client and agency workers placed at a client. Therefore to some extent this provision may imply access to collective facilities and training. It is a positive development that the lower-earning agency workers, when deemed to be the employees of an employment agency, acquire the

[793] See Chapter 6 at 3.3, 3.4 and 3.4.5 in particular for a discussion on the "deeming provision".
[794] s 198(4A) of the LRA as discussed in Chapter 6 at 3.3.
[795] Aletter and Van Eck *SAMLJ* (2016) 309.

right to not be treated less favourably than the client's other employees. Despite this, it does not specifically address the principle of access to collective facilities and vocational training.

Such access to collective facilities would increase the benefits to agency workers,[796] as well as a sense of job satisfaction and fulfilment. More importantly, access to vocational training could vastly improve agency workers employability and future prospects with clients. It is submitted that such training would assist agency workers in the fulfilment of their duties with the client, as well as in equipping the agency worker to be able to transition from non-standard employment to a traditional and more secure employment relationship.

Finally, the current South African regulation fails to ensure that employment agencies do not place limitations on agency workers to join the ranks of the client during or subsequent to placements.[797] The regulatory framework is silent on this aspect. This is a shortcoming in the current law and hinders the protection of agency workers.

6. Conclusion

The following problems prevailed in terms of the LRA before the LRAA of 2014 became effective: agency workers found it difficult to identify their employer, there was no joint and several liability between the employment agency and the client for unfair dismissal or unfair labour practices, agency workers were unfairly dismissed due to the cancellation of the commercial agreement between an employment agency and client, workers were externalised from their employers to employment agencies, differences existed in wages and benefits between agency workers and workers of the client, agency workers were assigned to clients for lengthy periods, and it was difficult for agency workers to engage in collective bargaining.[798]

[796] The EU's Temporary Agency Work Directive at Article 6 provides for such benefits for agency workers. See the discussion at Chapter 4 at 2.2.
[797] In the EU, the Temporary Agency Work Directive makes it clear in Article 6(2) that direct employment should not be prevented. See the discussion at Chapter 4 at 2.2. Similarly, Article 15 of the ILO's Private Employment Agencies Recommendation provides for the same. See the discussion at Chapter 3 at 3.4.
[798] See Chapter 6 at 2.3.

The LRAA of 2014 sought to address these shortcomings. This chapter illustrates, though the adapted LRA has made significant strides towards addressing some of the aforementioned issues, it is evident that all problems have not been resolved that were present before the changes came into effect.

The challenges associated with lengthy and indefinite assignments of agency workers to a large extent have been addressed.[799] The LRA's section 198A(1) definition of "temporary service" provides for a maximum duration of three months, which is a reflection of the policy that agency work is meant to be temporary in nature. The deeming provision bestows additional protections on agency workers once an assignment is no longer a "temporary service". But, as with other protections, the maximum duration of an assignment applies only to agency workers earning under the prescribed threshold amount. It is submitted that certain additional protections should be provided to agency workers earning over the threshold.[800]

The amended LRA introduced positive steps regarding agency workers and collective bargaining.[801] Section 198(4C) of the LRA provides that agency workers may not be employed under terms and conditions of employment not permitted by a collective agreement applicable at a client. Also, when determining whether a trade union is a representative trade union, section 21(8)(v) states that agency workers are to be counted in the composition of a workforce. Trade unions are allowed to exercise organisational rights at the workplace of an employment agency or a client in terms of section 21(12).

The LRA currently also resolves the issue of different wages and conditions of service for agency workers and employees of the client.[802] Section 198(5) of the LRA provides that agency workers who are deemed to be employees of the client must not be treated on the whole less favourably than employees of the client performing the same or similar work. This equal protection applies only to lower-income earners.

[799] See Chapter 6 at 3.3.
[800] See Chapter 8 at 4.2.3.
[801] See Chapter 6 at 3.3.
[802] As above.

Despite these positive changes the problems associated with the dismissal of agency workers due to cancellation of the commercial agreement between the employment agency and client has not been addressed. However, section 198(4C) of the LRA may be of some assistance to agency workers. It provides that agency workers may not be employed on terms and conditions that are not allowed in terms of the LRA or any employment law, which implies that employment agencies may not include terms in their agency workers' employment contracts which allow for the automatic termination of employment when the client cancels the commercial agreement with the employment agency.

Although section 198(2) of the LRA always explicitly stated that the agency worker is the employee of the employment agency, and that the employment agency is the employer of the agency worker, it is problematic for agency workers to identify their true employer. The introduction of the deeming provision in section 198A(3)(b)(i) of the LRA, which applies to lower-income earning agency workers, unfortunately, created much uncertainty in respect of which party truly is the employer.[803] It is not clear who has employer responsibility after the three month period.

In addition, the problem regarding joint and several liability for unfair dismissal or unfair labour practices is also not addressed directly by the LRA.[804] However, the meaning of joint and several liability is clarified in section 198(4A). It may be argued that the effect of the deeming provision which mentions "for the purposes of this Act", read with section 198(4A) of the LRA which entitles an agency worker to institute proceedings against either an employment agency or the client or both, amounts to joint and several liability for the purposes of the LRA too. If such joint and several liability does exist, based on the above-mentioned interpretation of the sections, then it is exclusively applicable to lower-income earners.

Despite the mentioned shortcomings of the amendments to the LRA, the ESA has introduced a number of positive features. It specifically prohibits the charging of placement and other fees to agency workers. The transparency brought about by the obligation to reflect the client's fees and the agency worker's remuneration in the

[803] See Chapter 6 at 3.3 and 3.4.
[804] See Chapter 6 at 3.3.

agreement between the employment agency and the client will assist in revealing when agency workers are being taken advantage of. In addition, the mechanism of enforcement through the threat of cancellation of registration is commendable as it is likely to have the desired effect of forcing employment agencies to comply with the regulations introduced in terms of the ESA.

An appraisal of South Africa's current regulation of agency work against the combined list of international norms reveals that the South African regulatory model is largely in coherence with these standards. However, there are areas of non-compliance. First, even though the legislature has introduced steps to improve the treatment of agency workers as compared to employees of the client, this added protection applies only to those earning under the threshold amount. Agency workers earning over the threshold are not entitled to equal treatment under the LRA. Second, special attention should be given to facilitating social dialogue in respect of agency work and broader labour matters in South Africa. Third, there is a lack of clear allocation of employer responsibilities between the employment agency and the client, particularly in cases where the deeming provision applies. Fourth, the current legislation does not provide agency workers with the right of access to collective facilities and vocational training at the client. Furthermore, the legislation failed to prevent an employment contract from prohibiting agency workers from taking up direct employment with a client.

These points of non-compliance with international norms, as well as the past problems that were not addressed by the LRAA of 2014, shall be kept in mind when fashioning proposals for the adjustment of the regulation of agency work in South Africa in Chapter 8. In the next chapter there is a consideration of foreign law in respect of the protection of agency workers.

Chapter 7

Protection of Agency Workers: Comparison with Germany and Namibia

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1. Introduction

The purpose in this chapter is to compare the regulation of agency work in Germany and Namibia with a view to facilitating insight into the regulation of agency work in a

developed and developing country[805] in order to consider adapting the South African model.

A brief history of the regulation of agency work in Germany is provided at the outset, followed by a study of labour market policy shifts. Thereafter, the regulation and the protection afforded to agency workers in Germany is measured against International Labour Organisation ("ILO") norms as well as those of the European Union ("EU"). The purpose here is to identify measures that ultimately could be considered in order to provide agency workers in South Africa with appropriate protection.

Next is an examination of the regulation of agency work in Namibia. A brief history of the regulation of agency work in Namibia is presented and the labour market policy changes are identified, proceeding to an evaluation of current regulation and the protection afforded to agency workers in terms of the ILO and EU norms. As with the comparative study of German regulation, the purpose is to develop a better understanding of the regulation of agency work in South Africa and through the comparison offer guidance to South African policy-makers.

2. Germany

2.1 Introduction

Germany has been chosen for the purposes of comparison for several reasons. The first is that the research involves the question of whether the protection of agency workers in South Africa is in line with EU norms. The second reason for selecting

[805] The meaning of "comparative study" as it is used in this chapter is to study the rules of law of foreign countries with the purpose of identifying differences and similarities pertaining to the drafting, interpretation and application of policy by different law-makers. The Peace Palace Library in the Hague in the Netherlands describes comparative legal study in its Research Guide as "[c]omparative law is the study of the relationship between legal systems or between rules of more than one system, their differences and similarities. Comparative Law is a method of comparing legal systems, and such comparison produces results relating to the different legal cultures being analysed. Comparative Law also plays a role in a better understanding of foreign legal systems. In this age of globalization and the complexity and intertwinement of international public and private law, it plays an increasing important role in international harmonization and unification of laws, thereby leading to more international cooperation and a better world order. Legislators increasingly make use of foreign law in drafting new legislation and in more and more countries courts draw inspiration from abroad as well. The increasing importance of comparing legal systems is true not only for the academic discipline of Comparative Law as such (where the focus is usually on methodology), but also for specific areas of law." The aforementioned is located at http://www.peacepalacelibrary.nl/research-guides/other-subjects/comparative-law/ accessed on 31 May 2016.

Germany is that it is considered as a European economic powerhouse and agency work is rated as its "number one job engine".[806] South Africa is considered an economic leader on the African continent.[807] Third, the labour laws post-apartheid have been influenced by German academics and lawmakers.[808] Fourth, the history of both involves separation and subsequent re-unification. Reference is made to the post war settlement in Germany and 'apartheid' policy in South Africa.[809] Fifth, both countries in the recent past reformed the regulation of agency work.

2.2 Brief History of Regulation of Agency Work in Germany

The history of the regulation of agency work in Germany is presented in terms of the eras during which important developments in respect of increased flexibility or worker security have been identified. The focus of the study is not an exposition of the German legal system in general, but an examination of aspects of the protection of agency workers.

2.2.1 Pre-1972

Historically, agency work was not considered compatible with the policies of the German Federal Employment Office ("FEO"). It disapproved of labour exchange and agency work was prohibited.[810] Weiss alludes to the fact that the FEO's monopoly

[806] Spermann (August 2013) 1.
[807] Hintereder and Orth state that "[w]ith a population of 82 million Germany is … the largest and most important market in the European Union (EU)." They further mention that "Germany is one of the most highly developed and efficient industrial nations and, after the USA, Japan, and China, has the world's fourth largest national economy." Available at http://www.tatsachen-ueber-deutschland.de/en/economy/main-content-06/strong-economic-hub-in-the-global-market.html accessed on 7 January 2016. See Dustmann et al *JEP* (2014) 167 – 188 for a discussion of how the labour market of Germany has contributed to and led to Germany being labelled an "economic superstar" in Europe. South Africa remains a very strong economy as compared to the other African nations. See the African Development Bank's Country Strategy Paper on South Africa 2013 – 2017 for a discussion on the economy, country strategy and implementation. Available at http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017_-_South_Africa_-_Country_Strategy_Paper_01.pdf accessed on 31 May 2016.
[808] Davis *ICON* (2003) 181 – 195 discusses how laws of Germany have influenced the text of the Constitution of the Republic of South Africa, 1996 (Constitution, 1996) and how only relevant states and not arbitrary comparator states should be used in court judgments. See also Kruger and Tshoose *PER* (2013) 285 at 311 where the authors mention the fact that the South African Labour Relations Act 66 of 1995 ("LRA") was modelled on the German and Dutch models. Furthermore, the Explanatory Memorandum to the LRA (1995) 16 *ILJ* 278 at 280 refers to the fact that Professor Manfred Weiss, from Germany, was one of the advisors to the Cheadle Task Team which drafted the LRA.
[809] For a recent comparative labour discussion incorporating the histories of both nations, as well as that of the United States, see Lawrence (2014).
[810] Weiss *BCLR* (1999) 255. However, the author states that a Federal Constitutional Court decision of 1967 ruled that agency work has nothing to do with labour exchange if an indefinite employment

was established in 1922 due to "very bad experiences with private employment agencies".[811] In principle agency work for profit was forbidden[812] and even punishable as a criminal offence.[813]

Agency work was not formally regulated at EU level although there had been an attempt to do so through the EU Directive on Health and Safety and the EU Directive on the Posting of Workers.[814] Schlachter alludes to the fact that the EU had many "failed attempts" at regulating agency work and the process leading to the current regulation took three decades of refinement.[815]

2.2.2 1972 until 2002

In this period there was detailed regulation of agency work in an effort to allow its operation and at the same time to protect agency workers.

In 1967 the Federal Constitutional Court (*Bundesverfassungsgericht*) held that the ban on agency work was unconstitutional,[816] but also that labour exchange is not applicable in a situation where the agency worker has an indefinite employment contract with the agency. In response the Act on Temporary Agency Work ("ATAW") (*Arbeitnehmerüberlassungsgesetz*) was enacted in 1972[817] which legalised and regulated private agency work in Germany for the first time. The ATAW aimed to establish protective measures for agency workers,[818] which included limiting the duration of an assignment and prohibiting synchronisation where agency workers were hired only for the duration of a particular assignment.[819]

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relationship is established between the agency worker and the agency. This would mean that the ban was in fact unconstitutional.

[811] As above at 260.

[812] As above. Non-profitable labour exchange activities were excluded from this prohibition, such as those of charity institutions.

[813] Waas *CLLPJ* (2012) 49.

[814] Schlachter *IJCLLIR* (2012) 7 states that the EU Directive on Health and Safety 91/383/EC and the EU Directive on Posting of Workers 96/71/EC touched upon aspects of agency work, but that the working conditions of agency workers "remained untouched" at EU-level regulation.

[815] As above. The author states that there was much debate and failed negotiations regarding this issue amongst stakeholders and social partners at European level.

[816] Federal Constitutional Court *(Bundesverfassungsgericht)* 1 BvR 126/65 of 4 April 1967.

[817] Weiss *BCLR* (2013) 113. See also Weiss *BCLR* (1999) 255 where the legislation is referred to as the Act on Temporary "Employment Business" *(Arbeitnehmerüberlassungsgesetz).*

[818] As above. At 114 the author notes that the ATAW has been amended several times but that it kept its basic structure between 1972 and 2002.

[819] Waas *CLLPJ* (2012) 50 refers to other protections provided by ATAW during this period, which included prohibition of employing agency workers repeatedly under fixed-term contracts of

Despite its noble intentions, abuses pertaining to agency workers abounded subsequent to the implementation of the ATAW, for example, there was a ban on such work in the construction industry due to mistreatment of agency workers.[820] Gradually, between 1972 and 2002, the legislation relating to agency work was liberalised.[821]

During this period there was a system for the registration of agencies. An agency needed a licence in order to operate, which, in principle, was issued only if there were no statutory reasons for its refusal.[822] The employment agency was the employer of the agency worker and the employment relationship was in principle intended to be an indefinite one.[823] Waas states that the traditional model of agency work in Germany had always been one in which the employment agency was the employer party and was exclusively responsible for the working conditions of the agency worker.[824]

Fixed-term employment contracts between the employment agency and the agency worker were permitted as long as they were not repetitively renewed although renewal was allowed should there be a specific justification, which was open to interpretational challenge.[825] It is noteworthy that the law prevented

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employment; and prohibition on repeatedly re-hiring agency workers within a three month period after their dismissal.

[820] Weiss *BCLR* (2013) 114.

[821] Waas *CLLPJ* (2012) 49 refers to the fact that the history of regulation of agency work in Germany has been a step by step liberalisation. For instance, Weiss *BCLR* (2013) at 114 states that the ban in the construction industry was lifted in 1994 and between 1997 and 2001 further amendments were made to the ATAW which allowed increased flexibility for companies.

[822] Weiss *BCLR* (2013) 114. Reasons for refusal included that the applicant did not have the required reliability for performance of activities such as social security payments, tax payments, work permit regulations and industrial safety legislation compliance. Weiss *BCLR* (1999) at 261 states that licences were usually issued if conditions listed in the ATAW were fulfilled, namely, the applicant must be represented by a person whom has the required qualification and is reliable; the applicant's financial situation must be satisfactory; and the applicant must have sufficient office space.

[823] As above at 116.

[824] Waas *CLLPJ* (2012) 48 and 49. Even today agency workers are paid during times of non-assignment by the agency.

[825] In South Africa s 198B of the Labour Relations Amendment Act 6 of 2014 ("LRAA of 2014") was recently added to legislation in terms of the regulation of fixed-term employment. s 198B(4) provides a list of justifications under which a fixed-term contract for a duration of longer than three months is allowed. The list includes the situations when an employee is replacing another employee who is temporarily absent from work; is employed on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months; is a student or recent graduate who is employed for the purpose of being trained or gaining work experience in order to enter a job or profession; is employed to work exclusively on a specific project that has a limited or defined duration; is a non-citizen who has been granted a work permit for a defined period; is employed to perform seasonal

"synchronization". This entailed the conclusion of an employment contract between the employment agency and the worker for a fixed-term linked specifically to the duration of the contract between the client and the agency.[826] The normal rules that applied to all fixed-term contracts also covered agency work.[827]

Strictly speaking, the client and the agency worker had no contractual relationship with each other. However, there were exceptions. If the employment agency had no licence or would lose its licence to operate as a private employment agency, then the law treated the situation as if there were an employment relationship between the client and the agency worker.[828]

Although there was a division of rights and duties, the employment relationship remained between the employment agency and the agency worker. All contractual claims related to employment could be made only against the employment agency.[829] In accordance with the ATAW, information relating to particulars of employment had to be contained within a written document.[830] Works councils assisted with the enforcement of the ATAW and monitored if legal provisions in respect of agency work were violated.[831]

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work; is employed for the purpose of an official public works scheme or similar public job creation scheme; is employed in a position which is funded by an external source for a limited period; or has reached the normal or agreed retirement age applicable in the employer's business.

[826] Weiss *BCLR* (2013) 116.

[827] Waas *CLLPJ* (2012) 50 states that this included that there had to be an objective ground as to why the employment contract was for a fixed duration.

[828] Weiss *BCLR* (2013) 116. In South Africa a new system of registration of employment agencies has been introduced in the Employment Services Act 4 of 2014 ("ESA"). The LRAA of 2014 in s 198(4F) also provides that "[n]o person must perform the functions of a temporary employment service unless it is registered in terms of any applicable legislation, and the fact that a temporary employment service is not registered will not constitute a defence to any claim instituted in terms of this section or 198A." Therefore under South Africa's current law, if an employment agency were not registered as such, it will still remain liable in respect of any claims.

[829] As above. The splitting of rights and duties included rights of the client with reference to the performance of work of the agency worker; the giving of instructions or directions regarding work performance by the agency worker; along with the corresponding duty of the client to abide by protective regulations such as health and safety laws. Note that social security contributions also had to be paid by the agency, along with wages, any benefits, and annual vacation. For a discussion on the relationship between an agency workers and a client under South Africa's amended legislation see Benjamin *ILJ* (2016) 37 28.

[830] Weiss *BCLR* (2013) 116. At 117 the author points out that the written information has to be provided before the agency worker commenced with the work, and that failure to provide the written document attracted a fine for the agency under the ATAW at that time.

[831] As above. The works council was entitled to refuse agency workers being allowed to be brought in by the client. The works council had to be informed and consulted before an agency worker was to be assigned to the client. It was thought that by bringing in agency workers to the client's workplace there was a risk to the client's employees that they may experience disadvantages or dismissal.

2.2.3 2003 until 2011

The preceding period of detailed regulation of agency work was followed by an era of deregulation.

With effect from 1 January 2003, a significant change took place in terms of the regulation of agency work in Germany. High levels of unemployment spurred the need to amend the 1972 legislation.[832] The amendment was called the First Act for Modern Services in the Labour Market ("2003 amendments") (*Erstes Gesetz für moderne Dienstleistungen am Arbeitsmarkt*).[833] Waas indicates that the purpose of the changes were to make the "relatively rigid German labour market more flexible"[834] and adds that the 2003 amendments were based on proposals submitted to parliament by the Hartz Commission which aimed at reducing unemployment.[835]

The 2003 amendments lifted the prohibition on synchronization and removed rules concerning the maximum duration of time which could be spent at a client's workplace.[836] The maximum period for the assignment of an agency worker, which was 24 months, was removed.[837] When compared with the regulation which had existed until then, there was a clear move towards deregulation,[838] which made it easier for employment agencies to operate and would be advantageous to clients as it brought about increased flexibility in the labour market. However, it resulted in decreased security for agency workers.

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[832] Waas *CLLPJ* (2012) 50. See also Weiss *BCLR* (2013) 113.
[833] First Act for Labour Services in the Labour Market (*Erstes Gesetz für moderne Dienstleistungen am Arbeitsmarkt*) BGB1. I 4607.
[834] Waas *IJCLLIR* (2003) 387.
[835] As above.
[836] Weiss *BCLR* (2013) 117. The author points out that this also had the effect that it became much easier for private employment agencies to obtain a licence due to the less strict regulation. Also, in respect of the prohibition which existed in respect of agency work in construction industries, this was not lifted by the 2003 amendments but was softened. There was also liberation in terms of administrative duties for agencies and clients which existed under the old regulation. A summary of the changes is also made by Waas *CLLPJ* (2012) 49 - 50.
[837] Waas *IJCLLIR* (2003) 392.
[838] However, Waas *IJCLLIR* (2033) at 393 argues that the deregulation may not have been as far-reaching as it appears. The reason for this is that the employment contract between the employment agency and the agency worker was still subject to the rules regarding fixed-term contracts in Germany. These rules included for instance, that a fixed-term employment contract can only be entered into where there is good cause for the contract duration being fixed. Also there was a maximum duration of a fixed-term contract, being two years, and a maximum amount of times a fixed-term contract could be renewed, being three times.

Germany's deregulated and more flexible labour market during the economic crisis of 2008 and 2009 may have contributed to the country not suffering significant economic damage and employment rose shortly thereafter.[839] In this context, Rinne and Zimmermann note that a particular "internal flexibility" contributed to Germany's success. They mention a reduction in the number of working hours per employee as opposed to the reduction in the number of employees which was achieved through so-called short-time work.[840]

Weiss explains that the trade-off to the deregulation of agency work was that equal treatment provisions in respect of essential working conditions and remuneration were introduced. For the duration of the placement at the client's workplace, agency workers were entitled to the same treatment as the client's employees.[841] The equal treatment requirement was not applicable if a collective agreement concluded between a trade union and employers' association or individual employer provided for different treatment. Notably, there was no limit to the "scope of deviation" from the principle of equal treatment in a collective agreement.[842]

In 2011 the German Federal Labour Court (*Bundesarbeitsgericht*) held that agency workers could not be subject to the working terms and conditions of the client without express consent in the contract of employment,[843] in other words, the terms and conditions applicable at the client were not automatically applicable to agency workers.

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[839] Allmendinger *et al* (2013) 32. Employment overall and atypical employment increased between 2008 and 2011. The authors of this discussion paper assess the labour market participation of different demographic groups and the influence of atypical employment thereon. Furthermore, see Rinne and Zimmermann *IZA JLP* (2012) for a discussion regarding how Germany's labour market had an effect on its "economic miracle" during the time of the recession.
[840] Rinne and Zimmermann *IZA JLP* (2012) http://izajolp.springeropen.com/articles/10.1186/2193-9004-1-3 accessed on 17 February 2016.
[841] Weiss *BCLR* (2013) 118. Remuneration includes not only the normal salary component but also additional employment "fringe" benefits.
[842] As above. For a discussion of trade unions at the time, see 118 – 119. In South Africa, current legislation provides for equal treatment under s 198A(5) of the LRA which states that "[a]n employee deemed to be an employee of the client in terms of subsection (3) (*b*) must be treated on the whole not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment." The legislation does not refer to collective agreements providing a limitation on the aforementioned right.
[843] German Federal Labour Court (*Bundesarbeitsgericht*) decision 5AZR 7/10 of 23 March 2011.

On 1 December 2011 Germany adopted the EU Directive on Temporary Agency Work 2008/104/EC ("Temporary Agency Work Directive") into the ATAW. Waas maintains that its adoption resulted in the further liberalisation of agency work in Germany.[844] As well as transposing the principles contained within the Temporary Agency Work Directive into German law, Weiss contends the 2011 amendments addressed a "scandal" that existed at the time.[845] Shortly before the 2011 amendments the practice arose whereby employees of companies would be dismissed and then hired by an agency which was set up within a group of companies to which the original employer company belonged, then workers would be placed with the same employer who had dismissed them. The arrangement was orchestrated purely to cut down on costs to employers.

2.2.4 Current Regulation and Anticipated Amendments

Germany currently requires that regulation must be in compliance with the Temporary Agency Work Directive.[846] The country is once again entering a phase of stricter regulation.

In describing what is required by the Temporary Agency Work Directive, Waas identifies that it established a *quid pro quo.* On one hand it removed certain statutory restrictions on employment agencies and on the other fortified the right to equal treatment for agency workers.[847] As a result, though the burden on employment agencies was lessened in terms of some restrictions, additional obligations of ensuring compliance with equality provisions were required. Even though agency workers' sense of security had been eroded through gradual deregulation they now enjoyed rights of equality.[848]

[844] Waas *CLLPJ* (2012) 50 views the Temporary Agency Work Directive as having an underlying purpose of deregulating temporary agency work. The change was reflected in an amendment of the ATAW, effective from 1 December 2011.
[845] Weiss *BCLR* (2013) 113. The 2011 amendment also addressed the situation of transnational temporary agency work, with agency workers from other EU countries being placed in Germany. The author describes that "social dumping" had to be prevented.
[846] See Chapter 4 for a discussion on the contents of the Temporary Agency Work Directive.
[847] Waas *CLLPJ* (2012) 47. The author examines the content of this *quid pro quo* further, being a deregulation of agency work combined with protection of agency workers.
[848] See Schlachter *IJCLLIR* (2012) for a discussion on the principle of equal treatment and agency workers within the EU who work cross-border.

A significant change was introduced in so far as it is now no longer possible for an agency worker to be assigned to a client for an indefinite period. Instead, such assignment needs to be "temporary" in nature:[849] the actual maximum duration was not defined and therefore is a point of debate.[850]

A minimum wage is now applicable to both unionised and non-unionised agency workers.[851] Furthermore, agency workers are assured of the right of access to information about vacancies within the client's organisation.[852] In line with the requirements of the Temporary Agency Work Directive, the law now requires agency workers to have access to collective facilities at the workplace, such as childcare, canteens and transport.[853]

Agency workers have experienced difficulties regarding social dialogue and collective bargaining in Germany. Union density amongst agency workers is low due to the fact that there is no particular industry sector under which agency work falls.[854] However, Voss *et al* mention that this situation has improved over recent years. There are company level agreements between an industry union and employment agencies which supply workers to that particular industry which establish minimum protections for agency workers.[855]

Spermann refers to another advantageous mechanism which will be introduced in favour of agency workers. The author explains that:

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[849] Weiss *BCLR* (2013) 120. Interestingly, trade unions have been one of the main proponents against having such indefinite assignments at a client in Germany. They argued that the agency workers would then be taking the place of standard employees of such clients.
[850] s 198A(1)(a) of the LRA in South Africa has sought to provide some guidance as to what constitutes "temporary". In this regard it appears that up to three months can be considered temporary in nature. s 198A of the LRA makes a distinction between agency workers employed for less than or more than three months. Up to three months is considered a "temporary service".
[851] Weiss *BCLR* (2013) 121. Note that the minimum wage applies even in-between assignments at clients, during times when the agency workers are not on assignment at a client.
[852] As above at 122. This allows for the possibility of agency workers to apply for such posts.
[853] As above.
[854] Voss *et a*l Final Report for the joint Eurociett / UNI Europa Project (2013) 161. The authors point out that the national social dialogue at play has been strongly focused on a minimum wage and also on increasing the rate of transitions from agency work into direct employment.
[855] As above at 162. There have also been initiatives by organisations to accredit unions on their fair working conditions and compliance in respect of agency work, as well as additional initiatives by unions to offer protections to workers in the form of information, newsletters, a hotline and support.

> "[i]n 2012 and 2013, several German trade unions and staffing industry confederations agreed to what are known as *Branchenzuschlagstarifverträge* – or, roughly, sector-specific surcharge collective labor agreements. These agreements, which will be effective through 2017, provide for the gradual equalization of wage differences between agency workers and permanent staff in the most important sectors served by temporary work agencies. After nine months of assignment to a user company, temporary agency workers now earn as much as an equivalent permanent staff member."[856]

Weiss makes the point that the inclusion of the principles contained within the EU Directive on Temporary Agency Work has served to counteract the effects of the era of deregulation and re-instil protections for agency workers and reinforce their rights of equal treatment when compared with employees of clients.[857]

Germany is currently in the process of amending its laws which regulate agency work. The changes debated at government level are available in the form of a Bill ("proposed 2017 amendments") (*Gesetzentwurf der Bundesregierung Entwurf eines Gesetzes zur Änderung des Arbeitnehmerüberlassungsgesetzes*).[858] On 1 June 2016 the German cabinet confirmed that the contents of the proposed 2017 amendments would be tabled in parliament for consideration, bringing the changes one step closer to realisation.[859] The proposed 2017 amendments are likely to become effective as from 1 January 2017.

The German government has expressed concern that there is still abuse of agency workers. A particular concern is that this category of work is often not temporary in nature.[860] Consequently, one of the main changes that will be brought about is the

[856] Spermann *IZA* (August 2013) 1. At 6 the author explains that "[t]he nine sector-specific surcharge collective labor agreements that have been concluded, each of which has a term of five years, have a basic structure that is oriented to growth in agency worker productivity at the placement company: there is a surcharge-free period (4–6 weeks), followed by a staggered increase in surcharges up to a maximum of 50% after a period of assignment of nine months to the same user company."
[857] In respect of additional protections against abuse, trade unions have sought to lobby against agency work in some industries such as the chemical and metal industries, as well as restrict the length of assignments at clients. See Weiss *BCLR* (2013) 122.
[858] The draft design for the proposed 2017 amendments can be found in the *Gesetzentwurf der Bundesregierung Entwurf eines Gesetzes zur Änderung des Arbeitnehmerüberlassungsgesetzes* of 1 June 2016.
[859] German Government Ministry for Labour and Social Affairs press release "Klare Regeln für Leiharbeit und Werkverträge - Bundeskabinett beschließt Gesetzentwurf, um Missbrauch zu verhindern" available at http://www.bmas.de/DE/Presse/Pressemitteilungen/2016/pk-leiharbeit-werkvertraege.html accessed on 2 June 2016.
[860] http://www.bmas.de/DE/Presse/Interviews/2015/18-11-2015-sueddeutsche-zeitung.html?cms_et_cid=2&cms_et_lid=20&cms_et_sub=19.11.2015_/DE/Presse/Interviews/2015/1

introduction of a maximum assignment period of 18 months.[861] Significant for the purpose of this study, if this period is exceeded, then the agency worker will become directly employed by the client unless the agency worker objects to such indefinite employment. The proposed 2017 amendments allow this objection in order to provide the parties with some form of sanctity of contract.[862]

It is argued that such an amendment could lead to a "revolving door" scenario in terms of which employment agencies rotate their workers with particular clients before the end of the 18-month period so as to avoid exceeding the envisaged maximum duration, which is counter-productive for an agency worker who develops a good relationship with a client in the hope of obtaining future direct employment. The opposite could result as clients will be aware that should they wish to retain a particular agency worker at their company in the longer term, direct employment is the only alternative.

An aspect of the proposed 2017 amendments which is clear is that the agency worker has the right to object to direct employment with the client. Often the assumption is that direct employment is beneficial to the worker rather than employment with an employment agency. The agency worker retains the right to choose: they may even feel empowered knowing that they cannot be automatically transferred to a client, but have a choice should the assignment exceed 18 months. It is submitted that this provision will be beneficial to agency workers in so far as they have a choice.[863]

8-11-2015-sueddeutsche-zeitung.html accessed on 16 February 2016. Minister Andreas Nahles explains that in the auto industry for instance, some agency workers have been placed at a client for durations of eight years. The new law will limit the duration.

[861] Article 1, 1. c) (1b) of the proposed 2017 amendments. In South Africa under the current regulation the maximum duration under which agency work is considered a "temporary service" is three months in terms of s 198A(1) of the LRA. This is significantly shorter than an 18 month period. See the discussion in Chapter 7 at 2.6.

[862] Happ and van der Most "Regulation of temporary agency work and contracts for work I - what companies can expect under the new draft bill" available at http://www.noerr.com/en/press-publications/News/regulation-of-temporary-agency-work-and-contracts-for-work-i.aspx accessed on 2 June 2016.

[863] In South Africa s 198A of the LRA does not provide for such a mechanism where agency workers can choose whether they are transferred to direct employment with a client or not. The legislation as it stands makes such transition automatic after three months as long as certain circumstances exist.

Another important amendment relates to equality of pay.[864] An agency worker will have the right to be paid the same as a comparable employee of the client within nine months of the placement. On the face of it, provisions which bring about equality for agency workers are positive for agency workers however this amendment could bring about increased costs for clients and may act as a deterrent to using agency workers. The long-term effect of this amendment remains to be assessed: agency workers may opt to be paid a minimum wage and have a job rather than having no income whatsoever because they have become too expensive due to the equal pay requirement.

The proposed 2017 amendments suggest that work councils will be informed about the duration, place and duties of an assignment with a client.[865] The work councils will be entitled to inspect the contracts which make up such assignments. These changes amass a significant amount of data for the councils which could be useful in identifying and preventing abuse in the future.

Moreover, the proposed 2017 amendments suggest that agency workers will not be allowed to be allocated to a client during times of industrial action.[866] The reasoning behind this is that it will prevent an employer escaping the effects of industrial action and will force the employer to address labour disputes rather than sourcing other workers to perform the duties of striking employees.

2.3 Labour Market Policy in Germany

According to Spermann, the use of flexible forms of work in Germany is increasing and it accounts for over a quarter of the working population.[867] Helfen explains that

[864] Article 1. 3. (1) – (5) of the proposed 2017 amendments. Also see Arbeitsschutz Portal.de "Leiharbeit: Kommt 2017 das neue AÜG?" available at http://www.arbeitsschutz-portal.de/beitrag/asp_news/4736/leiharbeit-kommt-2017-das-neue-aueg.html accessed on 6 June 2016.
[865] See also Happ and Van der Most "Regulation of temporary agency work and contracts for work I - what companies can expect under the new draft bill" available at http://www.noerr.com/en/press-publications/News/regulation-of-temporary-agency-work-and-contracts-for-work-i.aspx accessed on 2 June 2016.
[866] See also Jordan and Moritz "Proposed statutory 're-regulation' of temporary employment" available at http://www.lexology.com/library/detail.aspx?g=9de120d0-5b50-4a72-b72c-338976eac579 accessed on 2 June 2016.
[867] Spermann *IZA* (October 2013) 4. The author states that "[i]n terms of atypical employment in Germany, the four most common types of jobs, according to 2011 data from the Federal Statistical Office are: part-time work (more than 5 million), fixed-term employment (2.8 million), minijobs (2.7

since the post-war period in Germany, employment agencies have lobbied the legislature in a "rather hostile regulatory environment" by shifting from presenting agency work as an "instrument of flexibilization to depicting it as a solution to integrate excluded groups without negative effects for other groups in the labor market."[868]

In describing the current status of Germany's labour market, the author mentions that:

> "the country was able to deal with the crisis thanks to three features of its labor market: (1) internal flexibility within firms (i.e. collective labor agreements to adjust working hours, i.e. with working-time accounts); (2) external flexibilization instruments (legal provisions for part-time work, 'minijobs,' fixed-term employment contracts and temporary agency work); and (3) the labor market policy tool of providing subsidies for short-time work (*Kurzarbeitergeld*)."[869]

In Germany agency work has a higher than average turnover rate of agency workers and the duration of each placement is relatively short. In 2012, the average length of employment was 10.3 months.[870] Spermann describes the effects of a labour market policy of increased flexibility in the following manner:

> "[f]ollowing deregulation of temporary agency work as part of the Hartz reforms, which allowed for divergence in pay between permanent staff and agency workers, the scope of temporary agency work tripled in Germany within ten years – from 300,000 to about 900,000 temporary agency workers among a total employed work force of nearly 42 million. Since deregulation, some two thirds of

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million) and temporary agency work (775,000). Overall, atypical employment thus accounted for nearly eight million workers in 2011 – more than a quarter of all employed individuals."

[868] Helfen *OS* (2015) 401.

[869] Spermann *IZA* (October 2013) 1 further state that "[f]lexible forms of employment have become ever-more important in Germany over the past ten years; the working population has risen to nearly 42 million while unemployment has fallen to about 3 million, and structural unemployment has begun to decrease for the first time in decades. The economic and financial crisis of 2008–9, which hit the export-nation Germany especially hard, causing a five-percent drop in GDP, scarcely left its mark on the labor market. Foreign observers marveled at the robustness of the German labor market, and were amazed at Germany's successful institutional mix: despite maintaining a high level of dismissal protection when compared to other nations." See Spermann *IZA* (October 2013) for a discussion of the effects of atypical work on agency workers in Germany. The study includes their job satisfaction and commitment, health and employability, social participation and effects on personal life. See also Bornewasser and Manfred (2011).

[870] Spermann *IZA* (October 2013) 12. The author states that "[a]lmost half of the employment relationships end in fewer than three months, and in fact, nine percent last less than a week. This reflects the great dynamism of agency work in the form of a turnover rate that is far above average: in the second half of 2012, 481,000 new agency work relationships were initiated and 658,000 agency work relationships were terminated (see Federal Labor Agency 2013a)."

> temporary agency workers have come directly from unemployment or non-employment, meaning they use temporary agency work as their point of entry to the labor market."[871]

Despite this growing trend it seems that agency work is being used as an entry point to standard employment[872] even though short periods of employment remain the norm. In comparison with unemployment, agency work is preferable offering an income and work experience and an opportunity to enter permanent employment.[873] As from 1 January 2015, Germany implemented a general minimum wage of €8.50 per hour for all employees.[874] This could result in fewer new jobs being created due to increased costs to employers.

Schäfer confirms a policy shift which reflects a move towards stricter regulation, which the author believes is likely to hamper the purpose of agency work.[875] It remains to be seen what changes will be implemented by the government and what the effect will be, both from the employment agency's perspective and from the point of view of agency workers.

Therefore, considering the underlying policy approach, it is clear that after a period of deregulation, Germany will be regulating agency work more strictly.[876] Recently, Ferreira found that deregulation of agency work in Germany has acted as a "spark for development" but that the government "acted to protect temporary agency workers from abuse through introducing regulations on pay and conditions."[877]

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[871] As above at 14.
[872] Voss *et al* Final Report for the joint Eurociett / UNI Europa Project (2013) 13 refer to the fact that in Germany the "adhesive effect" of agency workers sticking with and becoming employed directly by a client is about five to 20 percent. Also at 12 the authors state that in Germany in 2011 more than 60 percent of those starting in agency work were either unemployed or had never worked before. This reflects how agency work in Germany has been a mechanism for transitioning from unemployment into employment.
[873] For a study on whether temporary work is in fact better than unemployment see Gebel and Michael *SOEP Paper* (2013). At 21 they find in a comparative study that in Germany there is a stronger chance of transitioning from temporary work to permanent work, showing a benefit of temporary work over unemployment.
[874] German Government Ministry for Labour and Social Affairs press release "Minimum wage in effect" http://www.bmas.de/EN/Services/Press/recent-publications/2015/minimum-wage-in-effect.html accessed on 17 February 2016.
[875] Schäfer (2015) 86.
[876] See *Diskussionsentwurf des Bundesministeriums für Arbeit und Soziales, Entwurf eines Gesetzes zur Änderung des Arbeitnehmerüberlassungsgesetzes und andere Gesetzes* 16.11.2015 for details on the proposed amendments.
[877] Ferreira *EURS* (2016) 15.

Agency work should purposefully be temporary in nature. The 18-month provision aims to elevate agency workers into indefinite employment with clients. Equal pay provisions further aim to assist agency workers to reach the same level of pay as comparable workers in a relatively short period.

2.4 Comparing German Regulation and International Norms

Germany's regulation of agency work is compared with ILO and EU norms so as to offer guidance as to how South Africa can achieve compliance with international standards.

A combined set of standards were identified in Chapter 6 which are used for the purpose of conducting this comparison. They are, first, employment agencies should be allowed to operate, second, agency work should be temporary in nature, third, agency workers should be entitled to the right of equal treatment, fourth, agency workers should be provided the rights of freedom of association and collective bargaining, fifth, tripartism and social dialogue should be strengthened, sixth, agency workers should not be charged fees and costs, seventh, there should be a clear allocation of the respective responsibilities of the employment agency and the client, eighth, agency workers should be provided the right of access to collective facilities and vocational training at the client and, ninth, agency workers should not be prohibited from direct employment with a client.[878]

With regard to Germany's compliance it can be remarked, firstly, it is clear that employment agencies are permitted to operate in Germany. Secondly, agency work is temporary in duration and this standard shall be reinforced through the proposed 2017 amendments on maximum duration.[879]

Thirdly, equal treatment is provided for in Germany and will be reinforced through the equal pay provisions in the amendments,[880] therefore Germany is compliant.[881] The

[878] See Chapter 6 at 5.
[879] Article 1, 1.c) (1b) of the proposed 2017 amendments.
[880] Article 1. 3 (1) of the proposed 2017 amendments.
[881] Waas *CLLPJ* (2012) 52 discusses the principle of equal treatment under German law after the transposition of the Temporary Agency Work Directive into the national law.

proposed 2017 amendments will further consolidate equal treatment of agency workers.

Fourth, agency workers are afforded the rights of freedom of association and collective bargaining. Fifth, regarding the norm of tripartism and social dialogue being strengthened Germany is compliant. Collective agreements are concluded between trade unions and staff confederations, as well as between unions and companies in particular sectors: these agreements account for minimum pay and other minimum conditions of employment. However, evidence suggests that trade union density rates are decreasing which could cause Germany to fail to meet the required standard.[882]

Sixth, German law is compliant regarding the standard that agency workers should not be charged fees or costs. Seventh, in respect of the norm of ensuring a clear allocation of respective responsibilities between the employment agency and client, the German framework provides a clear allocation of rights and duties. Eighth, German labour law provides for access to collective facilities and vocational training and meets this international standard.[883]

Finally, in respect of preventing a prohibition on direct employment with a client, the proposed 2017 amendments will provide for direct employment after 18 months.[884] Transitioning into direct employment with a client will be strengthened by this measure. The regulation of agency work in Germany is geared largely towards preventing abuse of agency workers: the proposed 2017 amendments to the ATAW confirm this principle.[885] The mechanism of direct employment with clients after 18 months will reinforce protection of agency workers in Germany.

[882] Voss *et a*l Final Report for the joint Eurociett / UNI Europa Project (2013) 161.
[883] Weiss *BCLR* (2013) 122 makes reference to this particular change in the law in accordance with the requirements of the EU Directive on Temporary Agency Work 2008/104/EC.
[884] See Chapter 7 at 2.2.4.
[885] German Government Ministry for Labour and Social Affairs press release "Klare Regeln für Leiharbeit und Werkverträge - Bundeskabinett beschließt Gesetzentwurf, um Missbrauch zu verhindern" available at http://www.bmas.de/DE/Presse/Pressemitteilungen/2016/pk-leiharbeit-werkvertraege.html accessed on 2 June 2016. The press release makes it clear that the proposed 2017 amendments are to curb abuse in respect of agency work.

2.5 Comparing Germany and South Africa

When comparing the regulation of agency work in Germany and South Africa, it is clear there are differences as well as similarities. The comparison enables prominent features to emerge, which is useful in considering an adapted model for South Africa.

The most notable similarities are, first, employment agencies are permitted to operate,[886] second, although agency work is permitted, both countries are moving towards ensuring that it is temporary in nature[887] and, third, agency workers are entitled to additional protections such as the rights to freedom of association,[888] the right to bargain collectively,[889] and the right to equal treatment.[890]

The main differences are, first, in terms of the proposed 2017 amendments agency work in Germany will be permitted for a period of 18 months. In South Africa, section 198A of the Labour Relations Act 66 of 1995 ("LRA") defines a "temporary service" as work for a client not exceeding three months. Both countries impose a limit on the duration of employment with an employment agency, but it is suggested that South Africa could adopt a longer period which will enable employment agencies to operate for a lengthier period and will create more flexibility for clients and increase the chances of employment agencies being utilised. A relatively short duration, namely three months, is likely to deter clients from using employment agencies. In addition, the longer period will provide the agency worker with more time during which an assessment can be made whether they would agree to a transfer to permanent employment.

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[886] Germany's current regulation allows for the operation of employment agencies. See Chapter 7 at 2.2.4. Similarly, South Africa's regulation also allows for the operation of employment agencies. In this regard see Chapter 6 at 3.3.
[887] Germany's proposed 2017 amendments will likely limit duration to 18 months. See Chapter 7 at 2.2.4. South Africa's amendments limit agency work duration to three months under certain circumstances. See Chapter 6 at 3.3.
[888] See Chapter 3 at 3.3 See also Article 4 of the ILO Private Employment Agencies Convention, 1997 (No 181).
[889] As above.
[890] See Chapter 3 at 3.3 See also Article 5 of the ILO Private Employment Agencies Convention, 1997 (No 181). Furthermore, see Chapter 4 at 2.2. See also Article 5 of the EU Directive on Temporary Agency Work 2008/104/EC.

Second, no threshold applies, in Germany the 18 month limit will apply to all agency workers irrespective of the remuneration they receive.[891] Whereas in South Africa section 198A of the LRA applies only to employees earning below a particular threshold amount.[892] It is asserted that the distinction created by the threshold amount under South African law may lead to higher-income earners being disadvantaged in that they do not enjoy the increased protections under section 198A. This thesis argues that additional protections should be afforded to higher earning employees.

Third, the proposed 2017 amendments will allow for an agency worker to object to direct employment with a client after the 18-month period.[893] South African legislation does not offer an agency worker with a choice: an agency worker becomes directly employed with a client after three months. The German mechanism may be to the advantage of agency workers and could be adopted in South Africa.

The fourth difference relates to the "deeming provision".[894] In this regard, it must be highlighted that the ambiguities of the South African law has led to a situation where it is unclear whether the employment agency or the client bears the obligations of the employer after the first three months. The German proposals do not express such confusion: employer obligations lie first with the employment agency and after a period of 18 months with the client. The German model could be an example to be followed in South Africa.

Fifth, German law specifically provides agency workers with the right of access to collective facilities and vocational training.[895] In South Africa, legislation does not explicitly provide these entitlements to agency workers, at most it provides lower-earning agency workers with the right to equal treatment.[896] Taking its cue from

[891] Article 1, 1. c) (1b) of the proposed 2017 amendments.
[892] s 198A(2) of the LRA states that "[t]his section does not apply to employees earning in excess of the threshold prescribed by the Minister in terms of section 6 (3) of the Basic Conditions of Employment Act."
[893] Article 1, 1. c) (1b) of the proposed 2017 amendments.
[894] s 198A of the LRA.
[895] Weiss *BCLR* (2013) 122 makes reference to this particular change in the law in accordance with the requirements of the EU Directive on Temporary Agency Work 2008/104/EC.
[896] s 198A(5) of the LRA.

German law, the South African model could be improved with the inclusion of these rights for agency workers irrespective of their level of remuneration.

The German policy approach is one that views agency work as a stepping-stone into both indefinite and direct employment with a client. South Africa's legislation has provision for the agency worker to transfer to direct employment with a client but nothing precludes an employment agency from restricting such a transfer.[897]

3. Namibia

3.1 Introduction

Namibia has been chosen as the second country for comparison with South Africa for several reasons. First, it is fitting to consider the position of another country situated within the Southern African Development Community ("SADC")[898] and the African Union.[899] Second, Namibia is a developing country and it borders on South Africa. Third, Namibia's Constitution of 1990 is similar in many respects to the Constitution of the Republic of South Africa, 1996 ("Constitution, 1996"). Finally, as discussed in this chapter, Namibia has recently implemented significant policy changes in respect of the regulation of agency work.

[897] The gradual nature of the German approach is facilitated by the longer duration under the ATAW before direct employment at a client. The clarity of the German approach is due to unambiguous drafting in the ATAW.

[898] According to the official SADC website "[i]n 1992, Heads of Government of the region agreed to transform SADCC into the Southern African Development Community (SADC), with the focus on integration of economic development. SADC members are Angola, Botswana, DR Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe." In respect of the purpose of SADC the website states that "[t]he SADC Treaty was signed to establish SADC as the successor to the Southern African Coordinating Conference (SADCC). This Treaty sets out the main objectives of SADC - to achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa and support the socially disadvantaged through regional integration. These objectives are to be achieved through increased regional integration, built on democratic principles, and equitable and sustainable development." Available at http://www.sadc.int/about-sadc/overview/history-and-treaty/ accessed on 3 June 2016.

[899] South Africa became a member state of the African Union on 6 June 1994 and Namibia became a member state in June 1990. The African Union aims to accelerate integration and unity on the African continent and to address social, economic and political problems faced by member states. The organs of the African Union include the Assembly, the Executive Council, the Commission, a Pan-African Parliament as well as the Court of Justice. Available at https://www.au.int/en.about/nutshell accessed on 20 January 2017.

3.2 Brief History of Regulation of Agency Work in Namibia

The history of the regulation of agency work in Namibia is reviewed according to eras during which important developments in terms of increased flexibility or workers' security are identified. For the sake of brevity and relevance to the overall study, focus is not on an explanation of the Namibian legal system but rather on significant aspects pertaining to agency worker protection.

It should be noted that despite Namibia's and South Africa's membership to the SADC and the African Union, both of these international organisations do not provide for regulation of agency work.[900] The lack of regional labour regulation in Africa can be attributed to a number of difficulties faced by states.[901] Enforcement of compliance with international labour standards on the continent is challenging due to no effective monitoring or penalties existing.[902]

3.2.1 Pre-2007

Benjamin writes that agency work originated in Namibia around 1990 when a large South African employment agency dominated the industry.[903] In 1990 Namibia became independent from South Africa and shortly thereafter, in 1992, the first labour legislation was promulgated in the form of the Namibian Labour Act 6 of 1992

[900] Although no regulation exists at SADC or African Union level, the long history of international migration in Southern Africa led to the SADC forming its SADC Labour Migration Action Plan in 2013. This seeks to regulate the protection of migrant labourers moving between the countries. Available at www.miworc.org.za/docs/MiWORC-PolicyUpdate-1-Adoption-of-SADC-Labour-Migration-Policy-Framework.pdf accessed on 20 January 2017. Besides this form of regional labour regulation, albeit not in respect of agency work, the SADC Protocol on Employment and Labour, 2014 has sought to serve as a legal framework for the cooperation of SADC member states on matters regarding employment. Both South Africa and Namibia have endorsed this protocol. However no member state has yet ratified the protocol. Article 3 and 4 contain the objectives of the SADC Protocol on Employment and Labour, 2014 and provides for the achievement of minimum labour standards, social protection, and creating social dialogue. Article 5(2) confirms that member states should ratify and implement all ILO core conventions. The topic of agency work is not expressly mentioned in the instrument.

[901] Smit *JLSD* (2015) 184 provides a list of reasons why a synchronised system of co-ordination of African countries is problematic to achieve. The reasons include massive differences between member states at an economic development level, with regards to "the rule of law, levels of social development, free market principles and democracy".

[902] Olivier *et al* (2013) 250 state that although in the SADC, the Southern African Development Community Treaty, 1992 does provide sanctions for members who persistently fail to fulfil obligations under the Southern African Development Community Treaty, 1992, there is no political will to enforce such sanctions. Saurombe *PER* (2012) 478 discusses the role of SADC institutions in implementing the Southern African Development Community Treaty, 1992 provisions and finds that the SADC "have a poor record with regards to implementation."

[903] Benjamin (2012) 202 mentions that by the mid-2000s there were approximately 10 employment agencies in Namibia.

("NLA of 1992").[904] Significantly, the NLA of 1992 did not refer to employment agencies or agency workers at all and consequently agency work was not regulated.[905] Since agency work was not accounted for in legislation, it grew in usage in Namibia.[906]

During this era the Namibian government conceptualised, but failed to implement, new labour legislation for the country. The Namibian Labour Act 15 of 2004 ("NLA of 2004") was published but never became operational which left the NLA of 1992 in place.[907]

The envisaged NLA of 2004 included a single section on agency work in a chapter entitled "General Provisions". Section 126 defined agency work and stipulated that the employment agency would be the employer of the agency worker.[908] Joint and several liability between the agency and the client was provided for in situations where there is a contravention of a collective agreement, arbitration award, or the sections of the legislation covering fundamental protections and basic conditions of employment.[909] Section 126(4) of the NLA of 2004 provided that agencies would need to offer employment on terms which are compliant with basic conditions in the legislation. The NLA of 2004 also envisaged penalties for contraventions of section 126.[910]

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[904] Van Eck *IJCLLIR* (2014) 58.
[905] As above. The author notes that this early legislation did strengthen the rights of workers in formal employment relationships but that there were no provisions on agency work.
[906] Botes *PER* (2013) 506.
[907] NLA of 2004 available at http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=71211 accessed on 11 April 2016.
[908] See s 126(1) of the NLA of 2004 which defined "employment hire service", as "any person who for reward, procures for or provides to a client, individuals who, render services to, or perform work for, the client; and are remunerated either by the employment hire service, or the client." s 126(2) stipulated which party is the employer and states that "[f]or all purposes of this Act, an individual whose services have been procured for, or provided to, a client by an employment hire service is the employee of that employment hire service, and the employment hire service is that individual's employer."
[909] s 126(3) of the NLA of 2004 stated that "[t]he employment hire service and the client are jointly and severally liable if the employment hire service, in respect of any of its employees, contravenes a collective agreement; a binding arbitration award that regulates terms and conditions of employment; or Chapter 2 or 3 of this Act." Chapter 2 of the NLA of 2004 covered fundamental rights and protections and Chapter 3 of the NLA of 2004 provided for basic conditions of employment.
[910] The legislation provided for a fine for the agency up to a maximum amount and / or imprisonment up to a period of two years.

The failure to implement NLA of 2004 meant there was no change but the government of Namibia had identified the need to address shortcomings surrounding agency work and the abuses associated with its practice: government saw the need to provide agency workers with some form of protection under the law.

3.2.2 2007 until 2012

Significant development occurred subsequent to the era of non-regulation of private employment agencies in Namibia. Even though the NLA of 2004 gave indication of how the government intended regulating agency work, there was a far-reaching policy shift away from what might have been expected. To understand this shift, it is necessary to refer to the history leading up to the changes brought about in 2007.

Namibia has a history of racial discrimination and oppression.[911] Botes explains that one of the only options for many people to find work was to submit themselves to the "contract labour system in search of work".[912] Indigenous Namibians were classified according to particular criteria, and were available to companies according to a contract which provided for only minimum wages.[913] In essence, this was an agency work arrangement, associated with a racist past and, in general, it imposed poor conditions on the workers.[914]

It was apparent to the Namibian government that the contract hire system described above could not be separated from traditional forms of agency work. All agency work was so strongly associated with the system of contract hire that an outright ban was imposed on agency work. In an important development, the Namibian Labour Act 11 of 2007 ("NLA of 2007") provided that "[n]o person may, for reward, employ any person with a view to making that person available to a third party to perform work

[911] Botes *PELJ* (2013) 509 – 510. The author states that one's position and treatment in society was determined by race. Van Eck *IJCLLIR* (2014) 57 makes the point that the policies in both countries have been formulated within similar social and political contexts. These include: government by a predominantly white minority; the white population exercised political and economic control until the early 1990s; and first democratic elections created the beginning of change as well as the promulgation of constitutions.
[912] As above. The laws included those on prohibited areas, limited freedom of movement, carrying of passes and adhering to a curfew.
[913] As above at 511.
[914] As above at 511 – 513. The author alludes to the fact that the employees were provided with one t-shirt, one pair of shorts and one blanket, for the entire duration of employment. They were limited to stay at the client's premises. Contact with their families was not allowed. Added to this, the client could determine what the punishment would be for any transgressions.

for the third party".[915] The NLA of 2007 stipulated that a contravention of the section would attract a penalty.[916]

The Namibian government's justification for its decision can be drawn from section 128(4) of the NLA of 2007 which stated that:

> "[i]n so far as this section interferes with the fundamental freedoms in Article 21(1)(j) of the Namibian Constitution, it is enacted upon the authority of Sub-article 2 of that Article in that it is required in the interest of decency and morality."[917]

Van Eck confirms that the reasoning behind the prohibition can be ascribed to the Namibian parliament's understanding that agency work should be regarded in the same light as attempting to regulate slavery.[918] Jauch states that it was the "perceived similarities between the colonial migrant labour and post-colonial labour hire" which led the government to put in force a prohibition.[919] Trade unions welcomed the decision, but employer organisations contested the prohibition of agency work.[920]

In 2008, the largest private employment agency in Namibia, namely Africa Personnel Services, challenged the constitutionality of the ban in the High Court.[921] The basis for the application was the premise that section 128 of the NLA of 2007 was inconsistent with the fundamental freedom to "carry on a trade or business" as guaranteed by Article 21(1)(j) of the Namibian Constitution.[922] The High Court dismissed the application and found that agency work has no legal basis in Namibia

[915] s 128(1) of the NLA of 2007.
[916] s 128(3) of the NLA of 2007 made provision for either a financial penalty, or imprisonment, or both.
[917] It is to be noted that despite the ban on agency work, Article 21(1)(j) of the Constitution of Namibia of 1990 states that "[a]ll persons shall have the right to practise any profession, or carry on any occupation, trade or business." Sub-article 2 of Article 21 states that "[t]he fundamental freedoms referred to in Sub-Article (1) hereof shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said Sub-Article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."
[918] Van Eck *IJCLLIR* (2014) 59.
[919] Jauch (2010) 6.
[920] As above at 1.
[921] *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others* A 4/2008. This resulted in s 128 being challenged and therefore not being implemented at the same time as the rest of the provisions of the NLA of 2007.
[922] *Africa Personnel Services* para 11.

and that it was unlawful, and the court alluded to the fact that in some respects agency work was similar to slavery.[923]

The High Court decision was taken on appeal to Namibia's Supreme Court ("NSC") in 2009.[924] The NSC lifted the ban on agency work on the basis that the ban was unconstitutional.[925] The NSC stated that:

> "[t]he prohibition is tailored much wider than that which reasonable restrictions would require for the achievement of the same objectives and is disproportionately severe compared to what is necessary in a democratic society for those purposes. Even if a generous margin of appreciation would be allowed in favour of Parliament, as the respondents urge us to do, the unreasonable extent of the prohibition's sweep would still fall well outside it."[926]

Especially relevant for purposes of this study is that the NSC was heavily influenced by ILO standards pertaining to agency work. In this regard the NSC stated that the Private Employment Agencies Convention does not prohibit agency work and it recognises that it poses "no real threat to standard employment relationships or unionisation and greatly contribute to flexibility in the labour market".[927]

The NSC highlighted the benefits of agency work: it held that it could "enhance opportunities for the transition from education to work by workers entering the market for the first time and facilitate the shift from agency work to full-time employment".[928] It added that those who are unemployed improve their chances of earning an income in the interim through agency work. Furthermore, the NSC stated that there are

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[923] *Africa Personnel Services* para 38. In essence it was held that only a business or trade that is lawful can claim protection. The Court further stated that "the core nature and character of labour hire partake of some of the aspects of letting and hiring of slaves as chattels under Roman Law, and, therefore cannot have a lawful place in Namibia."
[924] *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others* [2011] 1 BLLR 15 (NmS).
[925] Van Eck *ICCLLIR* (2014) 59.
[926] *Africa Personnel Services* para 118 refers to the fact that agency work may be regulated instead of having an outright ban in place by stating the example of "the wide-ranging regulative measures introduced in other democratic societies to demarcate the areas of economic activity and the categories of employees in relation to which agency work" and that this may "effectively regulate agency work in Namibia without compromising the objects of the Act or the legitimate objectives of 'decency and morality' in Article 21(2) of the Constitution."
[927] *Africa Personnel Services* para 117.
[928] As above.

those, who by choice, prefer the more flexible working arrangements offered by agency work.

Subsequent to this decision in 2010 the government made it known that agency work would be strictly regulated.[929] The Employment Services Act 8 of 2011 ("NESA") and the Labour Amendment Act 2 of 2012 ("NLAA of 2012") were enacted.

Benjamin makes the point banning agency work would be futile due to constitutional challenges.[930] He adds, one cannot expect labour law to "assert traditional standard employment as the norm" and to regulate all forms of employment relationships.[931] He argues instead for legislation to provide protections which are consistent with constitutionally entrenched rights.[932]

3.2.3 Current Regulation

The NLAA of 2012 amended portions of the NLA of 2007. Botes is of the opinion that the main aim of the provisions regulating agency work in the NLAA of 2012 was to provide protection to agency workers and to allow them the full rights as granted to other employees in terms of the NLA of 2007.[933] In this regard, agency workers in Namibia are entitled to fundamental rights and protections,[934] basic conditions of employment,[935] protection against unfair dismissal,[936] protection against unfair labour practices,[937] health and safety rights,[938] and rights of freedom of association and collective bargaining.[939] Section 128(3) of the NLA of 2007 provides that agency workers have the "same rights as any other employee in terms of this Act". At face value, the level of protection of agency workers through legislation is currently the same as for any other employee.

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[929] Jauch (2010) 8. The announcement was made soon after a meeting of the cabinet on 26 January 2010.
[930] Benjamin (2012) 209.
[931] As above.
[932] As above. The author adds that this will help to stop the "race to the bottom" which is driven by the use of non-standard forms of work.
[933] Botes *PELJ* (2013) 521. See 521 – 524 for a summary of the current regulation of agency work in Namibia.
[934] Chapter 2 of NLA of 2007.
[935] Chapter 3 of NLA of 2007.
[936] Chapter 3 Part F of NLA of 2007.
[937] Chapter 5 of NLA of 2007.
[938] Chapter 4 of NLA of 2007.
[939] Chapter 6 of NLA of 2007.

The Namibian government expressed the view that the amendments seek to give effect to the ILO concept of decent work. In a media briefing held shortly before the amendments came into force, the government stated that:

> "[t]his legislation has introduced, among other thing[s], basic minimum conditions of employment, protection of health and safety at the workplace, and the requirement of fair dismissal. In addition to legislation, the Ministry of Labour and Social Welfare has set as its objective the achievement of Decent Work for all, in line with the Decent Work Agenda of the International Labour Organisation."[940]

An example of the comprehensive rights now provided to agency workers is contained in section 128(4) of the NLA of 2007, which provides that:

> "[a] user enterprise must not –
> (a) employ an individual placed by an employment agency on terms and conditions of employment that are less favourable than those that are applicable to its incumbent employees who perform the same or similar work or work of equal value;
> (b) differentiate in its employment policies and practices between employees placed by a private employment agency and its incumbent employees who perform the same or similar work or work of equal value."[941]

This provision fortifies an agency worker's right to equal treatment when compared to employees of the client performing similar work or work of equal value. Furthermore, a client may not differentiate in policies or practices between its own employees and those placed by the employment agency.

The rights regarding collective bargaining are accounted for in section 128(3) of the NLA of 2007, agency workers have the right to join a trade union and be represented by a trade union in collective bargaining with their employer.

[940] Media briefing by the Namibian Minister of Labour and Social Welfare Immanuel Ngatjizeko on 26 July 2012.
[941] Should there be a contravention of this provision, an aggrieved party may approach the Labour Commissioner in terms of s 128(6) to seek a remedy, which remedy may include monetary compensation; an order to take action or refrain from a certain action; and any other remedy that the Labour Commissioner deems appropriate. The penalty for contravention of s 128(4) can include a fine or imprisonment or both, according to s 128(7).

The current Namibian framework clearly indicates where employer responsibilities lie. Section 128(2) of the NLA of 2007 states that:

> "[f]or the purposes of this Act and any other law, an individual, except an independent contractor, whom a private employment agency places with a user enterprise, is an employee of the user enterprise, and the user enterprise is the employer of that employee."

In terms of Namibian law it is possible for the client to be exempted from becoming the employer only if all parties are in agreement and the Minister of Labour foresees no prejudice to the employee's rights.[942] There is no dual employment in place and, subject to the exception, employer duty lies squarely on the client. In comparison with ILO and EU regulation and the regulation in other countries, such as South Africa and Germany, this approach is uncommon.[943]

The position is clear as to which party is the employer the allocation of the employer status to the client creates severe obstacles to employment agencies. As confirmed by the NSC clients utilise an employment agency so as to have a measure of flexibility. With the Namibian legislation dictating that clients become employers of agency workers, it is argued in these circumstances clients will not employ agency workers. In effect, the employment agency merely becomes a placement agency: it places the agency worker with the client who becomes the sole employer of the agency worker. Even though agency work is not explicitly banned in Namibia, the legislation creates a situation which makes it almost impossible for employment agencies to operate.

In line with this view, Botes recently expressed that:

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[942] Botes *PELJ* (2013) 522 and s 128 of NLA of 2007 as amended.

[943] In respect of the ILO regulation of agency work, the ILO Private Employment Agencies Convention, 1997 (No 181), whilst not indicating or dictating which party is to be the employer party, makes reference to agency workers "employed by" private employment agencies. Such references can be seen in Article 11 and 15 as an example. In respect of EU regulation of agency work, the EU Directive on Temporary Agency Work 2008/104/EC, Article 1(1) states as follows "[t]his Directive applies to workers with a contract of employment or employment relationship with a temporary-work agency who are assigned to user undertakings to work temporarily under their supervision and direction." This reflects at the outset that the common practice is for the employment agency to be the employer party of the agency workers. In respect of South African regulation, s 198 of the LRA provides that the employment agency is the employer party. Similarly in Germany, the ATAW makes reference to the employment agency as the employer.

> "[s]hould the client be regarded as the employer, it would defeat the purpose of promoting flexibility, as the client would need to comply with all labour legislation, observe all employer duties, and may dismiss the employees only in terms of restrictive labour legislation."[944]

The author adds that labour market flexibility will be diminished in its totality and this could lead to job losses as clients will be forced to remunerate all their employees equally. Fudge and Strauss, in indicating the limited activities of employment agencies, consider that:

> "given the fact that an employee will become an employee of the user enterprise as soon as they commence work for it, the employment agencies can do no more than recruit on behalf of the user enterprise. In other words, the regulatory regime introduced in Namibia will have the result that agencies can only perform the first two standard functions. The inclusion of this change of definition is either an indication of conceptual confusion or an attempt to prohibit labour hire by stealth."[945]

With regard to other statutory provisions regulating agency work in Namibia, Part IV of the NESA provides for the registration of private employment agencies. The NESA prevents discrimination by agencies in advertisement, recruitment or placement.[946] Agencies may also not place workers at a client with an outstanding compliance order in respect of a contravention.[947] These NESA provisions bolster the protection of agency workers, especially when read together with the rights contained in the NLAA of 2012.

3.3 Labour Market Policy in Namibia

As reflected in the history of the regulation of agency work in Namibia, the policy approach towards agency work has changed drastically over a relatively short period. It has evolved from a position where there was no regulation to an absolute ban and to strict regulation. The *African Personnel Services* decision aptly describes the government's policy perspective behind the initial total ban on agency work. The NSC stated that:

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[944] Botes *SALJ* (2015) 115.
[945] Fudge and Strauss (2014) part 6.
[946] s 26(1) of NESA.
[947] s 26(2)(a) of NESA.

> "[i]n Namibia, the expression 'labour hire' is loaded with substantive and emotive content extending well beyond its ordinary meaning. …So regarded, it constitutes one of the deeply disturbing and shameful chapters in the book of injustices, indignities and inhumanities suffered by indigenous Namibians at the hands of successive colonial and foreign rulers for more than a century before Independence."[948]

Van Eck states, during the era when the policy to ban agency work was formulated, it is apparent that the Namibian government did not take account of international policies and norms developed at either the ILO or EU.[949] However, it is important to bear in mind that the Namibian government had an extremely negative political connotation to labour hire before the policy decision was taken to ban agency work.

Despite the fact that Namibia has not adopted the Private Employment Agencies Convention, the ILO heavily influenced the NSC's finding. The NSC stated that:

> "[g]iven the scope of regulation contemplated in the 1997-Convention to facilitate agency work and to prevent potential abuses; the wide-ranging regulative measures introduced in other democratic societies to demarcate the areas of economic activity and the categories of employees in relation to which agency work may properly be engaged in and the potential to effectively regulate agency work in Namibia without compromising the objects of the Act or the legitimate objectives of "decency and morality" in Article 21(2) of the Constitution, the blanket prohibition of agency work by s. 128 of the Act substantially overshoots permissible restrictions."[950]

It is clear that the NSC aimed to strike a balance between the right to freedom of economic activity and the protection of workers' rights.[951] The NSC articulated that agency work can be allowed to operate in a constitutional democracy as long as regulation is in place to prevent abuses. The *African Personnel Services* decision was the catalyst in changing the Namibian government's attitude to agency work. It is submitted that the policy of the Namibian government, after this decision, became one of allowing agency work with strict regulation.

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[948] *Africa Personnel Services* para 1.
[949] Van Eck *ICJLLIR* (2014) 59 states that there was no indication that Namibian policy-makers were mindful of the approach at the ILO and EU level of balancing the recognition of agency work and the protection of agency workers.
[950] *Africa Personnel Services* para 118.
[951] Van Eck *IJCLLIR* (2012) 40.

In a recent decision of *Africa Labour Services (Pty) Ltd v The Minister of Labour and Social Welfare and the Government of the Republic of Namibia*[952] this policy approach is re-iterated. The Court stated that the latest amendments allowing for the regulation of agency work offer no invasion of any constitutional freedom of employment agencies to conduct their business and that there is no impermissible material barrier to an employment agency conducting its business.[953] In this context, reference is made to the regulation by the ILO influencing the current regime.[954] It is submitted that the view expressed is incorrect in that there are clear obstructions to employment agencies conducting their business in Namibia.

Fudge and Strauss argue that the Namibian government adopted a "schizophrenic" approach when they formulated the provisions of the NLA of 2007. The authors state that the legislation was presented as "a rational regulatory scheme that is constitutionally defensible in judicial forums while being able to present it in the political realm as an effective prohibition of labour hire".[955] It is submitted that Namibia's regulation of agency work is strict to the point where the purpose of using an employment agency, for the sake of flexibility, has been undermined in its totality.

3.4 Comparing Namibian Regulation and International Norms

The regulation of agency work in Namibia is compared with ILO and EU norms in order to offer guidance for South Africa regarding compliance with international standards.

Important international norms were identified in Chapters 3 and 4. They are listed in paragraph 2.4 above and in what follows the Namibian framework is assessed against these criteria. First, employment agencies should be allowed to operate, second, agency work should be temporary in nature, third, agency workers should

[952] High Court of Namibia Main Division, Windhoek Case No A 163/2012.
[953] *Africa Labour Services (Pty) Ltd v The Minister of Labour and Social Welfare and the Government of the Republic of Namibia* High Court of Namibia Main Division, Windhoek Case No A 163/2012 para 66. See para 19 for a summary of the employment agency's arguments against the regulation and alleged onerous obligations placed on agencies.
[954] The Court points out that when s 128 of the NLA of 2007 was amended it was done by the government ministry taking into account the "important international instruments" being those of the ILO.
[955] Fudge and Strauss (2014) part 6. They make the point that the balance might have best been achieved by focusing on the "regulation-making power and setting out the criteria that the minister should exercise when utilising that power."

be entitled to the right of equal treatment, fourth, agency workers should be provided with the rights of freedom of association and collective bargaining, fifth, tripartism and social dialogue should be strengthened, sixth, agency workers should not be charged fees or costs, seventh, there should be a clear allocation of the respective responsibilities of the employment agency and the client, eighth, agency workers should be provided the right of access to collective facilities and vocational training at the client and, ninth, agency workers should not be prohibited from direct employment with a client.[956]

In the discussion that follows it should be taken into account that the Namibian agency work regulatory system is flawed, irrespective of any compliance with the international standards.

Firstly, regarding the norms that employment agencies should be allowed to operate, Namibia's legislation fails to meet this important value. The country's regulation has the effect of limiting the operation of agency work to the extent that employment agencies fulfil the function only of a placement agency.[957]

Secondly, Namibian legislation does not comply with the standard that agency work should be temporary in nature: agency workers become directly employed by the client with whom they are placed upon such placement.

Thirdly, in respect of the standard of providing agency workers with the right of equal treatment, this is provided by section 128(4) of the NLA of 2007. It should be taken into account that the client becomes the employer after the placement. The client is compelled not to employ agency workers on terms and conditions that are less favourable than those of existing employees of the client in relation to similar work or work of equal value.[958] Furthermore, it is the duty of the client not to differentiate in employment practices or policies between its own employees and those placed by an employment agency.[959] This norm cannot be said to be fulfilled by employment

[956] See Chapter 6 at 5.
[957] See Chapter 7 at 3.2.3.
[958] s 128(4)(a) of the NLA of 2007.
[959] s 128(4)(b) of the NLA of 2007.

agencies in Namibia, there are equality obligations in respect of the client's workers and the placed workers.

Fourth, regarding the rights of freedom of association and collective bargaining for agency workers, these rights are accounted for in section 128(3) of the NLA of 2007. Fifth, in respect of the standard that tripartism and social dialogue should be strengthened, it is noted that there is a system of facilitating social dialogue in Namibia. The Namibian Employers' Federation representing the interests of employers and trade unions, such as the National Union of Namibian Workers and the Trade Union Congress of Namibia, were involved in discussions around the NLAA of 2012,[960] nevertheless, it is maintained that there is room for strengthening social dialogue. As alluded to by Van Eck, in countries such as South Africa and Namibia, social dialogue unfortunately is characterised by an adversarial approach which includes "political rhetoric and policy logjam".[961] Such circumstances are not conducive to pioneering ways to meet the needs of business and labour.

Sixth, with regard to the norm of fees or costs not being charged to agency workers the NESA provides that such fees cannot be charged by agencies and also that an amount cannot be deducted by clients from agency workers' salaries to make up for placement fees paid by the client.[962] Accordingly, the norm in respect of fees and costs has been complied with.

Seventh, in respect of the clear allocation of the respective responsibilities of the employment agency and the client, Namibian legislation dictates that all agency workers become employees of the client. In other words, all employment obligations are the responsibility of the client: this creates a situation of certainty but it is submitted that the construction of the system is inherently flawed.

Eighth, regarding the international norm that agency workers should be provided the right of access to collective facilities and vocational training at the client, there are no

[960] Media briefing 26 July 2012 by the Namibian Minister of Labour and Social Welfare Immanuel Ngatjizeko. The Minister mentions that "the National Union of Namibian Workers (NUNW) and the Trade Union Congress of Namibia (TUCNA) have demanded that the Ministry implement the laws as planned."
[961] Van Eck *IJCLLIR* (2014) 66.
[962] NESA Part 4.

provisions which explicitly provide such rights. However, the equality rights of workers placed with clients imply access to collective facilities. Namibian legislation provides that the client is the employer of the placed workers, hence this protective measure is irrelevant.

Finally, in respect of the standard that agency workers should not be prohibited from direct employment with a client, it is clear that agency workers in Namibia become employed by the client.[963] It can be argued that under the NLA of 2007 all employment agencies in effect have been limited to perform the activities of placement agencies. In reality, the wording of the Namibian provisions determines that the norm of access to employment by clients does not apply.

3.5 Comparing Namibia and South Africa

The analysis of the regulation of agency work in Namibia provides insight into Namibia's policy approach and how it can assist in developing an adapted model for South Africa. A comparison between key aspects of South African and Namibian regulatory measures follows below. It should be noted that the lessons gained point to aspects which South Africa should avoid.

A key aspect of the identified ILO and EU norms is that employment agencies should be allowed to operate.[964] Whereas South Africa's legislation allows for such operation;[965] regulation in Namibia effectively bans employment agencies from operating.[966] As a consequence employment agencies are limited to function as placement agencies. There is a strong case to be made that this restriction on business activities could be found to be unconstitutional in terms of Article 21 of the Namibian Constitution of 1990 which guarantees the right to carry on a trade or business.[967]

[963] s 128(2) of the NLA of 2007.
[964] See Chapter 3 at 3.3. See also Introduction to the Private Employment Agencies Convention; Chapter 4 at 2.2; and Article 4(1) of the Temporary Agency Work Directive.
[965] South African legislation allows for and regulates the operation of employment agencies through the LRA.
[966] See Chapter 7 at 3.2.3 and 3.3 for detailed discussion.
[967] Article 21(1)(j) of the Constitution of Namibia of 1990 states that "[a]ll persons shall have the right to practise any profession, or carry on any occupation, trade or business."

Despite this flaw, South Africa can take note of the Namibian regulatory framework which provides for employment directly with a client. South African legislation provides for a three-month period after which the agency worker is deemed to be employed by the client[968] though agency work is limited in duration it does not have the effect of banning agency work as is the case in Namibia.

An aspect of Namibian legislation that is preferable is that it is unambiguous and does not produce interpretational challenges. It is clear which party bears the responsibilities of the employer. As previously discussed, it is specifically the "deeming provision"[969] that gives rise to interpretational difficulties in South Africa.

A further key requirement of international norms is that agency workers should be protected[970] and specific rights should be accorded to agency workers, freedom of association,[971] the right to bargain collectively,[972] the right to equal treatment,[973] the right to access collective facilities and vocational training[974] and the right to have access to direct employment at clients.[975]

South African and Namibian law provide agency workers with rights of freedom of association and collective bargaining,[976] as well as equal treatment.[977] The limitation

[968] s 198A(3) of the LRA provides, in respect of temporary service that "[f]or the purposes of this Act, an employee (a) performing a temporary service as contemplated in subsection (1) for the client is the employee of the temporary employment services in terms of section 198 (2); or (b) not performing such temporary service for the client is (i) deemed to be the employee of that client and the client is deemed to be the employer; and (ii) subject to the provisions of section 198B, employed on an indefinite basis by the client."
[969] s 198A of the LRA.
[970] See Chapter 3 at 3.3; Article 4 and 5 of the Private Employment Agencies Convention; Chapter 4 at 2.2; and Article 2 of the Temporary Agency Work Directive.
[971] See Chapter 3 at 3.3 and Article 4 of the Private Employment Agencies Convention.
[972] As above.
[973] See Chapter 3 at 3.3; Article 5 of the Private Employment Agencies Convention; Chapter 4 at 2.2; and Article 5 of the Temporary Agency Work Directive.
[974] See Chapter 4 at 2.2 and Article 6 of the Temporary Agency Work Directive.
[975] See Chapter 4 at 2.2 and Article 6(2) of the Temporary Agency Work Directive.
[976] In South Africa, s 198 of the LRA does not expressly provide these rights but does refer to the fact that collective agreements concluded by a client are applicable to agency workers placed at that client. The rights of freedom of association and collective bargaining are bestowed upon all employees, including agency workers, in terms of s 4 of the LRA. In Namibia, s 128(3) of the NLAA of 2012 provides the rights of joining a trade union and being represented by a trade union in collective bargaining with an employer.
[977] In South Africa, s 198A of the LRA provides for equal treatment for agency workers earning below the earnings threshold. In Namibia, s 128(4) of the NLAA of 2012 provides the rights of equal treatment for agency workers. This includes the right to not be employed by a client on terms and conditions that are less favourable than those applicable to the client's incumbent employees who are

of South African legislation is that it provides equal treatment for agency workers only those earning under the prescribed threshold amount.[978] South African legislation has provision for the right of equal treatment to agency workers once they are deemed to be an employee of the client, which does not apply to higher-earning agency workers.

Namibian labour law is unique in so far as it provides for direct employment with the client at the outset. It is submitted that it is not possible to compare the regulations of the two countries in their entirety. Even though the drafting of particular portions of the legislation with regard to particular rights can be compared, it must be kept in mind that the Namibian system in effect prevents employment agencies from operating.

In respect of the right of access to collective facilities and vocational training, the South African and Namibian regulations do not explicitly provide these entitlements to agency workers. South African law provides lower-earning agency workers with the right to equal treatment.[979] The South African regulation could be improved by bestowing these particular rights on agency workers irrespective of their level of remuneration.

South African law does not address the right of access to direct employment with a client, Namibian law, with its unique construction, provides for direct employment with the client from the outset.[980] It is asserted that South Africa should not imitate Namibia's approach as it will result in denying employment agencies their core activity, South African regulation could be improved by ensuring that no limitation can be placed on an agency worker joining a client.

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performing the same or similar work or work of equal value. Furthermore, the client is prohibited from differentiation, in its employment practices or policies, between agency workers placed by an employment agency and its incumbent employees performing the same or similar work or work of equal value.

[978] See s 198A(5) of the LRA.

[979] s 198A(5) of the LRA.

[980] s 128(2) of the NLAA of 2012 provides that the agency worker is the employee of the client and that the client is the employer of the agency worker.

It is evident that Namibian policy does not view agency work as a stepping stone from unemployment into employment or from precarious work into more stable work. Instead of Namibian law providing progressive steps from agency work into traditional employment, effectively it prohibits employment agencies. It is suggested that a gradual and progressive upgrading arrangement in an adapted model for South Africa would serve the purpose of assisting agency workers in transitioning from non-standard employment into more secure, standard employment. Agency work can serve as a mechanism for entering employment by the unemployed.

4. Conclusion

This chapter considered the history and development of the regulation of agency work in Germany and Namibia and focused on identifying guidance by legislation in Germany and Namibia for an adapted model for South Africa.

The policy approach in the different countries is significant to the overall study. This chapter highlighted that Germany entered a period of deregulation and increased flexibility during the time of the recession between 2008 and 2009. Some authors suggest that this flexibility enabled Germany to retain jobs. More recently, the policy of the country shifted to one of increased regulation. The purpose of this tightening of regulation is to ensure that agency work remains temporary in nature. Another purpose is gradually to move agency workers up the ladder from precarious to more stable and secure positions directly with clients.

By way of contrast Namibia's strict regulation of agency work effectively prohibits such activity.[981] There was an explicit ban on agency work, it is not viewed as a bridge to permanent employment. Currently, legislation apparently allows agency work, but in reality the activities of employment agencies are restricted to fulfil only the functions of placement agencies.

[981] See Chapter 7 at 3.2.3 and 3.3.

The comparison of international norms and German standards confirms that they comply with international best practice.[982] In contrast, a comparison of international norms with the current regulation of agency work in Namibia illustrates that Namibian policy does not recognise the importance of flexibility in the functioning of the labour market: the model also does not truly allow agency work to operate and therefore is not compliant with these standards.[983] Due to the principles contained in Namibia's legislation on agency work, some of the norms are irrelevant and cannot be compared, for example, the norm of access to collective facilities and vocational training. Namibian regulation of agency work to a large extent is inconsistent with international standards.

The comparative study of foreign law in this chapter provides an excellent platform for developing recommendations for an adapted model for South Africa in the chapter that follows.

[982] See Chapter 7 at 2.4.
[983] See Chapter 7 at 3.4.

Chapter 8
Conclusion and Recommendations

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1. Background

The primary purposes of this research were to detect the characteristics pertaining to International Labour Organisation ("ILO") and European Union ("EU") labour policy that underlie agency work,[984] to identify key norms that emanate from international instruments pertaining to the regulation of agency work,[985] to examine the regulatory models regarding agency work in Germany and Namibia[986] and to appraise the extent to which the South African regulatory framework complies with the international norms.[987] Before addressing these aims, the thesis explored the role and function of labour law. These principles form the foundation of the thesis and invigorate the approach adopted throughout the research.

[984] See Chapter 3 for a discussion on ILO policy. See Chapter 4 for a discussion on EU policy.
[985] See Chapter 3 for the identification of ILO norms. See Chapter 4 for the identification of EU norms.
[986] See Chapter 7 for a comparative study of the regulation of agency work in Germany and Namibia.
[987] See Chapter 6 for the appraisal of South African law against international norms.

All of the above serves as groundwork in order to answer the ultimate research question in the thesis: whether, and to what extent, South Africa should adapt its model regarding the regulation of agency work. During the research process, the study sought guidance from international approaches that South African policy-makers can adopt in order to implement an improved regulatory model pertaining to agency work.

In considering this question, the precarious nature of agency work must be kept in mind.[988] Recognition must be given to the fact that in South Africa there has been increased scale and abuse of non-standard workers including agency workers.[989] This compounding problem in the country's labour market calls for the urgent need to address the issue and provide improved and adequate protection of the rights of agency workers.

This concluding chapter brings together the significant issues dealt with in this enquiry. Each chapter ended with a conclusion, therefore, the full conclusions and recommendations will not be repeated. This chapter sets out key findings relating to each of the aims outlined above and it summarises the conclusions. In the final instance, the chapter recommends that the South African framework should be adapted. Detailed suggestions are put forward in respect of what exactly policy-makers should include in the amended model. These recommendations are presented in graphic form which illustrates the staged and progressive improvement of the rights of agency workers.

2. Key Findings

2.1 The Purpose of Labour Law

A discussion on the function of labour law was relevant in leading up to the appraisal of South Africa's regulation of agency work. The justification for this was explained and is that the perspective followed by a policy and law-maker influences the

[988] See Chapter 1 at 2.2.
[989] Benjamin *et al* Regulatory Impact Assessment 2010 available at http://www.labour.gov.za/DOL/downloads/documents/useful-documents/labour-relations/RIA13Sept2010.pdf accessed on 22 August 2016 at 12.

legislation which is drafted, and this effects the level of protection afforded to agency workers.

As discussed in Chapter 2, Kahn Freund identified the initial purpose of labour law as a countervailing force to the employer's power.[990] Labour law was to compensate for the inherent inequality of bargaining power between an employee and an employer. This original view was altered as the two main approaches to the purpose of labour law were developed.[991] These competing perspectives remain relevant today.

First, the libertarian perspective[992] endorses deregulation and argues that labour laws should be kept to a bare minimum. This approach is mainly concerned with the economic well-being of enterprises and their competitiveness. It holds the doctrine of freedom of contract in high regard and does not support a protective view of labour law. Second, is the social justice perspective[993] which places the protection of employees above the economic interests of businesses. Legal intervention is viewed as necessary for the protection of employees and labour rights are seen as human rights.

An exploration of the role of labour law is significant as the perceived function of labour law influences labour policy, which, in turn, forms the basis of labour regulation.[994] It is submitted that the core function of labour law is to deliver social justice, in so far as the well-being of employees leads to long-term economic prosperity.[995] In South Africa non-standard employment is increasing and such workers generally are in a more precarious position than indefinitely employed workers and fall outside the scope of traditional labour law protection.[996] The social

[990] See Chapter 2 at 2.
[991] See Chapter 2 at 2.1 to 2.4 for a discussion of the different eras during which the role of labour law varied.
[992] See Chapter 2 at 3.2 for a discussion on the free-market libertarian perspective.
[993] See Chapter 2 at 3.3 for a discussion of the features of this perspective, see Chapter 2 at 3.3.1 to 3.3.5.
[994] See Chapter 2 at 5.
[995] See Chapter 2 at 5 for a discussion on the advantages of a social justice approach.
[996] See Chapter 1 at 2.2.

justice approach recognises that agency workers are particularly vulnerable and require increased protection.[997]

A key finding of the study is that South African labour policy cannot disregard the social justice perspective,[998] both because of its international obligations and the Constitution, 1996 which characterises labour rights as human rights and affords them a special status. This thesis is premised on the basis that a balance of social and economic goals in a labour policy is the ideal scenario and is evident in the country's "regulated flexibility" approach. Accordingly, it can be said that the approach to the function of labour law establishes a model which consists of diversified rights and economic elements. The rights of employees and social goals transcend those of a purely economic nature if the correct balance cannot be struck.[999]

2.2 Characteristics of ILO and EU Labour Policy

In formulating recommendations concerning the regulation of agency work in South Africa, guidance is sought from ILO and EU policy approaches. The study revealed that the ILO initially adopted a strict rights-based approach to the regulation of agency work,[1000] but policy shifted after several challenges and criticisms of the ILO.[1001] These issues related to the irrelevance of international standards, the problem of universality, the criticism that international standards were too detailed and inflexible, the methods of supervision and enforcement of standards being weak, and the challenge of globalisation that places greater focus on economic considerations.

The ILO addressed the criticisms levelled against it by way of a number of reform strategies.[1002] It moved to a soft law approach and focused on principles in instruments. Furthermore, the decent work agenda and the Declaration on Social Justice for a Fair Globalization are important reform strategies, which created

[997] See Chapter 6 at 3.3.
[998] See Chapter 2 at 4 for a discussion on the purpose of labour law in South Africa currently.
[999] See Chapter 2 at 5.
[1000] See Chapter 3 at 5 and 5.
[1001] See Chapter 3 at 4.2 for a discussion on the challenges which the ILO experienced.
[1002] See Chapter 3 at 5.1 to 5.4 for a discussion on the reform strategies adopted by the ILO.

awareness of the ILO's activities and workers' basic rights and the ILO conducted a review of its standards to determine their relevance. Whereas the ILO historically based labour law on the protection of workers' rights, the institution's reform strategies resulted in a shift which includes considerations of an economic nature.

A key finding regarding ILO policy on agency work is that this form of work is recognised as a springboard into employment and is regulated with a view to providing appropriate protection for agency workers.

EU policy adopts a similar approach. Historically, the EU was established to prevent competition and create a common market.[1003] Its focus, in contrast to the ILO, was economic. The adoption of the "flexicurity" policy signifies a shift in policy[1004] and the EU gave content to the strategy establishing four pathways as mechanisms to achieve the balance for which the flexicurity policy strives.[1005] In this regard, labour law is viewed as a necessity for the protection of workers and allows a measure of flexibility for employers.

In respect of the EU's policy regarding agency work, a key finding is the policy introduces the idea that agency work should be allowed but should remain temporary in nature. It views agency work as a stepping-stone towards secure and indefinite employment. Through the flexicurity pathways there is a focus on facilitating transition from unemployment into employment, and from precarious work into secure employment.[1006]

2.3 Norms Emanating from International Instruments

This study identifies particular principles in respect of the regulation of agency work which emanate from the ILO and EU instruments respectively.[1007] The following list sets out the current ILO norms with regard to the protection of agency workers as in Chapter 3: First, flexibility in the functioning of the labour markets is important and

[1003] See Chapter 4 at 3.1.1.
[1004] See Chapter 4 at 3.1.2.
[1005] See Chapter 4 at 3.2 and 3.3 in respect of the meaning of flexicurity and for a discussion on the policy framework consisting of the four pathways.
[1006] See Chapter 4 at 3.4.
[1007] See Chapter 3 at 6 for a discussion on the ILO norms. See Chapter 4 at 4 for a discussion on the EU norms.

accordingly employment agencies should be allowed to operate and should not charge agency workers fees or costs. Second, agency workers require protection and should be provided with the rights of freedom of association and collective bargaining. Third, agency workers should be afforded the right to equal treatment. Fourth, agency workers should not be prohibited from working for the client subsequent to placement by the employment agency, allowing greater opportunities for agency workers to secure decent employment and income and social protection. Fifth, tripartism and social dialogue should be strengthened. Lastly, the respective responsibilities of the employment agency and client should be allocated clearly.

The research in Chapter 4 demonstrates the following are current EU norms in terms of the protection of agency workers: First, employment agencies should be promoted and should be allowed to operate. Second, agency work should be temporary in nature. Third, agency workers should be provided with the right of equal treatment by employment agencies. Fourth, agency workers should have access to direct employment at clients. Lastly, agency workers should have access to collective facilities provided by clients and vocational training.

It is clear that these standards to a large extent overlap and for the purpose of the appraisal of the South African model a combined list was compiled.[1008]

2.4 Comparative Models: Germany and Namibia

The research includes a comparative study of the regulatory models in respect of agency work in Germany and Namibia.[1009] South Africa can gain from the regulatory experience in Germany and Namibia. The key findings in respect of the comparative study follow below.

The German policy approach towards agency work and the proposed amendments offer guidance. In this country there is a higher degree of compliance with international standards than is the case in South Africa.[1010] Their policy entails that agency work should remain temporary in nature but the limit extends to a maximum

[1008] See Chapter 6 at 5.
[1009] See Chapter 7 for the comparative study of Germany, Namibia and South Africa.
[1010] See Chapter 7 at 2.4 for the appraisal of Germany's regulation against the international norms which were identified.

duration of 18 months,[1011] after which agency workers can object to direct employment with a client. German legislation provides for a clear allocation of employer obligations between the employment agency and the client. The right of equal treatment applies.[1012] Furthermore, the right of access to direct employment with the client is secured.[1013] Germany has moved from an era of deregulation to one of stricter regulation[1014] in order to increase the protection of vulnerable agency workers. German labour policy on agency work views it as a flexibility mechanism but also as a means of transitioning from unemployment to employment, or from agency work to standard employment.

The comparison highlighted that although South African policy shares a number of similarities, there are significant differences.[1015] For example, the period which permits agency work. Once the proposed 2017 amendments come into effect, in Germany agency work will be permitted for a period of 18 months. In South Africa "temporary service" is work for a client not exceeding three months. In this regard a key finding is that both countries impose a limit on the duration of employment with an employment agency, but it is suggested that South Africa could adopt a longer period as this will increase the chances of employment agencies being utilised and will provide the agency worker with more time to assess whether they would agree to a transfer to permanent employment.

Another difference is that in Germany there is no threshold figure. The 18 month limit will apply to all agency workers irrespective of the level of remuneration that they will receive.[1016] In South Africa, section 198A of the LRA applies only to employees earning below a particular threshold amount.[1017] A key finding of the study is that the distinction created by the threshold amount under South African law leads to higher-income earners being disadvantaged in that they do not enjoy the increased

[1011] See Chapter 7 at 2.2.4 in respect of current regulation and anticipated amendments in Germany.
[1012] See Chapter 7 at 2.2.4.
[1013] See Chapter 7 at 2.6.
[1014] See Chapter 7 at 2.3.
[1015] See Chapter 7 at 2.5 for a comparison of German and South African regulation.
[1016] See Chapter 7 at 2.2.4.
[1017] See Chapter 6 at 3.3.

protection under section 198A. Accordingly, this thesis argues that additional protection should be afforded to higher-earning employees.[1018]

Another significant difference is that the proposed 2017 amendments allow an agency worker to object to direct employment with a client after the 18-month period.[1019] South African legislation does not offer an agency worker a choice and direct employment is automatic after three months. A further difference relates to the "deeming provision".[1020] South African legislation has led to uncertainty, whereas the German proposals do not create confusion. German law expressly provides agency workers with the right of access to collective facilities and vocational training.[1021] In South Africa these entitlements are not explicitly provided to agency workers.

Contrary to the comparison with German regulation, research into the Namibian framework revealed policy and regulatory aspects which South Africa should avoid. A comparison of Namibian regulation with ILO and EU norms evidenced a high level of non-compliance.[1022] In essence, regulation in Namibia severely restricts employment agencies from operating.[1023] Employment agencies have a limited function as placement agencies. From a policy perspective, Namibian labour policy does not view agency work as a mechanism to transition non-standard workers into standard employment.

3. Appraisal: Does the South African Model Comply with International Norms?

Before considering whether the current South African model on agency work complies with international norms, it is relevant to reflect on whether the model is aligned to the social justice perspective which is said to form the purpose for labour law in the country.[1024] The amendments to legislation particularly regarding agency

[1018] See Chapter 6 at 6 and Chapter 8 at 4.2.3.
[1019] See Chapter 7 at 2.2.4.
[1020] See Chapter 6 at 3.3.
[1021] See Chapter 7 at 2.2.4.
[1022] See Chapter 7 at 3.4 in respect of an appraisal of Namibian regulation against international norms.
[1023] See Chapter 7 at 3.2.3 and 3.3 for a discussion on current regulation and labour market policy in Namibia.
[1024] See Chapter 2 at 4.

work have been promulgated so as to create increased protection for agency workers.[1025]

Considering the key factors of the social justice perspective, the current legislation is compared briefly. The factors as detailed in Chapter 2 include the protection of employees over freedom of contract, legal intervention, labour rights being regarded as human rights, and the provision of social security and social protection.[1026] It is clear that detailed legislation under the LRA in respect of agency workers constitutes legal intervention.

Regarding the factor of protection of employees over freedom of contract, the intended purpose of the law on agency work is to provide greater protection for employees.[1027] This increased protection can be seen through measures such as joint and several liability; written particulars of employment; and the consideration of agency workers in the composition of a workforce when a union wishes to exercise organisational rights.[1028] Improvement of employee protection is especially evident in added protections for low-earning agency workers. These include being deemed to be an employee of the client; the right to equal treatment; and employment becoming indefinite in duration once deemed to be an employee of the client.[1029]

In respect of the factor of labour rights being regarded as human rights, the right to fair labour practices is contained in South Africa's Constitution, 1996.[1030] Lastly, regarding the social justice perspective factor of social security and protection, the notion of deeming agency workers to be indefinitely employed by clients vastly increases agency workers social protection. Accordingly, it is submitted that South Africa's current model of agency work is in compliance with the factors of a social justice perspective to the role of labour law.

However, going a step further, it is pertinent in this particular study to consider whether South African law is compliant with international norms. Chapter 6

[1025] See Chapter 6 at 3.2 and 3.3.
[1026] See Chapter 2 at 3.3.
[1027] See Chapter 6 at 3.3.
[1028] As above.
[1029] As above.
[1030] s 23 of the Constitution, 1996.

conducted an appraisal of the South African regulatory model in relation to the international norms distilled from the analysis of ILO and EU regulations. For this purpose a combined list of ILO and EU norms was utilised. Important outcomes of the appraisal are set out below.

The combined standards identified are:[1031] first, employment agencies should be allowed to operate, second, agency work should be temporary in nature, third, agency workers should be entitled to the right of equal treatment, fourth, agency workers should be provided the rights of freedom of association and collective bargaining, fifth, tripartism and social dialogue should be strengthened, sixth, fees and costs should not be charged to agency workers, seventh, there should be a clear allocation of the respective responsibilities of the employment agency and the client, eighth, agency workers should be provided the right of access to collective facilities and vocational training at the client, ninth, agency workers should not be prohibited from direct employment with a client.

South Africa has made huge strides in improving compliance. Key aspects include introducing a maximum duration of agency workers' assignments, securing equal treatment and steps towards improved facilitation of collective bargaining for agency workers.[1032] Accordingly, in respect of the question of whether South Africa's legislation is in compliance with international norms, it can be said that the South African regulatory model complies with international norms in some respects but is lacking in others as highlighted below.

The appraisal of South Africa's current regulation of agency work against the combined list of international norms reveals the following areas of non-compliance. First, the right of equal treatment has been introduced but applies only to those earning under the threshold amount.[1033] In this regard it can be said that the South African regulation is compliant in so far as lower-earning agency workers are

[1031] See Chapter 6 at 5 for the appraisal of South Africa's regulation of agency work against the combined list of international norms.
[1032] See Chapter 6 at 3.3.
[1033] As above.

concerned. However, it is submitted that increased rights of equality should also be afforded to higher-earning agency workers, albeit at a later date.[1034]

Second, more should be done to facilitate and strengthen social dialogue in respect of agency work and broader labour matters. To the credit of the South African government, structures are in place to facilitate discussion between government, business and labour.[1035] However, the adversarial approach evident in collective bargaining and negotiations in the country indicates a need to foster the process to improve social dialogue. Furthermore there should be measures to ensure that the product of social dialogue is not later undermined in parliament.

Third, there is a lack of clear allocation of employer responsibilities between the employment agency and the client which becomes particularly problematic in instances where the deeming provision applies.[1036] Early case law following the legislative changes in South Africa in respect of agency work, highlight that this issue is troublesome.[1037] Confusion compounds the problem agency workers historically have had in South Africa of not being able to identify their true employer.

Fourth, agency workers are not provided with the right of access to collective facilities and vocational training at the client. In Chapter 6 it was argued the provision of these rights to agency workers could vastly improve agency workers employability and future prospects with clients.[1038] Furthermore it would assist agency workers with the fulfilment of their duties with the client and it would aid in equipping the agency worker with the ability to transition from non-standard employment to a traditional and secure employment.

Fifth, there is no prohibition against a clause which prevents agency workers from taking up direct employment with a client after placement.[1039] This is a loophole in the current legislation.

[1034] See Chapter 8 at 4.2.2 in respect of recommendations proposed for higher-earning agency workers.
[1035] See Chapter 6 at 3.2.
[1036] See Chapter 6 at 3.3.and 3.4.
[1037] See Chapter 6 at 3.4.2 to 3.4.4.
[1038] See Chapter 6 at 5.
[1039] See Chapter 6 at 5.

These shortcomings serve as foundation for the development of recommendations for improving the protection of agency workers in South Africa.

4. An Amended Model for South Africa

4.1 Introduction

Against the background of the points of non-compliance revealed in respect of the appraisal of South Africa's regulation of agency work the following suggestions are made and, at the same time, it is important to align such proposals with the country's over-arching labour policy.

As explained in Chapter 5, South Africa's labour policy is underpinned by the notion of regulated flexibility. This concept seeks to balance the protection of employees and provide mechanisms of flexibility for employers. It was confirmed that a clear meaning and framework for the policy is lacking. Government as well as academics have alluded to mechanisms to achieve a balance between the conflicting interests of security and flexibility, including the provision of a floor of minimum conditions of employment which can be varied by way of collective bargaining, additional protection for lower-income earners and additional flexibility for smaller undertakings.[1040] These mechanisms are fully supported. It is submitted that these strategies should be refined and recorded in official public policy documents.

In considering a suitable policy approach for the regulation of agency work in South Africa, it must be kept in mind that the country has one of the highest unemployment rates in the world.[1041] In this regard, it is commendable that the National Development Plan 2030 ("NDP 2030") includes the priority of raising employment through faster economic growth.[1042] South African labour policy on agency work therefore should seek to address the need to create employment.

Furthermore, adjustments could be made to the regulatory model to ensure that past problems under the Labour Relations Act 66 of 1995 ("LRA") are addressed which

[1040] See Chapter 5 at 3.3 for a discussion regarding the regulated flexibility mechanisms.
[1041] See Chapter 1 at 2.1.
[1042] See Chapter 5 at 3.

the Labour Relations Amendment Act 6 of 2014 ("LRAA of 2014") did not resolve.[1043] The LRAA of 2014 sought to amend the issue of lengthy and indefinite assignments of agency workers through the introduction of a definition of "temporary service". However, the three-month limitation on assignments applies to lower-earning agency workers only without bolstering protection for higher-earning agency workers at all.

Unfortunately the problems associated with the dismissal of agency workers due to cancellation of the contract between the employment agency and the client, have not been resolved by the LRAA of 2014. In addition, the issue of agency workers having difficulty in identifying their employer has been exacerbated by the introduction of the "deeming provision". Externalisation of a client's employees to an employment agency has also not been resolved by the amendments. The absence of joint and several liability for employment agencies and clients regarding unfair dismissal or unfair labour practices has not been specifically dealt with.

Additionally, South Africa's regulation of agency work can be adapted to be more closely aligned with the identified international norms. Agency work in South Africa should be geared towards a "staircase to security".[1044] This notion implies a regulatory approach which views agency work as a mechanism of flexibility but also as a means to allow workers to transition from unemployment into employment, or from non-standard employment into standard and secure employment.

Based on these considerations, it is submitted that the over-arching approach to regulation of agency work in South Africa should be underpinned by the values of social justice. The strategy should be to reduce unemployment and protect agency workers. The remaining unresolved problems under the LRA should be addressed and show improvement in the areas of non-compliance with international norms. The recommendations which follow strive to achieve these aims.

[1043] See Chapter 6 at 2.3.
[1044] See Chapter 8 at 4.2 and 5 regarding the proposed amended model.

4.2 Recommendations

4.2.1 Introduction

It is proposed that an amended model, termed the "staircase to security" should be adopted by South African policy-makers. The recommendations are made on the basis of affording agency workers greater protection. The distinction made between the regulation of lower-earning and higher-earning employees in terms of the LRA and other labour legislation in the country would be maintained. It is submitted that the differentiation of lower and higher-earning employees aligns with South African labour policy of regulated flexibility. However, higher-earning employees should receive additional protection. In the next part proposals are set out in respect of lower-earning employees.

4.2.2 Lower-Earning Employees

It is submitted, in accordance with the proposed staircase to security model, legislation should establish separate stages in an agency worker's journey to decent employment; commencing with the placement of an agency worker with a client and leading progressively to standard employment. The staircase to security should contain three clearly demarcated stages. Each stage should provide an improved level of protection to the agency worker.

The first stage is similar to the current position but with significant adaptation. During this stage the employment agency remains the sole employer of the agency worker and, as such, bears the responsibility of all employer obligations, which ensures certainty in terms of where the responsibilities towards agency workers lie. Joint and several liability of the employment agency and client remains in place in respect of contraventions of the Basic Conditions of Employment Act ("BCEA")[1045] and collective agreements, however the employment agency remains solely responsible for unfair dismissal and unfair labour practices.

It is submitted that the right of direct employment with a client be explicitly provided for from the outset of the placement. Should a client offer employment, an agency

[1045] Basic Conditions of Employment Act 75 of 1997.

worker has the right to take up employment directly with a client without a penalty fee being imposed on the worker or on the client. Such recommendation affords greater rights to agency workers and opens up the opportunity for them to seek and secure direct employment. In line with the policy of regulated flexibility, agency workers are not afforded equal treatment during this stage.

A longer duration of six months is proposed for the purposes of this first stage,[1046] as had initially been agreed upon by the social partners during earlier rounds of negotiations. It is submitted that three months is too short a duration in the context of a client and agency worker getting to know each other.

During the second stage, which should last another six months, the employment agency remains the sole employer of the agency worker. This will resolve the debate regarding sole versus dual employment. This also provides clarity and certainty to agency workers. As in the first stage, there should be joint and several liability for contraventions of the BCEA and collective agreements. During this stage agency workers should receive two significant additional rights: first, the employment agency and the client should be jointly and severally liable for unfair dismissal and unfair labour practices and, second, agency workers should gain the right to equal treatment. In comparison with the current position this change will provide clarity regarding who bears the responsibilities of employers. Furthermore, agency workers gain increased protection by way of the joint and several liability and through the reassurance of equal treatment. In addition to these protections agency workers should have the right to access collective facilities and vocational training at the client during the second phase. These additions will significantly improve the situation of agency workers during the second phase.

In the third and final stage, which commences 12 months after the initial placement, the agency worker reaches a phase of standard and more secure employment. This would greatly improve the security of agency workers. It is submitted that after 12 months of employment the agency worker should become the employee of the client,

[1046] See Chapter 7 at 2.6 for guidance that South Africa can gain from Germany's regulation of agency work, and particularly for a discussion on the longer time period and potential advantages thereof.

but should have the choice to object to direct employment with the client. This offers agency workers a degree of control and flexibility over their future employment. Should there be no objection by the agency worker, the client becomes the sole employer and bears all employer obligations. The employment agency has no duties or liability in this stage. The employment relationship between the agency worker and client becomes indefinite until termination in accordance with the law. Should the agency worker object to direct employment, then the employment relationship between the employment agency and the agency worker continues on the terms and conditions applicable in the second stage.

The staircase to security maintains the need for flexibility for business but also provides an increased level of security for agency workers in a clear and staged method. The proposed model allows employment agencies to operate, but the triangular relationship is limited to a period of 12 months, at the same time ensuring that employment agencies are still utilised by clients. The three stages ensure that a transition occurs to the benefit of agency workers over time. Significantly, this model is compliant with the identified ILO and EU norms.

4.2.3 Higher-Earning Employees

The regulation of higher-earning agency workers is also covered in terms of the staircase to security model discussed above. In terms of the proposed model, higher-earning agency workers receive improved protection compared to the current legislative framework. For the sake of clarity, the three stages of the framework in respect of higher-earning agency workers are set out below.

The first stage remains similar to the current situation. During the first six months of employment the employment agency is the sole employer of the agency worker and is responsible for all employer obligations. Joint and several liability of the employment agency and client remains in place in respect of contraventions of the BCEA and collective agreements, but the employment agency is solely responsible in case of unfair dismissal and unfair labour practices. In a slight addition, the agency worker's right of direct employment with a client is explicit from the outset of the placement. This is beneficial to an agency worker who wishes to secure a direct employment arrangement with a client.

In the second stage, which also lasts six months, the employment agency is the sole employer of the agency worker and joint and several liability for contraventions of the BCEA and collective agreements remains in place. In this stage the higher-earning agency worker has the additional right of being able to claim from both the employment agency and the client for unfair dismissal and unfair labour practices. This provides increased protection to these agency workers. In addition, higher-earning agency workers have the right of access to collective facilities and vocational training at the client which equips the agency worker with the ability to perform their duties better and increases their chances of securing standard employment. These rights also improve their security. The agency worker continues to be entitled to direct access to employment at a client at any time.

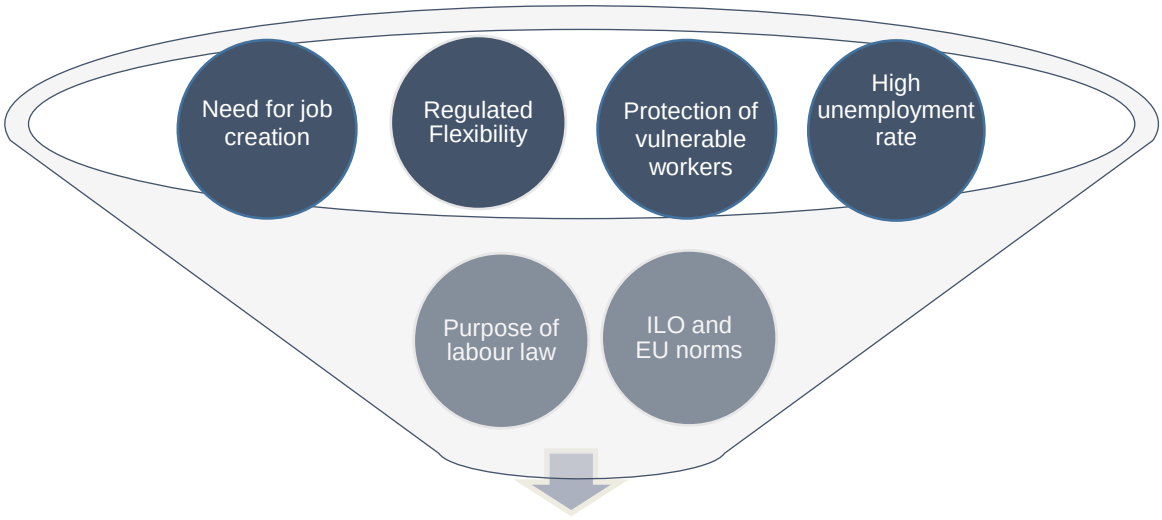
During the third and final stage, 12 months after the initial placement, the agency worker reaches a phase of standard and secure employment by becoming an indefinitely employed worker of the client. This change is a vast improvement on the current position of higher-earning agency workers. Similar to the recommendation in respect of lower-earning agency workers, the agency worker should have the chance to object to direct employment with the client. Likewise, this affords agency workers with a degree of control over their future employment. Should the agency worker object, then the employment relationship continues to exist between the employment agency and the agency worker on the terms and conditions applicable in the second stage and the worker gains the right to equal treatment. Should the agency worker not object, the employment agency has no further employer duties in respect of the agency worker. The employment relationship between the agency worker and client is indefinite until termination in accordance with the law. These recommendations offer a vast improvement to higher-earning agency workers than is provided under prevailing law.

5. Visual Diagram

The diagram which follows serves to illustrate the recommendations presented above. It depicts the contextual factors peculiar to South Africa, which are relevant to the staircase to security and are considerations which are at the basis of the over-

arching approach to the regulation of agency work in South Africa. The diagram further categorises the different rights under each of the three stages in the amended model and highlights the staged and progressive improvement of rights for agency workers.

Contextual Considerations



Over-arching Premise and the Approach to Regulation of Agency Work in SA

- South Africa should work towards reducing unemployment
- Employment agencies should be allowed to operate
- Agency workers should receive staged improvement in protection
- Agency work should be geared towards a "staircase to security"

Staircase to Security

0 - 6 months:
- Agency is the sole employer.
- Agency responsible for all employer obligations.
- Joint and several liability for contraventions of: BCEA, collective agreements.
- Right of access to direct employment at client.
- All rights applicable to lower and higher earners.

6 - 12 months:
- Agency is the sole employer.
- Agency responsible for all employer obligations.
- Right to equal treatment (lower-earners only).
- Joint and several liability for contraventions of: BCEA, collective agreement, unfair dismissal and unfair labour practices (lower and higher earners).
- Collective facilities and vocational training (lower and higher earners).
- Worker's choice after 12 months: employment remains with agency or directly with client (lower and higher earners).

12 months onwards:
- Client is the sole employer.
- Client responsible for all employer obligations.
- No duties or liability for employment agency.
- Employment is indefinite.
- Higher-earners attain right to equal treatment if they elect to remain an agency worker.

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