Identification of the parties to the employment relationship: an appraisal of teleological interpretation of statutes

by

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SUMMARY OF THESIS

The study, entitled "Identification of the parties to the employment relationship: an appraisal of teleological interpretation of statutes", is a legal-interdisciplinary doctrinal investigation situated within the fields of labour law and the interpretation of statutes. It concerns itself with the proper interpretation of labour legislation in general and the interpretive question as to who should be party to the employment relationship in particular, within the context of the advent of constitutionalism and the proliferation of and the increase in the importance of labour legislation. In law, meaning-generation is a function of statutory interpretation and every application of a text to particular circumstances entails interpretation. The protection extended by labour legislation is only extended to those persons who are defined as "employees".

The study describes the teleological model of statutory interpretation, which aims to give effect to the purpose of a legislative provision in light of constitutional values. The study explores the five elements of (teleological) interpretation that should be considered when interpreting concepts such as "employee": the text, the context, the *telos* (or values), the history and the comparative dimension. The chief findings of the study includes: that legislation has become an indispensable source of contemporary labour law; that the courts have adopted a teleological approach to the interpretation of statutes; that the courts have, in interpreting the term "employee", adopted a teleological approach to the interpretation of statutes; and that the interpretations advanced by the courts have not had the profound effect envisaged by the Constitution on the transformation of society.

DECLARATION

I hereby declare that this thesis is the product of my own work. The content of the thesis reported herein was composed by and originated entirely from me.

I also declare that information derived from the published and unpublished work of others has been acknowledged in the text and references are given in the list of sources.

I am aware that in case of non-compliance, the University is entitled to withdraw the doctorate degree awarded to me on the basis of the present thesis.

Marthinus Jacobus van Staden
November 2017

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"We are nothing without the work of others our predecessors, others our teachers, others our contemporaries. Even when, in the measure of our inadequacy and our fullness, new insight and new order are created, we are still nothing without others."

- J. Robert Operheimer, Reith Lecture, 20 December 1953.

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CHAPTER 1

Introduction

"Statutory interpretation is the Cinderella of legal scholarship. Once scorned and neglected, confined to the kitchen, it now dances in the ball-room."[1]

1 *Research statement*

The study constitutes a legal-interdisciplinary doctrinal investigation situated within the fields of labour law[2] and the interpretation of statutes.[3] The main emphasis falls

[1] Eskridge *Dynamic Statutory Interpretation* (1994) 1.

on the interpretation of labour legislation. The study proposes to explore and understand the manner in which labour legislation in general, and the term "employee" in particular, should be interpreted and has been interpreted within the context of the advent of constitutionalism and the proliferation of and increase in importance of labour legislation.

The study is important because an understanding of the proper approach to the interpretation of statutes can increase the predictability of legal dispositions.[4] Furthermore the judiciary can, through its power of interpretation, contribute to the transformation of society and the achievement of a social justice.[5] Therefore, the value of the study is closely related to the realisation of society founded on the advancement of a culture of human rights and freedoms.[6] Doctrinally, the study will have the value of contributing to legal science as it describes the constitutionally mandated approach in labour related matters and can contribute to an increase in the predictability of interpretive outcomes in labour law matters. To this end, the study

2 According to Wallis *Labour and Employment Law* (1995) 2-3 the expression "labour law" is "intended to encompass all the areas of the common law, statute and judicial and quasi-judicial expositions of law that are relevant to labour in its ordinary sense of people who work for others. Put differently, it is concerned with the laws that govern employment and the relationship between employees and employers. In this study the term labour law is used to also denote "employment law".

3 According to Du Plessis *The Interpretation of Statutes* (1986) 1 "[t]he subject *Interpretation of Statutes* is concerned with the principles, rules, methods and techniques which jurists employ in order to understand statutes, ie legal precepts deriving from legislative activity, and to apply their provisions to concrete, practical situations." More generally, Popkin *A Dictionary of Statutory Interpretation* (2007) 136 defines interpretation as "the process by which judges determine statutory meaning". The author notes that some have drawn a distinction between "interpretation" and "construction". According to this view, interpretation refers to textual analysis whilst construction refers to the reliance of non-textual criteria. Note that this distinction is not made in this study and that these terms are used interchangeably to denote the same process. Barak *Purposive Interpretation in Law* (2005) 1 defines interpretation as a rational activity that gives meaning to legal texts. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) par 18 the term "interpretation" was defined as follows: "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence."

4 Scalia and Gardner *Reading Law: The Interpretation of Legal Texts* (2012) xxvii.

5 Smit "Towards social justice: an elusive and challenging endeavour" 2010 *TSAR* 1 11.

6 S 1 of the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution) provides that "[t]he Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. (b) Non-racialism and non-sexism. (c) Supremacy of the constitution and the rule of law. (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

will consider the proper approach to the interpretation of the seminal term "employee" and explore the interpretive factors at play when interpreting the concept.

Although some scholarship has developed in regard to the interpretation of statutes in general,[7] it is submitted that, within the context of labour law, little investigation has taken place into the interpretive approach of the judiciary in labour related matters.[8] Judges rarely make statements to the effect that "the proper interpretation of A is B because the text is plain" or that "the proper meaning of A is B because this would promote the purpose of the provision". Instead they limit themselves to statements such as: "the proper interpretation of A is B". It may also be true that judges are not consciously aware of their interpretive choices.[9]

[7] See Du Plessis and De Ville "Bill of Rights interpretation in SA context" 1993 *Stell LR* 63; Botha "Interpretation of the Constitution" 1994 S*APR/PL* 257; Fagan "In defence of the obvious – ordinary language and the identification of constitutional rules" 1995 *SAJHR* 545; Davis "The twist of language and the two Fagans: please sir, may I have some literalism!" 1996 *SAJHR* 504; Fagan "The longest erratum note in history" 1996 *SAJHR* 79; De Vos "A bridge too far? History as context in the interpretation of the South African Constitution" 2001 *SAJHR* 1; Du Plessis *Re-interpretation of Statutes* (2002); Mdumbe "Has the literal/intentional/textual approach to statutory interpretation been dealt the coup de grace at last?" 2004 *SAPR/PL* 472; Ross "Interpretation theory and statutory construction: revisiting the issue in the light of constitutionalism" 2004 *Stell LR* 268; Le Roux "Undoing the past through statutory interpretation: the Constitutional Court and the marriage laws of apartheid" 2005 *Obiter* 526; Devenish "*African Christian Democratic Party v Electoral Commission:* the new methodology and theory of statutory interpretation in South Africa" 2006 *SALJ* 399; Le Roux "Directory provisions, section 39(2) of the Constitution and the ontology of statutory law *African Christian Democratic Party v Electoral Commission*" 2006 S*APR/PL* 382; Hofman "Comments on the South African Law Reform Commission's draft Interpretation of Legislation Bill" 2007 *SALJ* 479; Kroetze "Power play: a playful theory of interpretation" 2007 *TSAR* 19; Devenish "*Department of Land Affairs v Goedgelegen Tropical Fruits* - a triumph for teleological interpretation, an unqualified contextual methodology and the jurisprudence of *ubuntu*" 2008 *SALJ* 231; Du Plessis "Interpretation" in Woolman, Roux and Bishop (eds) *Constitutional Law in South Africa* (2008); Wallis "What's in a word? Interpretation through the eyes of ordinary readers" 2010 *SALJ* 673; and Bishop and Brickhill "In the beginning was the word: the role of text in the interpretation of statutes" 2012 *SALJ* 681.

[8] See McGregor "Is actual commencement of work a requirement to be an 'employee' for purposes of unfair dismissal? A purposive interpretation" 2004 *SA Merc LJ* 270; Benjamin "A matter of ongoing concern: Judicial interpretation and misinterpretation of section 197 of the Labour Relations Act" 2005 *Law, Democracy and Development* 169; Manamela "The interpretation and application of section 95(4) of the Labour Relations Act 66 of 1995" 2005 *SA Merc LJ* 348; Cohen "Placing substance over form – identifying the true parties to the employment relationship" 2008 *ILJ* 864; Bosch and Le Roux "Not letting them whistle: the Labour Appeal Court's approach to the Protected Disclosures Act and protecting parliament's employees" 2011 *Obiter* 591; Maleka and Nkhumise "The interpretation and application of section 191(12) of the Labour Relations Act: *Bracks NO v Rand Water*" 2011 *SA Merc LJ* 504; and Chicktay "Defining the right to strike: a comparative analysis of international labour organization standards and South African law" 2012 *Obiter* 260. Note, however, that these studies tend to focus upon the proper interpretation of a relevant statutory provision with little to no reference to proper interpretative theory and approach.

[9] Kenny "Constitutional role of the judge: statutory interpretation" 2013 Paper presented at the Judicial College of Victoria and the Melbourne Law School, The University Of Melbourne http://www.fedcourt.gov.au/publications/judges-speeches/justice-kenny/kenny-j-20130315 (06-04-

In South Africa, choices made by judges will depend upon "the intellectual instincts and habits of mind of the traditional common or Roman-Dutch lawyer trained and professionally socialized during the apartheid era".[10] It is important to note that "[l]egal culture has a powerful, steering or filtering effect on interpretive practices, therefore on adjudication, and therefore on substantive legal development".[11] Similarly, debate in labour law scholarship has been concerned with the proper interpretation of legal provisions, without investigating the underlying methodology to such constructions, perhaps because of the (often) obscure manner in which statutory interpretations are communicated by the courts.[12] It is of important to consider the interpretive approach of the judiciary to the interpretation of labour legislation. The study will therefore involve an appraisal of the interpretation of the term "employee", so as to determine the constitutionally justifiable and appropriate approach to the interpretation of the term. The results produced in this study will have consequences for the interpretation of all labour law.

It should be noted that the adoption of a teleological approach to the interpretation of statutes does not automatically result in an interpretation of legislative provisions that will necessarily advance the transformative vision of the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution). One of three possibilities could emerge: Firstly, judges can openly or surreptitiously refuse to adopt a teleological approach to the interpretation of statutes. Secondly, the pronouncements of judges can possibly amount to little more than lip service to the new constitutionally mandated approach to the interpretation of statutes. Thirdly, stating that a court utilised an approach that may be described as teleological does not mean that the court utilised an approach which best advances the values inherent in the Constitution and the Constitution's transformative vision. This is so because a given interpretive approach can justify a variety of outcomes.

2015), a judge of the Federal Court of Australia, has said that "[s]tatutory interpretation is something judges do most days. Whilst recognising we must be careful and abide by the rules, we generally interpret statutory provisions as a matter of course. We would not ordinarily consider the constitutional position that judges occupy as interpreters".

10 Klare "Legal culture and transformative constitutionalism" 1998 *SAJHR* 146 156.

11 Above 148.

12 Kenny (n 9).

All three scenarios may be explained by legal culture where the interpreter may consciously or unconsciously disagree with the approach to statutory interpretation adopted by the Constitutional Court because of an overly positivistic view of law and/or because the interpreter has been "brought up" in a culture of formal, technical, literal and rule-bound interpretation.[13] Some judges may, even upon a full appreciation of the constitutional obligations imposed upon interpreters, still profess over-exaggerated and undeserved allegiance towards the text of a statutory provision and thus skirt the objects of the Constitution. To complicate matters further, it must be acknowledged that the text of statutory provisions will always, to some extent, be a controlling influence upon the final construction of a legislative provision.[14]

2 *Assumptions*

The study will assess the validity of the following presuppositions:

(a) Legislation has become an indispensable source of contemporary labour law.

(b) The Constitutional Court has adopted what has been described as a "broad" purposive or "teleological" approach to the interpretation of statutes that advances the values of the Constitution.[15] The word "teleological" is derived from the Greek word "telos" meaning the end of a goal-oriented process. Teleological judgments are consequentialist in nature and it advances the proposition that judgments should be made based on the consequences that result therefrom.[16]

[13] Klare (n 10) 168.

[14] As Rosenau *Post-Modernism and the Social Sciences: Insights, Inroads, and Intrusions* (1992) 25 puts it, "[t]he reader may construct the text, but the text in turn controls the encounter".

[15] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors Pty Ltd. In re: Hyundai Motor Distributors Pty Ltd v Smit* 2001 1 SA 545 (CC); *National Education Health and Allied Workers Union v University of Cape Town* 2003 3 SA 1 (CC); *Bato Star Fishing Pty v Minister of Environmental Affairs* 2004 4 SA 490 (CC); *African Christian Democratic Party v Electoral Commission* 2006 3 SA 305 (CC); *Department of Land Affairs v Goedgelegen Tropical Fruits Pty Ltd* 2007 6 SA 199 (CC); *Aviation Union of South Africa v South African Airways Pty Ltd* 2012 1 SA 321 (CC); *Dengetenge Holdings Pty Ltd v Southern Sphere Mining and Development Company Ltd* 2014 5 SA 138 (CC); and *Cool Ideas 1186 CC v Hubbard* 2014 4 SA 474 (CC). See also Ackermann "Constitutional comparativism in South Africa: a Response to Sir Basic Markesinis and Jorg Fedtke" 2005 *Tulane Law Review* 169 176.

[16] Barnett, Bass and Brown "Ethical ideology and ethical judgment regarding ethical issues in business" 1994 *Journal of Business Ethics* 469 471.

(c) The judiciary has, in interpreting the term "employee", adopted a teleological approach to the interpretation of statutes.
(d) Even though the judiciary has adopted a teleological approach, the interpretations advanced by them has not had the profound effect envisaged by the Constitution on the transformation of society and the achievement of a society based on social justice, because of legal cultural reasons.

3 *Research questions and research aims*

From the above the following key research questions may be formulated:

(a) Why is labour legislation important?
(b) What are the considerations that interpreters should be aware of when interpreting the term "employee"?
(c) Has the interpretations or constructions advanced in interpreting the term "employee" advanced the transformation vision of the Constitution and contributed to the achievement of social justice?

The key aims of this study is therefore sevenfold:

(a) The study will describe the phenomenon of legislation and labour regulation by means of legislation and the consequences thereof for the work relationship.
(b) The study will describe contemporary approaches to the interpretation of statutes within the context of the Anglo-American tradition.
(c) The study will describe the teleological interpretation approach as the dominant approach to the interpretation of statutes.
(d) The study will describe the considerations that an interpreter of the concept "employee" should take into consideration when constructing the concept.
(e) The study will advance and prescribe a constitutionally appropriate conceptual model of statutory interpretation for the interpretation of labour laws in general and the term "employee" in particular, that furthers the transformative vision of South African society and the constitutional aim of achieving a society based on social justice.

4 *Justification*

4.1 The importance of statutory interpretation

Legislation has become an indispensable source of contemporary law, if not the most important source both generally and in the context of labour law.[17] Consequently the role of statutory interpretation has grown significantly. Spigelman has observed that statutory interpretation has become the most important field of study as no area of the law has escaped legislative intervention.[18] Similarly, Von Savigny regarded the interpretation of laws as "the foundation of legal science".[19] Labour law is no exception to this observation and it is trite that labour law has not escaped such statutory modification. To this end an enormous number of statutory arrangements, mainly directed towards the protection of employees and the advancement of section 23 of the Constitution,[20] have been enacted.[21] The legislature has responded with the promotion of job security and the setting of minimum standards, the promotion and protection of collective bargaining and the third response was the creation of specialist tribunals and tailor-made procedures to enforce these fundamental principles.[22]

There are many reasons to inquire into the interpretive approach of the judiciary. Chief amongst these is the concern that the neglect of such inquiries will impair the predictability of legal dispositions.[23] If citizens at large, and litigants in labour matters in particular, are incapable to predict what legislative provisions require of them, then

[17] See Chapter 2 for a discussion of the significance of legislation in regulation the employment relationship.
[18] Spigelman "The poet's rich resource: issues in statutory interpretation" 2001 *Australian Bar Review* 224.
[19] Von Savigny *System des Heutigen Romischen Rechts* (1840) par 32.
[20] S 23 of the Constitution affords "everyone" protection from unfair labour practices, and every "worker" the right to form and join a trade union, to participate in the activities and programmes of a trade union and to strike.
[21] Legislation such as the Basic Conditions of Employment Act 75 of 1997, the Labour Relations Act 66 of 1995, the Employment Equity Act 55 of 1998, the Skills Development Act 97 of 1998 and also social labour legislation such as the Compensation for Occupational Injuries and Diseases Act 130 of 1993, the Unemployment Insurance Act 63 of 2001, the Occupational Health and Safety Act 85 of 1993 and the various amendments to these acts.
[22] Grogan *Workplace Law* (2014) 4.
[23] Scalia and Gardner (n 4) xxvii.

legal certainty, which is a central requirement of the rule of law, is encroached.[24] The purpose of any legislative or constitutional provision is to create a norm to which citizens may conform their conduct.[25] Predictability of outcomes is key to legal certainty and is a central requirement of the rule of law and as such, scholarship about the interpretation of statutes advances a central constitutional value.[26] Section 1(*c*) of the Constitution states that the Republic is founded upon the values of "supremacy of the Constitution and the rule of law".

This is not to say, however, that it is possible, through the rules, canons and methodologies of statutory interpretation to predict with exact certainty what the interpretive outcomes of each case would be.[27] As Cowen has shown, "it is not possible to reduce the subject to a system of formulas which will yield solutions with computerlike facility 'a sort of table of juristic logarithms'".[28] But this does not mean to say that outcomes in decision-making may be likened to a judicial throw of the dice either. As the author has argued, "there is more room for helpful guidance than is often supposed – provided we attend more closely to underlying theory and assumptions".[29]

By studying the methods employed by the judiciary in the interpretation of legislative provisions, we can avoid some of the pitfalls and come to know the real difficulties inherent in the interpretation of these provisions.[30] Nevertheless, even though predictability in law may not be entirely possible, it still remains the goal that legal science must strive towards. Indeed, "predictability is bound to increase

[24] Maxeiner "Some realism about legal certainty in the globalization of the rule of law" 2008 *Hous J Int'l L* 27 30. See also *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) par 102.

[25] Endicott "The value of vagueness" in Marmor and Soames (eds) *Philosophical Foundations of Language in the Law* (2013) 14 16.

[26] Maxeiner (n 24) 30.

[27] In the British case of *Corocraft v Pan-American Airways* 1968 2 All ER 1059 it was held that: "In the performance of this [interpretative] duty the judges do not act as computers into which are fed the statute and the rules for the construction of statutes and from whom issue mathematically correct answers. The interpretation of statutes is a craft as much as a science, and the judges as craftsmen, select and apply the appropriate rules as tools of the trade. They are not legislators but finishers and polishers of legislation which comes to them in a state requiring various degrees of further processing" (1017).

[28] Cowen "Prolegomenon to a restatement of the principles of statutory interpretation" 1976 *TSAR* 131 133.

[29] Above.

[30] Von Savigny (n 19) par 32.

proportionately as the subject becomes more thoroughly and more sensitively understood".[31]

In law, meaning-generation is a function of statutory interpretation and every application of a text to particular circumstances entails interpretation.[32] As text has no pre-interpretive meaning,[33] this means that every text must be interpreted to attach meaning to provisions and (labour) legislation is no exception to this observation.[34] Thus, if you seem to meet a legislative provision that doesn't have to be interpreted, that is because you have interpreted it already. Sunstein has said that interpretive principles are always at work.[35]

Meaning that seems to leap off the page, is a meaning that flows from interpretive assumptions that are so deeply entrenched that they have become invisible.[36] This is so because a statute is a legal instrument that is, according Endicott, "a normative text with a technical effect" in that "the law itself has techniques for determining the effect of the normative text".[37] The well-known dictum *in claris non fit interpretatio* (clear rules do not require interpretation) has therefore been discredited.[38] The Israeli Supreme Court per Barak J has held that all legislative provisions, including those whose language is "clear" require interpretation and that the statute is only "clear" because interpretation has clarified it.[39]

[31] Cowen (n 28) 133.
[32] Scalia and Garner (n 4) 53.
[33] Sunstein "Interpreting statutes in the regulatory state" 1989 *Harvard Law Review* 405 411.
[34] Barak (n 3) 12.
[35] Sunstein *The Partial Constitution* (1993) 104. Adler and Van Doren *How to Read a Book* (1972) 5 in their pioneering work *How to Read a Book* described this idea with reference to interpretation of all texts as follows: "Since reading of any sort is an activity, all reading must to some degree be active. Completely passive reading is impossible; we cannot read with our eyes immobilized and our minds asleep."
[36] Fish *Doing What Comes Naturally*: *Change Rhetoric, and the Practice of Theory in Legal Studies* Duke University Press Durham (1989) 358. Gadamer *Truth and Method* (1979) 147 has stated that "all that no longer expresses itself in and through its own world – that is, everything that is handed-down, whether art or other spiritual creations of the past, law, religion, philosophy and so forth – is estranged from its original meaning and depends for its unlocking and communication [upon interpretation]".
[37] Endicott (n 25) 15.
[38] Barak (n 3) 12.
[39] *Air Tour (Israel) Ltd v Chair of the Council for Antitrust Oversight* 39(1) PD 169 176. See also *Gov Ari Ltd v Netanya Local Planning and Construction Council* 35(4) PD 764 769. Similarly, Innes CJ in *Venter v R* 1907 TS 910 914–915 stated that "[n]o matter how carefully words are chosen there is a difficulty in selecting language which, while on the face of it expressing generally

In labour law, statutory interpretation is also of significant importance, not only because all legislative provisions, including labour legislation, must be legally interpreted in order to assign meaning to them, but also because labour legislation often utilised vague terms, concepts and standards to regulate the employment relationship. Consider, for example, the vague concept "unfair labour practice" as contained in section 23 of the Constitution. When the concept was first introduced in South Africa it was defined as "any labour practice that in the opinion of the Industrial Court is an unfair labour practice".[40]

In effect the former Industrial Court was therefore given extensive discretion to decide for itself what conduct amounted to unfair labour practices and what did not and this leeway, according to some, "amounted to a license to legislate".[41] Later interventions by the legislature to introduce more specific definitions could also not produce the intended certainty and produced general and open-ended definitions requiring the court to use its own discretion in interpreting it.[42] In *National Education Health and Allied Workers Union v University of Cape Town,* the Constitutional Court found it "neither necessary nor desirable" to define this concept as it is currently contained in the Constitution.[43] Instead the court preferred the concept to be left to gather meaning within the courts.

In the United Kingdom, labour law is also fraught with terms that may be said to be general or vague.[44] "Proportionality" with regard to discrimination law and cases arising under the United Kingdom Human Rights Act, 1998, and the definition of "employee" as contained in section 230(1) of the Employment Rights Act, 1996 may also be said to be vague.[45] In Germany the Civil Code (*Bürgerliches Gesetzbuch*), the Protection against Dismissal Act (*Kündigungsschutzgesetz*), and the Works

the idea on the framer of the measures, will not, when applied under certain circumstances go beyond it, and when applied under other circumstances fall short of it."

40 S 1(f) of the Industrial Conciliation Amendment Act 94 of 1979.

41 Vettori *Alternative Means to Regulate the Employment Relationship in the Changing World of Work* (2005 thesis University of Pretoria) 301; Thompson and Benjamin South African Labour Law (1997) A-60.

42 The definition was amended by s 1(h) Labour Relations Act Amendment Act 95 of 1980, s 1(h) Labour Relations Act Amendment Act 83 of 1988 and s 1 Labour Relations Act Amendment Act 9 of 1991.

43 Par 26.

44 Davies "Judicial self-restraint in labour law" 2009 *ILJ* 278 278.

45 Refer to *Express and Echo Publications Ltd v Tanton* 1999 IRLR 367 (CA).

Constitution Act (*Betriebsverfassungsgesetz*) also contain general principles rather than specific rules, inevitably drawing the courts into a creative role as they "create" regulation through their interpretive function.[46] Waas has shown that the legislative principles of good faith has been used by the German courts to adapt legislative demands to new situations.[47] In the European Union, directives ("a legislative act that sets out a goal that all EU countries must achieve ... [and] it is up to the individual countries to devise their own laws on how to reach these goals") are also purposefully drafted in vague terminology, describing broad community aims to be achieved by individual member states.[48]

In South African labour law there are legislative instruments that can similarly be characterised as vague. Consider, for example the concept "unfair labour practice"[49] (and its corollary "unfair dismissal")[50] as well as the standards "rational", "unfair" and "justifiable" which are utilised in the context of labour discrimination law.[51] It is clear that the legislature had intentionally chosen to introduce these vague concepts, and the question therefore arises why the legislature would choose to employ these terms as legislative devices. In this study the focus will be on the similarly vague concept of "employee".[52]

[46] Berger and Neugart "How German labor courts decide: an econometric case study" 2011 *German Econ R* 56 56.

[47] Waas B "Good faith in the law of the employment relationship: Germany" 2011 *Comparative Labour Law and Policy Journal* 603 604-606.

[48] EU "Regulations, directives and other acts" http://europa.eu/eu-law/decision-making/legal-acts/index_en.htm (03-03-2015).

[49] S 23 of the Constitution.

[50] S 186 of the Labour Relations Act 66 of 1995.

[51] S 11 of the Employment Equity Act (55 of 1995; as recently amended by s 6 of the Employment Equity Amendment Act 47 of 2013).

[52] S 213 of the Labour Relations Act 66 of 1995 defines an "employee" 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 is practically identical to the definitions used in s 1 of the Employment Equity Act 55 of 1998, s 1 of the Basic Conditions of Employment Act 75 of 1997, and s 1 of the Skills Development Act 97 of 1998. Note, however, that the definitions of "employee" as contained in social security legislation differ from the definition contained in the labour statues. According to s 1 of the Unemployment Insurance Act 63 of 2001 "employee" means "any natural person who receives remuneration or to whom remuneration accrues in respect of services rendered or to be rendered by that person, but excludes any independent contractor". S 1 of the Occupational Health and Safety Act 85 of 1993 defines "employee" as "any person who is employed by or works for an employer and who receives or is entitled to receive any remuneration or who works under the direction or supervision of an employer or any other person". S 1 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 defines "employee" as "a person who has entered into or works under a contract

In legal parlance vague language is often viewed as "bad", whilst precise language is viewed as "good". Vague language is seen to be a product of poor legislative drafting. The concern is understandable. The purpose of any legislative provision is to create a norm to which citizens may conform their conduct. When a norm is vague, it is seemingly incapable of guiding a citizen's conduct (nor does it control the conduct of the officers or public officials responsible for applying them). How then is it possible for individuals to conform their conduct to the norm?

Additionally, concerns related to the separation of powers and the function of the legislature *vis-à-vis* the judiciary is raised.[53] This is so because the task of giving content to and determining the scope of the application of a vague norm is transferred first to an applying official, but ultimately to the courts. In effect, vague norms open the doors for judicial law-making. Our legal system does however consist of both vague and precise norms and vague norms are not always "bad", but sometimes even politically desirable. As such, legislatures may consciously choose to frame legislative provisions in a vague manner.[54] The effect would be to create a vague norm so that its application is unclear.

There may be instances where, although the text of a legislative provision is seemingly clear or precise, the technical effect of legal language means that "[l]egal rules of interpretation may give a vague effect to a precise term".[55] This is so because

of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or in kind, and includes (a) a casual employee employed for the purpose of the employer's business; (b) a director or member of a body corporate who has entered into a contract of service or of apprenticeship or learnership with the body corporate, in so far as he acts within the scope of his employment in terms of such contract; (c) a person provided by a labour broker against payment to a client for the rendering of a service or the performance of work, and for which service or work such person is paid by the labour broker; and (d) in the case of a deceased employee, his dependants, and in the case of an employee who is a person under disability, a curator acting on behalf of that employee".

53 *Minister of Health v Treatment Action Campaign (2)* 2002 5 SA 721 (CC) par 199; and *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) par 37.

54 In *Matiso v The Commanding Officer, Port Elizabeth Prison* 1994 3 SA 592 (SE) 597I-598B it was stated that "[t]he values and principles contained in the Constitution are, and could only be, formulated and expressed in wide and general terms, because they are to be of general application. In terms of the Constitution the Courts bear the responsibility of giving specific content to those values and principles in any given situation".

55 Endicott (n 25) 16.

"there is no straightforward, general relation between the language used in a legal instrument to make law, and the law that is made".[56]

To understand why vagueness can be valuable, the starting point must inevitably be to ask why precision is valuable. According to Endicott precision is valuable for the following reasons. Firstly, precision has "guidance value" because a precise standard makes it clear what people's rights and obligations are. Secondly, precision has "process value" because it directs officials in a legal system.[57] From here it is easy to formulate the chief points of criticism against the use vague concepts: the provision does not make it clear what the obligations or rights of affected persons are.

When legislatures draft a norm vaguely, that does not mean to say that this is always a result of poor legislative drafting. It might be useful for the legislature to leave it to the judiciary to give content to a legislative norm. According to Endicott this choice has "power allocation value" and "private ordering value".[58] Substantively, the legislature delegates to the courts the power to determine, based on the vague criteria contained therein, whether or not an act amounted to unfair discrimination. The allocation of this power to the judiciary is justifiable because judges possess specialised expertise to develop legislation in light of norms. The doctrine of precedent will then allow the norm to develop incrementally and to revise general principles through the processes of appeal.

The processes of the courts mean that general rules would develop only after taking cognisance of both employees and employers. Similarly Hart adopted the view that it may be inevitable and desirable for there to be a margin of uncertainty as it will leave judges to arrive at sensible results in unforeseen future cases.[59] It may also be valuable to leave the persons affected by a rule (*in casu* the employers and employees) uncertain as to its application as employers will have an incentive to come up with creative ways to avoid accountability.

[56] Above.
[57] Endicott (n 25) 19.
[58] Above 26-28.
[59] Hart *The Concept of Law* (1994) 130 and 251-252.

Similarly, it can be argued that the vagueness and uncertainty of the term "employee" may be desirable for employers. Employers will tend to come up with innovative means to avoid the duties imposed on them by labour legislation by excluding from the ambit of the term "employee". It is therefore clear that such vagueness would mostly not be to the benefit of the more vulnerable party. The judiciary is however capable, through its power of interpretation, to significantly increase the ambit of protection afforded to workers, by interpreting the term "employee" extensively.[60]

There is a more pertinent reason why the legal profession should be concerned with matters of interpretation. As Smit has indicated "the judiciary has through its power of interpretation the potential to contribute to the transformation of South African society".[61] It may be argued that the only way the judiciary can contribute to the transformation of society and the achievement of social justice, is through its power of interpretation. This is so because the Constitutional Court has firmly established the subsidiary principle in so far as "[w]here there is legislation giving effect to a right in the Bill of Rights, a claimant is not permitted to rely directly on the Constitution".[62]

Subsidiarity does not mean that the Constitution will play no role in adjudication as a provision in question must be interpreted in terms of section 39(2) of the Constitution so as to "promote the spirit, purport and objects of the Bill of Rights". The Constitutional Court has stated that "[a]ll statutes must be interpreted through the prism of the Bill of Rights".[63] Subsidiarity means that the Constitution must inspire the meaning that is attributed to legislative provisions. If this is not done, primarily

[60] Van Staden "The role of the judiciary in balancing flexibility and security" 2013 *De Jure* 470 473. See *Uber South Africa Technological Services (Pty) Ltd and NUPSAW and SATAWU* case no WECT12537-16 (CCMA) (unreported) where the CCMA classified uber drivers as employees. See also *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers* case no c449/17 (LC) (unreported) where the Labour Court decided on jurisdictional grounds that Uber drivers are not employees. See in general Mokoena "Are uber drivers employees? A look at emerging business models and whether they can be accomodated by South African labour law" 2016 *ILJ* 1574.

[61] Smit (n 5) 11.

[62] *Sali v National Commissioner of the South African Police Service* 2014 9 BLLR 827 (CC) par 4, 72 and n 2. See also *S v Mhlungu* 1995 3 SA 867 (CC) par 59; *MEC for Education: KwaZulu Natal v Pillay* 2008 1 SA 474 (CC); and *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) par 51.

[63] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd. In re: Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) par 21.

because of an adherence to out-dated and literalistic modes of statutory interpretation, it may be argued that the provisions of the Constitution will become obsolete (except to the extend that it may be argued that the legislation concerned has been adopted to give effect to a constitutional provision).

This sentiment is truer in the context of interpreting the term "employee". Few other terms have the potential to contribute to or undermine the achievement of social justice. The primary purpose of the LRA is to "advance economic development, social justice, labour peace and the democratisation of the workplace".[64] The protection extended by labour legislation is only extended to those persons who are defined as "employees" and, as such those who find themselves outside of the border of this definition will be denied the protection afforded by labour legislation.[65]

4.2 The importance of the term "employee"

Labour law distinguishes between the contract for letting and hiring of services (*locatio conductio operarum*) and the contract for letting and hiring of work (*locatio conductio operis*).[66] The primary purpose of this distinction is to attempt to exclude individuals from the ambit of our labour legislation.[67] The protection extended by labour legislation is only extended to those persons who are defined as "employees". Labour laws generally regard employees as vulnerable and in need of legislative protection. In contrast, however, these laws presume that those who fall outside of the definition of employee, such as independent contractors, to be in a commercial relationship and less in need of protection. These workers will have to rely upon the law of contract and resolve their disputes through the general court system.[68] Because of the subsidiary principle, workers who fall outside the scope of the term "employee" will also not be able to rely on the constitutional protection of section 23

64 S 1 of the LRA.
65 Grogan (n 22) 15; and Le Roux "Independent contractors and employees: some recent distinctions made by the courts" 2015 *Contemporary Labour Law* 1 1.
66 *R v AMCA Services* 1959 4 SA 207 (A) 211H. See also Van Jaarsveld and Van Eck *Kompendium van Arbeidsreg* (2006) 6-8.
67 Grogan (n 22) 15 and Le Roux (n 65) 1.
68 Harpur and James "The shift in regulatory focus from employment to work relationships: critiquing reforms to Australian and UK occupational safety and health laws" 2014-2015 *Comparative Labour Law and Policy Journal* 111 111.

of the Constitution without first challenging the constitutionality of their exclusion.[69] As Deakin and Wilkinson has shown, "[i]t is no exaggeration to think of the classification of work relationships as the central, defining operation of any labour law system. Without classification, the law cannot be mobilised."[70]

It is not surprising that the law reports are littered with cases where courts had to determine if a person is to be regarded as an employee for the purposes of our labour legislation.[71] The statutory definitions of the term "employee" begs as many questions as has been raised by the common law definition thereof.[72] The United States Supreme Court[73] noted

> "Few problems in the law have given greater variety of application and conflict in result than cases arising in the borderline between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing."[74]

[69] *Sali v National Commissioner of the South African Police Service* 2014 9 BLLR 827 (CC) par 4, 72 and n 2. See also *S v Mhlungu* 1995 3 SA 867 (CC) par 59; *MEC for Education: KwaZulu Natal v Pillay* 2008 1 SA 474 (CC); and *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) par 51.

[70] Deakin and Wilkinson *The Law of the Labour market: Industrialization, Employment and Legal Evolution* (2005) 4.

[71] See *Bargaining Council for the Furniture Manufacturing Industry, KwaZulu Natal v UKD Marketing CC* 2013 34 ILJ 96 (LAC); *Bayat and Durban Institute of Technology* 2006 27 ILJ 188 (CCMA); *Beya v General Public Service Sectoral Bargaining Council* 2015 36 ILJ 1553 (LC); *Cubey and CSIR* 2006 27 ILJ 2464 (CCMA); *Denel Pty Ltd v Gerber* 2005 26 ILJ 1256 (LAC); *Discovery Health Ltd v Commission for Conciliation, Mediation and Arbitration* 2008 29 ILJ 1480 (LC); *Greyvenstein and Iliso Consulting Engineers* 2004 25 ILJ 613 (CCMA); *Herbst v Elmar Motors* 1999 20 ILJ 2465 (CCMA); *Independent Institute of Education Pty Ltd v Mbileni* 2013 34 ILJ 1538 (LC); *Khanyile v Telkom SA Ltd* 1999 20 ILJ 2470 (CCMA); *Kylie v Commission for Conciliation Mediation and Arbitration* 2010 31 ILJ 1600 (LAC); *Maritz and Cash Towing CC* 2002 23 ILJ 1083 (CCMA); *Melomed Hospital Holdings Ltd v Commission for Conciliation, Mediation and Arbitration* 2013 34 ILJ 920 (LC); *Moses v Safika Holdings Pty Ltd* 2001 22 ILJ 1261 (CCMA); *Motor Industry Bargaining Council v Mac-Rites Panel Beaters and Spray Painters Pty Ltd* 2001 22 ILJ 1077 (N); *Mulder and Special Investigating Unit* 2012 33 ILJ 1508 (CCMA); *National Union of Metalworkers of South Africa v Lee Electronics Pty Ltd* 2013 34 ILJ 569 (LAC); *Ndikumdavyi v Valkenberg Hospital* 2012 33 ILJ 2648 (LC); *Phaka v Bracks* 2015 36 ILJ 1541 (LAC); *Phera v Education Labour Relations Council* 2012 33 ILJ 2839 (LAC); *SA Society of Bank Officials v Standard Bank of SA Ltd* 1994 15 ILJ 332 (IC); *Protect a Partner Pty Ltd v Machaba-Abiodun* 2013 34 ILJ 392 (LC); *Seti and Nelson Mandela Metropolitan University* 2009 30 ILJ 1199 (CCMA); *Shell SA Pty Ltd v National Bargaining Council for the Chemical Industry* 2013 34 ILJ 1490 (LAC); *Shezi v Gees Shoes CC* 2001 22 ILJ 1707 (CCMA); *Sibiya v Amalgamated Beverages Ltd* 2001 22 ILJ 961 (LC); *South African National Defence Union v Minister of Defence* 1999 20 ILJ 2265 (CC); *State Information Technology Agency Pty Ltd v Swanevelder* 2009 30 ILJ 2786 (LC); *Total SA Pty Ltd v National Bargaining Council for the Chemical Industry* 2013 34 ILJ 1006 (LC); *Universal Church of the Kingdom of God v Myeni* 2015 36 ILJ 2832 (LAC); *Van Deventer and Venture SA Pty Ltd* 2007 28 ILJ 268 (CCMA); *Von Backstrom v Independent Electoral Commission* 2000 21 ILJ 267 (CCMA); and *Wyeth SA Pty Ltd v Manqele* 2005 26 ILJ 749 (LAC).

[72] Grogan (n 67) 16.

[73] *National Labor Relations Board v Hearst Publications*the 1944 322 US 111.

[74] 121.

Although the South African legislature and the International Labour Organisation (hereafter the ILO) has done much to assist interpreters in determining the border between employment and commercial relationships,[75] it is foreseen that courts will have to deal with a proliferation of cases where the scope of coverage of the term will be considered. In the wake of the "fourth industrial revolution", a technological revolution that will profoundly alter the way we live, work, and relate to others,[76] many will find themselves in new forms of work which bare little resemblance to the archetypal form of work of the twentieth century. Many workers will find themselves in the grey area between employment and self-employment.[77]

Additionally, many employers actively disguise employees as independent contractors so as to avoid the requirements of labour law.[78] To this the problem of those who find themselves excluded from legislative protection and in illegal or unauthorised forms of work, as well as the phenomenon of labour broking, outsourcing and short-term contracts, should be added. As a result, many workers will find themselves outside of the scope of labour law protection, as in fact many millions already do globally.[79] In 2014 a range of labour law instruments were amended to address this concern.[80]

Le Roux has indicated that, as more workers find themselves in positions where they are excluded from the protection afforded by labour law, that the global response has not been to address the emerging failure of the decommodified contract of employment, but rather to "stall the inevitable by defining an employee more extensively in the hope that more workers will be drawn into the net of labour law".[81]

[75] See Chapter 8 below.

[76] Schwab "The Fourth Industrial Revolution: what it means, how to respond" http://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond (23-01-2016).

[77] Benjamin "An accident of history: who is (and who should be) an employee under South African labour law" 2004 *Industrial Law Journal* 787 789. See also Waas and Van Voss *Restatement of Labour Law in Europe: Vol I: The Concept of Employee* (2017).

[78] Above.

[79] Davidov and Langille "Introduction: goals and means in the regulation of work" in Bogg, Costello, Davies and Prassl (eds) *The Autonomy of Labour Law* (2015) 1 1.

[80] See Basic Conditions of Employment Amendment Act 20 of 2013; Employment Equity Amendment Act 47 of 2013; and Labour Relations Amendment Act 6 of 2014.

[81] Le Roux "Employment: a Dodo, or simply living dangerously?" 2014 *Industrial Law Journal* 30 32.

The ILO has acknowledged the centrality of interpretation (or application) in establishing whether or not an employment relationship exists in situations where the respective rights and obligations of the parties concerned are not clear in the Preamble of the Employment Relations Recommendation, 2006. Brassey indicated that, although the definition of employee was open for an expansive interpretation, that courts had preferred to interpret the term conservatively.[82] Instead our courts have searched for "a single definitive touchstone to identify the employment relationship".[83] As such, some have argued for a new approach to the interpretation of the statutory definition of an employee that is rooted in purposive interpretation that will lead to a more expansive interpretation of the definition of an employee.[84] Such purposive interpretation, states Benjamin, requires that the term be interpreted to give effect to the Constitution and the purpose of the statutory provision.[85]

If more than one interpretation is possible, the interpretation that best gives effect to the Constitution must be applied.[86] As Kasuso has indicated, our courts "have not yet developed an adequate policy driven approach in dealing with what has become a significant challenge to the efficacy of employment legislation".[87] Similarly, Benjamin has argued that "the jurisprudential basis for identifying reality of an employment relationship in our law remains unclear".[88]

4.3 The teleological model of the interpretation of statutes

In 1976 Cowen expressed the need for a clearly articulated and consistently followed general theory of interpretation.[89] Prior to the adoption of the first justiciable Constitution the task of formulating such a theory seemed impossible. Although

[82] Brassey *Employment and Labour Law* (2000) B:iii.
[83] Benjamin (n 77) 787.
[84] Above 788.
[85] Above 798.
[86] *Discovery Health Ltd v Commission for Conciliation, Mediation and Arbitration* 2008 29 ILJ 1480 (LC) par 37.
[87] Kasuso *The Definition of an "Employee" under Labour Legislation: An Elusive Concept* (2015 thesis University of South Africa) 4.
[88] Benjamin (n 77) 794.
[89] Cowen (n 28) 137.

literalism[90] as expressed in the so-called "golden rule"[91] of statutory interpretation dominated, interpretation often preceded to a lesser extent in terms of intentionalist,[92] contextual[93] or purposive[94] theories. To complicate matters, interpretation often proceeded in terms of what Du Plessis has termed the "literalist-cum-intentionalist" theory in which allegiance was declared to the intention of the legislature but ultimately a provision was merely interpreted in a literalist fashion.[95]

[90] According to Du Plessis (n 7) 32-29 "[l]iteralism maintains that the meaning of an enacted provision can and must be deduced from the very words in which the provision is couched, regardless of consequences".

[91] According to this rule "the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid the absurdity and inconsistency, but no further." See *Grey v Pearson* 1843–60 All ER Rep 21 (HL) 36. The golden rule became established in case law as a softened position to crude literalism. See *Venter v R* 1907 TS 910 914–915; *Principal Immigration Officer v Hawabu* 1936 AD 26 30–31; *S v Toms; S v Bruce* 1990 2 SA 802 (A) 807H–J; *Van Heerden v Joubert* 1994 4 SA 793 (A) 795E–G; *Poswa v Member of the Executive Council for Economic Affairs, Environment and Tourism, Eastern Cape* 2001 3 SA 582 (SCA) par 10-13. See also Cowen "The interpretation of statutes and the concept of 'the intention of the legislature'" 1980 *THRHR* 374 379.

[92] Intentionalism, writes Du Plessis (n 7) 32-31 "claims that the paramount rule of statutory interpretation is to discern and give effect to the real intention of the legislature." See also *Farrar's Estate v Commissioner for Inland Revenue* 1926 TPD 501 508; *SANTAM Versekeringsmaatskappy Bpk v Roux* 1978 2 SA 856 (A) 868E–F; *Suliman v Minister of Community Development* 1981 1 SA 1108 (A) 1120A–B; *S v Masina* 1990 4 SA 709 (A) 713G; *Dodd v Multilateral Motor Vehicle Accidents Fund* 1997 2 SA 763 (A) 769D; and *Coin Security Group Pty Ltd v SA National Union for Security Officers* 1998 1 SA 685 (C) 688E.

[93] According to Du Plessis (n 7) 32-33 "[c]ontextualism is the theory of statutory interpretation that holds that the meaning of an enacted provision and its words and language can only be determined in light of its context or 'background conditions'". See also *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1925 AD 245 261; *Jaga v Dönges; Bhana v Dönge* 950 4 SA 653 (A) 662D–667H; *Secretary for Inland Revenue v Brey* 1980 1 SA 472 (A) 478A–B, *S v Makwanyane* 1995 3 SA 391 (CC) par 10; *Ferreira v Levin NO; Vryenhoek v Powell* 1996 1 SA 984 (CC) par 52, 54, 57, 70, and 170; *S v Motshari* 2001 2 All SA 207 (NC) par 8; and *Department of Land Affairs v Goedgelegen Tropical Fruits Pty Ltd* 2007 6 SA 199 (CC) par 24.

[94] "A proponent of purposivism", writes Du Plessis (n 7) 32-35, "will attribute meaning to such a provision in the light of the purpose or object it has (most probably) been designed to achieve". See also *Qozoleni v Minister of Law and Order* 1994 3 SA 625 (E) 634I-635C; *Potgieter v Kilian* 1995 11 BCLR 1498 (N) 1515B–F; *Stellenbosch Farmers' Winery Ltd v Distillers Corp (SA) Ltd* 1962 (1) SA 458 (A) 473F; *Nasionale Vervoerkommissie van Suid-Afrika v Salz Gossow Transport* 1983 4 SA 344 (A) 357A; *Kanhym Bpk v Oudtshoorn Munisipaliteit* 1990 3 SA 252 (C) 261C–D; *Raats Röntgen and Vermeulen Pt Ltd v Administrator Cape* 1991 1 SA 827 (C) 837A; and *Stopforth v Minister of Justice; Veenendaal v Minister of Justice* 2000 1 SA 113 (SCA) par 21.

[95] According to Du Plessis (n 7) 32-32 "[t]he principal purpose of interpretation is said to be determining the intention of the legislature. The legislature couches or encodes its intention in the language of the statutory provision to be construed. When the words used for this purpose are clear and unambiguous, their literal, grammatical meaning must prevail and they must be given their ordinary effect. This, it is believed, will disclose and convey, without further ado, the true intention of the legislature and thereby the 'correct' meaning of the provision construed." See also *Randburg Town Council v Kerksay Investments Pty) Ltd* 1998 1 SA 98 (SCA) 107A–B; *Public Carriers Association & Others v Toll Road Concessionaries Pty Ltd* 1990 1 SA 925 (A) 942I–J; *Manyasha v Minister of Law and Order* 1999 2 SA 179 (SCA) 185B–C; and *Commissioner, SA Revenue Service v Executor, Frith's Estate* 2001 2 SA 261 (SCA) 273G–I.

Other theories were also not developed to their fullest extent as they were often qualified by the literalist postulate that interpreters could only look beyond the text when the text was vague or when strict adherence would lead to absurdity.[96] This discordance in the approach to statutory interpretation can be explained by the fact that different common-law systems of statutory interpretation were introduced in South Africa because of the country's colonial past. As Cowen points out, Roman law and Roman-Dutch law was not entirely settled as to the proper approach to statutes. Nevertheless the author concludes that "the overwhelming 'weight' of authority in Roman-Dutch law, favours the anti-literalist approach".[97] It was De Villiers CJ who, "on a fateful day in 1875",[98] dealt the deathblow to the Roman-Dutch law of statutory interpretation in *De Villiers v Cape Divisional Council* when the court found that interpretation had to proceed in terms of (literalist) English common-law. [99] Following this seminal decision, interpretation consequently proceeded in terms of a literal fashion, and neglected Roman-Dutch law concerning statutory interpretation.[100]

Following the advent of constitutional democracy, much of the received wisdom of the common-law theories of statutory interpretation must be reconsidered. The judiciary has adopted an approach to the interpretation of statutes that seeks to animate and give life the values and rights in the Constitution.[101] Following the toppling of the notion of the "intention of the legislature" by constitutional

[96] See n 91 above. See also *Goldberg v P J Joubert Ltd* 1960 1 SA 521 (T) 523D; *Naboomspruit Munisipaliteit v Malati Park (Edms) Bpk* 1982 2 SA 127 (T) 133F; *Oertel v Direkteur van Plaaslike Bestuur* 1983 1 SA 354 (A) 370D–G *and Reynolds Bros Ltd v Chairman, Local Transportation Board, Johannesburg* 1984 2 SA 826 (W) 828G.

[97] Cowen (n 28) 144.

[98] Above.

[99] 1875 Buchanan 50 64-65. The Court held that "[i]f the rules of the Roman-Dutch law (following those of the Roman law) for the proper construction of statutes were to guide this Court, there would be no difficulty in construing the clause... But in construing statutes made in this colony after the cession to the British Crown, this Court should, in my opinion, be guided by the decisions of the English Courts, and not by the Roman-Dutch authorities .... There seems no doubt ... that the enlarged or extensive interpretation of statutes which was admitted in former times has given way (except it would appear in old statutes) to a strict observance of the literal and grammatical sense of the words employed. The current of modern decisions seems to be in favour of considering the literal meaning of the words in which the statute is expressed as the primary index to the intention with which the statute was made, and to abide by the literal meaning even where it varies from other indications of the actual intention of the Legislature."

[100] Cowen (n 28) 145.

[101] See Botha *Waarde-aktiverende Grondwetuitleg: Vergestalting van die Materiële Regstaat* (1996 thesis UNISA).

supremacy, "broad" purposive interpretation is slowly supplanting (or has already supplanted, some may claim) the old "golden rule" of statutory interpretation.[102]

Section 39(2) of the Constitution states that anyone "[w]hen interpreting any legislation must promote the spirit, purport and objects of the Bill of Rights". Section 39 can therefore be seen as an instruction to interpreters to look beyond the text in which a statutory provision is couched to give meaning to such provisions. Additionally, the Constitutional Court in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd*[103] found that "where two conflicting interpretations of a statutory provision could both be said to be reflective of the relevant structural provisions of the Constitution as a whole, read with other relevant statutory provisions, the interpretation which *better* reflects those structural provisions should be adopted".[104]

Botha declares that "[t]he fundamental principle of statutory interpretation is that the purpose of the legislation must be determined in the light of the spirit, purport and objects of the Bill of Rights in the Constitution".[105] It is striking that this principle endorses the purposive approach whilst qualifying it at the same time. Indeed teleological interpretation can be seen as a species of purposive interpretation but goes beyond simply ascertaining the purpose of a legislative provision.

Du Plessis has indicated that purposive interpretation *simpliter* "has the potential to turn into a rather unruly horse if three *caveats* are not heeded".[106] Firstly, the processes involved in the interpretation of statutes are too complicated for the purpose of a statutory provision to be described in a simple catchword or catchphrase.[107] Secondly, merely asking what the purpose of a statutory provision is may be restrictive, because the purpose may indeed be restrictive. Merely enquiring into the purpose of a statutory provision without regard to the broader purpose of a statutory provision can therefore be limiting and ignore the injunction placed upon

[102] Du Plessis (n 7) 32-52.
[103] 2009 1 SA 337 (CC).
[104] Par 46.
[105] Botha *Statutory Interpretation: An Introduction for Students* (2005) 10, 66, 75. The author does not repeat this supposition in Botha *Statutory Interpretation: An Introduction for Students* (2012) but does not deny it either.
[106] Du Plessis (n 7) 32-54.
[107] Above.

the courts by section 39 of the Constitution to "promote the spirit, purport and objects of the Bill of Rights" when interpreting legislation. Thirdly, Du Plessis warns that purpose can also only be determined through processes of interpretation and that "the purpose of a provision can simply not be known prior to interpretation".[108] The author warns that such a narrow approach "too easily seduces an interpreter to read a purpose or object into a provision prematurely, and therefore in an arbitrary manner, shedding the responsibility to justify or, at least, explain his or her preference".[109]

The method of statutory interpretation which goes beyond merely asking what the purpose of a statutory provision is, is generally referred to as "teleological interpretation",[110] a "value-activating strategy",[111] or the "value-coherent theory" of statutory interpretation.[112] It has become commonplace for this principle to guide the interpretation of legislation and has been endorsed by the Constitutional Court.[113] The approach was best described (although not explicitly endorsed) in *African Christian Democratic Party v Electoral Commission*:

> "[I]n approaching the interpretation of provisions of ... legislation, courts ... must understand those provisions in the light of their legislative purpose within the overall ... [legislative] framework. That framework must be understood in the light of the important constitutional rights and values that are relevant."[114]

According to Le Roux this "[b]roader approach" favoured by the Court has four distinct steps: Firstly, the purpose of the provision must be established. Secondly, it should be asked if "that purpose would be obstructed by a literal interpretation of the provision". If that is the case, thirdly, "an alternative interpretation of the provision that 'understands' its central purpose" must be adopted. Fourthly, it must be ensured "that the purposive reading of the legislative provision also promotes the object, purport and spirit of the Bill of Rights".[115] It may thus be argued that "broad"

[108] Above 32-55.
[109] Above.
[110] Botha (n 105) 59.
[111] Devenish *Interpretation of Statutes* (1992) 40.
[112] Above 39.
[113] *African Christian Democratic Party v Electoral Commission* 2006 3 SA 305 (CC); and *Department of Land Affairs v Goedgelegen Tropical Fruits Pty Ltd* 2007 6 SA 199 (CC).
[114] 2006 3 SA 305 (CC) par 34.
[115] Le Roux (n 7) 386.

purposivism with its alliance to constitutional values is a preferred alternative, and a solution, to the problems of conventional purposivism.

The Constitutional Court has also expressly endorsed this approach with regard to labour matters. In *National Education Health and Allied Workers Union v University of Cape Town*[116] it was held that

> "[t]he proper approach to the construction of section 197 is to construe the section as a whole and in the light of its purpose and the context in which it appears in the LRA. In addition, regard must be had to the declared purpose of the LRA to promote economic development, social justice and labour peace."[117]

This development aside, it is also true that the entire judiciary has not uniformly adopted this approach.[118] Klare has observed that lawyers display a "relatively strong faith in the precision, determinacy and self-revealingness of words and texts" and that "legal interpretation in South Africa tends to be more highly structured, technicist, literal and rule-bound".[119] It would be incorrect to state that because the Constitutional Court has endorsed a "broad" purposive approach that it has infiltrated the entire legal culture. Klare's observation as to the propensity of South African lawyers to literalism is probably still, at least partially, as accurate today and it may be argued that interpretation still regularly proceed along literalist lines.

4.4 Elements of teleological interpretation

Teleological interpretation requires interpreters to have regard to all the elements of a statutory provision to determine what the broad purpose of a provision is. These elements are: the text, context, values, history and comparative environment of a provision.[120] In this study, these five elements of teleological interpretation will be explored as they pertain to identifying the parties to the employment relationship. Grammatical interpretation is used to limit the possible meaning of a provision and

[116] 2003 3 SA 1 (CC).
[117] Par 62. See also *Aviation Union of South Africa v South African Airways Pty Ltd* 2012 1 SA 321 (CC) par 34-35.
[118] In *Bato Star Fishing Pty Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) the Constitutional Court criticised the Supreme Court of Appeal because it continued to rely on the literal interpretation principle.
[119] Klare (n 10) 168.
[120] Du Plessis (n 7) 248.

focuses on how the natural language assists the interpreter.[121] Grammatical interpretation is not a throwback to literalism as it does not claim that only textual elements may be taken into consideration or that it is only possible to look beyond the text if certain criteria are met.[122] Grammatical interpretation acknowledges that in all interpretation the statutory text should serve as a starting point and that the richness of the textual environment can assist the interpreter in determining the meaning of a statutory provision. Interpreters are required to observe the conventions of the natural language in which the provision is couched.[123]

Contextual interpretation requires that legislative provision must be understood in light of the intra-textual and extra-textual environment of which the provision forms part.[124] Contextual interpretation requires that we understand a legislative provision in the light of the text of the Act (i.e. the Constitution) as a whole (the "intra-textual environment") and of principles outside of the Act (the "extra-textual environment"). The "intra-textual environment" includes the preamble of the Act, the long title, the definition clause, the objects of an Act and interpretation provisions, headings above chapters and articles and annexures. The "extra-textual environment" refers to the "wider network of enacted law and other normative law-texts such as precedents" as well as to "the political and constitutional order, society and its legally recognized interests and the international legal order".[125] When these intra-textual and extra-textual text-components are not integrated with the particular statutory provision, it becomes disintegrated from the rest of the legal system and will be understood in isolation from each other.[126]

Teleological interpretation requires that statutes must be understood in light of their purpose.[127] It is presumed that the purpose of all legislation is to advance broader societal purposes.[128] Teleological interpretation endeavours to advance the values of

[121] Du Plessis (n 7) 32-159.
[122] Du Plessis (n 7) 198.
[123] Above 208.
[124] Du Plessis (n 7) 32-159.
[125] Du Plessis above 32-159, 32-166.
[126] Du Plessis (n 7) 32-160; Tribe and Dorf *On Reading the Constitution* (1991) 21-30.
[127] Above 32-160.
[128] Above 32-168.

the legal order.[129] Purposive interpretation has traditionally been anchored in two objective elements. Firstly, interpreters should assume that the legislature is composed of "reasonable people seeking to achieve reasonable goals in a reasonable manner".[130] Secondly, interpreters should accept that the legislature "sought to fulfil their constitutional duties in good faith".[131]

Historical interpretation requires interpreters to consider the tradition from which a provision emerged, allows the interpreter to consider materials relevant to the genesis of the text and other historic events.[132] Historical interpretation requires that the interpreter identify the historical situation that gave rise to the law, although it is sufficient that the spirit of the history be taken into account.[133] Teleological interpretation without the historical dimension is not possible.[134]

Comparative interpretation allows the interpreter to understand a provision in light of international standards and to seek guidance from other legal systems.[135] According to section 39(1) of the Constitution "[w]hen interpreting the Bill of Rights, a court, tribunal or forum ... must consider international law"[136] and "may consider foreign law".[137] The Constitutional Court has held that international and foreign authorities are important because courts in these jurisdictions have already analysed arguments for and against certain prepositions and have shown how they have dealt with the matter.[138] The Constitutional Court has held that the most important source of South Africa's public international law obligations in respect of labour law, are the Conventions and Recommendations of the ILO.[139]

[129] Du Plessis (n 7) 247.
[130] Barak (n 3) 87.
[131] Above.
[132] Du Plessis (n 7) 32-160.
[133] Above 32-170.
[134] Du Plessis (n 7) 32-170.
[135] Above 32-160.
[136] S 39(1)(*b*).
[137] S 39(1)(*c*).
[138] *S v Makwanyane* 1995 3 SA 391 (CC) par 34.
[139] *National Union of Metalworkers of South Africa v Bader Bop Pty Ltd* 2003 3 SA 513 (CC) par 28.

5 *Methodology and limitations*

The study will consist of a literature study of relevant constitutional provisions, labour legislation, case law, books, journal articles and similar sources. The study will consist of a doctrinal analysis and will focus on the legal language,[140] context, values and purposes, history and transnational contextual factors of the definition of "employee". Doctrinal legal analysis is by its nature concerned with "rhetorical practices that are internal to law, avoiding reliance on extralegal normative considerations".[141]

The doctrinal method belongs to the branch of "expository jurisprudence" (which is concerned with analysing the law as it is and as it actually exists) as opposed to "censorial jurisprudence" (which is concerned with reformation of the law and deals with the law as it ought to be).[142] It should be noted, however, that doctrinal studies are not value free and do allow for critique and suggestions for the reform of the law, but from an internal perspective. The methodology is utilised to advance consistency and coherence to the interpretation of the concepts which form the topic of the interpretive analysis. Studies of this nature "take the law as given and attempt to render it intelligible with reference to some overarching theoretical concern".[143]

The aim of the doctrinal methodology "is premised on the idea that the law is based on certain principles, which can be revealed through studying the relevant laws. Once the premise is discerned ... then the laws can be assessed for compliance with the relevant principle(s) and explained according to that framework."[144] In this study, the premise is that the South African judiciary has adopted a teleological model of statutory interpretation. The interpretation of three distinct labour legislative provisions will be assessed and explained according to that framework.

[140] The term "legal language" is used purposefully so as not to create the impression that the study is purely of a hermeneutic nature, but rather that it is the legal meaning of the concepts that will be investigated.
[141] Wendel "Explanation in legal scholarship: the inferential structure of doctrinal analysis" 2011 *Cornell Law Review* 1035 1039.
[142] Meyerson *Jurisprudence* (2011) 14.
[143] Wendel (n 141) 1040.
[144] Morris and Murphy *Getting a PhD in Law* (2011) 31.

In general, doctrinal analysis can be used to "render the law internally consistent (that is, is there a thread of precedent into which the judgement fits?) or externally consistent (does the [interpretation of the] statute ... align with relevant principles)".[145] In this study the doctrinal analysis method will be employed to appraise the external consistency of the interpretation of key labour law concepts as tested against the teleological model of the interpretation of statutes. The study will therefore employ techniques of deductive reasoning and arguments by analogy.[146]

Two important points with regard to the doctrinal methodology should be noted from the outset. Firstly, the doctrinal methodology is not value-free. Although doctrinal studies present themselves as "objective and unconcerned with the world outside the law", these studies are driven by values of "coherence, certainty, and the idea that law can be made ... ordered and stable".[147] But beyond these values which are inherent to the doctrinal method of legal analysis, "normativity creeps back into legal scholarship in interesting ways".[148]

With "social facts" are meant "facts about the behaviour, beliefs and attitudes of people is their social interactions".[149] Social facts are non-normative and generally distinguished from "moral facts" which are facts about what is morally right and wrong.[150] There are however no reason why moral facts cannot also be social facts, because the moral fact has been accepted in, or incorporated into, law.[151]

The teleological model of statutory interpretation is inherently value laden. It involves the activation of certain common-law and constitutional societal (real legal) values in the interpretation of statutes. In the South African judiciary's adoption of

[145] Above.
[146] Deductive reasoning is the process of reasoning from one or more premises to reach a logically certain conclusion and therefore links premises with conclusions. See Sternberg *Cognitive Psychology* (2009) 578.
[147] above 32.
[148] Wendel (n 141) 1040. The author describes "covert normativity" as follows: "There is nothing wrong with legal explanation making reference to moral concerns. In fact, it may be the inevitable result of the law's claim to legitimacy. In order for moral reasons to be relevant to legal explanation, however, they must be incorporated into the materials of the law in some way. It may be the case that moral values can become part of law-a 'social fact' in jurisprudential terms-to the extent that they play a role in the conventional practices of judicial reasoning."
[149] Meyerson (n 142) 23.
[150] Above.
[151] Dworkin *Taking Rights Seriously* (1977) 23.

this doctrine, these values have therefore been implicitly and unreservedly incorporated into South African law. Similarly the Constitution is also foundationally a moral and value-laden document and additionally there exists many other moral principles or values within the common law.[152]

As such, the doctrinal methodology employed herein is value-laden without looking "outside" or "beyond" the law. Thus, as Le Roux points out, teleological interpretation "is inspired by an essentially Dworkinian vision of law's empire and the integrity of the legal order".[153] Dworkin insisted that an interpretation of law must both fit with past political decisions and justify the decision in terms of the community's morality.[154] According to Wendel

> "Dworkin's moralized account of theory-acceptance shifts the burden to doctrinal legal scholars to either accept the role of moral principles in legal explanation, or articulate metatheoretical criteria that show why we should prefer one explanation to another, without reference to morality".[155]

The second point to consider, following from the first, is that, the study will not be confined solely to an exposition and clarification of the law. The study will contain critique and suggestions for law reform, albeit form the perspective appropriate to a doctrinal analysis. Indeed, statutory interpretation is a deeply value-laden branch of law.[156]

[152] Such as the canons or presumptions of statutory interpretation. Refer in general to Van Staden "A comparative analysis of common-law presumptions of statutory interpretation" 2015 *Stellenbosch Law Review* 550.

[153] Le Roux (n 7) 387.

[154] Above 96-98.

[155] Wendel "Explanation in legal scholarship: the inferential structure of doctrinal analysis" 2011 *Cornell Law Review* 1035 1073.

[156] As Sunstein (n 33) 451 has stated "the process of interpretation requires courts to draw on background principles. These principles are usually not 'in' any authoritative enactment but instead are drawn from the particular context and, more generally, from the legal culture. Disagreements about meaning often turn not on statutory terms 'themselves', but instead on the appropriate interpretive principles." On the Dworkinian account of the law it can be reasoned that the transformative vision of the Constitution is not merely a political aim but that the achievement of a society reflective of the values advocated by the Constitution is part of the law. The values in the Constitutions can be described as the (transformative) aims or national commitment of South African society, which are to be achieved by "political and other means under the Constitutions' guidance and control". See Michelman "Expropriation, eviction and that gravity of common law" 2013 *Stellenbosch Law Review* 245 245. It "connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law". See Klare (n 10) 150. The object of the Constitution is to achieve a society reflective of these values. To the extent that the interpretation of legislative provisions do not advance these societal values, it will be argued that interpretive practices should be reformed.

The first limitation of the study flows directly from the nature of the methodology employed herein. As the study is doctrinal in nature it will not consider matters deemed to be "outside" of the law, such as matters of a moral, political or sociological nature. These factors may have a major impact upon the adjudication and conclusion of legal outcomes and may be appropriate and important subject matter for future studies. Additionally, these factors may be important as they may impact upon the elements of teleological interpretation. So, for example, the rise of non-standard forms of work will be considered as part of the contextual dimension of statutory interpretation.

The second limitation flows from the nature of the study. Because the central aim of the study is to test the interpretive approach of the South African judiciary in labour related cases against that of the dominant approach to statutory interpretation in South Africa, the study will not be a direct comparative analysis. As the study will attempt to appraise the external consistency of the interpretation of key labour law concepts as tested against the teleological model of the interpretation of statutes a comparative analysis will not be relevant to the study. This does not mean to say that the study will only consider South African sources and argument.

Specifically, the study will contextualise the theories or approaches to the interpretation of statutes within the South African context against that of the dominant theories or approaches of statutory interpretation. In this sense it would be possible to argue that the study is comparative in nature. Additionally, it should be noted that transnational components are important as it is an important element of the teleological model of statutory interpretation. Chapter 8 of the study will consider the approach of the ILO and other jurisdiction to the question who should be included in the employment relationship.

Such comparisons will be made to elucidate the meaning and boundaries of the model of teleological interpretation adopted by the Constitutional Court. Similarly, arguments about the rise of the importance of legislation in general and labour legislations in particular will be advanced in a global context before describing the same phenomenon in the South African context. Additionally, meaning of statutes in

South Africa can also not be understood without reference to foreign and international law, and as such the study will consider the impact of foreign law[157] and international standards,[158] where relevant, from an interpretive viewpoint.

The third limitation relates to constraint of time and space. The study will test the teleological model against the interpretive approach of the judiciary in interpreting the key labour law concept of "employee". Because of the vast array of concepts employed in the regulation of the employment relationship it is not possible within the scope of this study to appraise the interpretation of the teleological model of interpretation against all or even most provisions used. Instead the study will concentrate upon the concept of "employee" as used in labour legislation as this is arguably one of the most important principles encountered in our labour law as admission to this category is *sine qua non* for access to the protection afforded by labour legislation. Ostensibly, the terms have also been the subject of more litigation than others, and where the judiciary has on several occasions been called upon to give content to and elucidate the meaning of this term. The study will consider cases and research materials up until 1 September 2017.

[157] S 39(1)(c) of the Constitution authorises, but does not require, an interpretation of the Bill of Rights with reference to foreign law. The Constitutional Court has however used foreign law to interpret legislation on several occasions: *Justice Alliance of South Africa v President of the Republic of South Africa* 2011 5 SA 388 (CC) par 72-73; *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 4 SA 395 (CC) par 45-46; and *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 1 SA 984 (CC) par 72-78. In *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) par 31 the Court set out the following important principles with regard to the use of foreign law to interpret legislation: "(a) Foreign law is a useful aid in approaching constitutional problems in South African jurisprudence. South African courts may, but are under no obligation to, have regard to it. (b) In having regard to foreign law, courts must be cognisant both of the historical context out of which our Constitution was born and our present social, political and economic context. (c) The similarities and differences between the constitutional dispensation in other jurisdictions and our Constitution must be evaluated. Jurisprudence from countries not under a system of constitutional supremacy and jurisdictions with very different constitutions will not be as valuable as the jurisprudence of countries founded on a system of constitutional supremacy and with a constitution similar to ours. (d) Any doctrines, precedents and arguments in the foreign jurisprudence must be viewed through the prism of the Bill of Rights and our constitutional values." In *Jafta v Ezemvelo KZN Wildlife* 2009 30 ILJ 131 (LC) par 59 the Labour Court described comparative law as "indispensable".

[158] S 233 of the Constitution requires that legislation must be interpreted in compliance with international law whilst s 39(1)(*b*) requires courts, when interpreting the Bill of Rights, to consider international law. S 1(b) of the Labour Relations Act 66 of 1995 reads: "The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are [*inter* alia] to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation".

6 *Outline*

6.1 Part A: General

This study is comprised of four parts. Part A will describe the nature of the study, the research objectives and assumptions and describe the importance thereof. It will describe the research methodology employed and the limitations thereof. It will describe the phenomenon of regulating the labour relationship by means of legislation within the context of the rise of legislation as the preferred means to regulate the employment relationship. It will describe and explore approaches to the interpretation of statutes and explore and describe the teleological model of statutory interpretation.

6.1.1 Chapter 1: Introduction

This chapter will introduce the study, sketch the contextual background thereof and explain why the study is important. It will describe how the study proposes to understand the manner in which labour legislation should be interpreted and has been interpreted. It will introduce the teleological model of statutory interpretation. It will also introduce the research questions, assumptions and aims associated with the central purpose of the study of appraising the teleological model of the interpretation of statutes in the context of labour law. The chapter will describe the doctrinal methodology to be employed in the study and the limitations of the study.

6.1.2 Chapter 2: The rise of legislation in regulating the employment relationship

This chapter will consider the rise of legislation as the increasingly preferred means of regulating society and the employment relationship. The rise of legislation strengthens arguments on the importance of the interpretation of statutes. As society becomes increasingly regulated by legislation, the importance of the interpretive function will increase correspondingly. The chapter will consider the term "legislation", the rise of legislation as an indispensable source of law and the rise of legislation in the context of labour law. It will argue that the primacy of collective bargaining in labour law has given way to the primacy of legislation. It will be

concluded that regulation by means of legislation has become the dominant source of law and that legislation has become an indispensible source of law for the regulation of the employment relationship, necessitating increased analysis and appraisal of the interpretive methodologies, approaches and principles that are applied to allocate meaning to labour law legislative provisions.[159]

6.2 Part B: The teleological model of interpretation

This part of the study will describe the theoretical underpinnings relevant to the teleological model of interpretation. It will also contextualise this modus of interpretation historically and by describing other approaches to the interpretation of statutes and the theoretical underpinning that underlie any given theory or approach to the interpretation of statutes.

6.2.1 Chapter 3: Approaches to the interpretation of statutes

This chapter will consider the theories of interpretation that judges use when approaching interpretation questions. The chapter will consider the use of theories as angle of incidence and the historic vicissitude of theories of statutory interpretation. The theoretical underpinnings central to theories of statutory interpretation will be explored. The chapter will consider the relevance of the intention of the legislature, the nature of language, the role of the judiciary in the interpretation of statutes and the time-frame within which statutes operate.[160] This chapter will describe the constitutional background to the interpretation of statutes and the teleological model of statutory interpretation generally and specifically, in a labour law context.

[159] See Le Roux *The Regulation of Work: Whither the contract of Employment? An Analysis of the Suitability of the Contract of Employment to Regulate the Different Forms of Labour Market Participation by Individual Workers* (2008 thesis University of Cape Town).

[160] Cowen "Prolegomenon to a restatement of the principles of statutory interpretation" in Cowen (ed) *Cowen on Law* (2009) 97 121. Originally published in 1976 *TSAR* 131.

6.3 Part C: Interpretation of "employee"

This part of the study will describe and outline the legislative environment in which the term "employee" is situated, including section 23 of the Constitution. It will describe considerations relevant to the interpretation of the concept "employee" as they relate to the five elements of teleological interpretation (text, context, values, history and international and foreign law considerations).

6.3.1 Chapter 4: The historical dimension

The chapter will consider the tradition from which the question as to who is an employee has emerged, and will consider materials relevant to the genesis of the written text and other historic events. The chapter will consider the historical origins of the contract of employment as the preferred vehicle for the delivery of rights and entitlements in the employment relationship will be considered in Roman law, Roman Dutch law and English law. It will also be considered how these systems of law deal with the matter of identifying the parties to the employment relationship. The South African inception of the contract of employment will be considered as well as pre-constitutional approaches to identifying the parties to the employment relationship. Contemporary approaches to the problem and the impact of the Constitution will be considered. The approach of the judiciary in post-constitutional South Africa to identifying the parties to the employment relationship and the (demise of the) centrality of the contract of employment will be considered. Contemporary legislative responses to the problem of identifying the parties to the employment relationship will be described.

6.3.2 Chapter 5: The language dimension

Statutory text should serve as the starting point to determine the employment relationship. The richness of the textual environment in relation to the concept "employee" can assist the interpreter in determining the meaning of a statutory provision. The chapter will consider the legislative environment relevant to the question as to who should be regarded as party to the employment relationship. The definition of "employee" as contained in the South African Constitution and labour

legislation will be considered, as well as the presumption in favour of employment, the Code of Good Practice: Who is an Employee and other legislation provisions that impact upon identifying the parties to the employment relationship (such as the regulation of certain forms of atypical work and the definition of "employer"). Thereafter common-law canons of interpretation relevant to the textual environment will be considered.

6.3.3 Chapter 6: The contextual dimension

Legislative provisions in which the term employee are defined must be understood in light of the intra-textual and extra-textual environment of which the provisions form part.[161] Contextual interpretation requires that we understand a legislative provision in the light of the text of the act (i.e. the Constitution) as a whole (the "intra-textual environment") and of principles outside of the act (the "extra-textual environment"). The chapter will explore the concept "employee" within both these environments. It will also consider the historical context of the history of the exclusion of certain races from the employment relationship in South Africa and the global rise in atypical or non-standard forms of employment as the foremost "mischief" that our current legislative provisions are designed to remedy. The chapter will consider legislative and jurisprudential responses to these mischiefs.

6.3.4 Chapter 7: The value dimension

This chapter will consider the values that are to be advanced when interpreting the term "employee" and identify the parties to the employment relationship. Teleological interpretation endeavours to advance the values of the legal order. As such this chapter will identify and elucidate the values which impact upon determining who is an employee and who is not. They are: dignity, equality, social justice, fair labour practices, security of employment (including dismissal protection and social protection), labour market flexibility, flexicurity and freedom of contract.

[161] Du Plessis "Interpretation of the Bill of Rights" in Woolman, Roux and Bishop (eds) *Constitutional Law of South Africa* (2014) 32-159.

6.3.5 Chapter 8: The comparative dimension

The chapter will seek to understand the concept "employee" in light of international standards and seek guidance from other legal systems. The chapter will consider the identification of the parties to the employment relationship in the relevant Conventions and Recommendations of the ILO. In addition, the chapter will consider the approach of other legal systems in determining who is an employee and who is not (Australia, Canada, India, the United Kingdom, Morocco, Namibia, Swaziland, Tanzania, Zimbabwe, Germany and the Netherlands).

6.4 Part D: Findings and recommendations

6.4.1 Chapter 9 Conclusion

This chapter will revisit the research hypothesis, summarise the outcomes of the research and draw conclusions therefrom. The conclusion will revisit the key assumptions of the study. This part of the study will summarise which interpretive considerations, as identified by the elements of teleological interpretation are to be considered when determining the parties to the employment relationship. Following from the above, the study will advance key points of recommendations in relation to the interpretation of the term "employee" in particular and labour legislation in general. Specifically, the study will advance and prescribe a constitutionally appropriate conceptual model of statutory interpretation. Although this model has arguably already developed in constitutional law, it is submitted that, within the context of labour law, little investigation has taken place into the interpretive approach of the judiciary in labour related matters.

7 *Concluding remarks*

It should be noted from the outset that it is not suggested that such a model of interpretation should be equated with a theorem or that the application of the model will in all cases lead to a judicially correct or preferred outcome. Indeed interpretation in terms of this method could quite possibly lead to various different outcomes. The point has already been made that it is not possible to reduce statutory interpretation to

a system of formulas that will yield solutions in a "computerlike" way. According to Du Plessis

> "statutes ... ought not to be understood as 'entities' composed of, for instance, grammatical, systematic, purposive or historical 'elements': these 'elements' should rather be seen as simultaneously given, co equal modes of existence or being that are 'on the move', overlapping and interacting."[162]

According to Le Roux this means that "a statutory norm can never finally come to rest on any one of its potential modes of being".[163] Du Plessis therefore highlights the "structural complexity" and "many-sidedness" of legislative provisions and points out that their interpretation and the linguistic, systematic, teleological, historical and comparative elements of legislation should be weighed against one another without attributing a superior status to any one of these elements.[164] This is the nature of the interpretive exercise. In any given case any one of these elements may be relationally more important than in another cases. This does not mean to say (contrary to the point already made above) that an inquiry into the interpretive approach of the judiciary is not valuable. Indeed it will be argued that theories of statutory interpretation have a strong influence on interpretive outcomes. Although there are shades of meaning that an interpreter can attach to a statutory provision, this does not mean to say that the interpreter has an unfettered discretion. Instead the model will ascribe certain basic principles that constrain interpreters.

As such, it is not the purpose of this study to consider the ultimately correct interpretation of the term "employee" as contained in various labour statutes, but rather to reflect on the elements that should be taken into consideration when interpreting this term. As such, this study is an attempt to contribute to the jurisprudential basis for identifying the reality of an employment relationship in particular, and to reflect on the appropriate approach to the interpretation of labour legislation in general.

[162] Du Plessis "The (re-) systematization of the canons of and aids to statutory interpretation" 2005 *SALJ* 591 611.
[163] Le Roux (n 7) 398.
[164] Above 397 and Du Plessis (n 162) 612.

CHAPTER 2

The significance of legislation to the employment relationship

"[T]he legislature is the only institution which can respond quickly and effectively to frequently fluctuating circumstances of a socio-economic nature."[1]

1 *Introduction*

The regulation of work by means of legislation is not a modern invention. The Code of Hammurabi, a Babylonian law code of ancient Mesopotamia dating back to approximately 1754 Before Common Era (BCE), contained rules affecting the work relationship.[2] The Code laid down workers' minimum wages (four to six silver shekels per annum) and prescribed periods for free workers' employment contracts in addition to many other protective provisions relating to labour.[3] Rules relevant to the employment relationship were contained in the Manusmṛti (or Laws of Manu), an ancient Sanskrit legal text dated from the 2nd to the 3rd century Common Era (CE).[4] So, for example, a herdsman was entitled to take as remuneration for himself the milk of ten of the best cows.[5] So to, Ancient Egyptian labour laws dating from 2925 BCE to 30 BCE prescribed conditions of employment, protected workers from exploitation and assault by employers and regulated remuneration and rations.[6]

1 *Martin v Murray* 1995 ILJ 589 (C) 601E-H.
2 Harper *The Code of Hammurabi King of Babylon; About 2250 BC; Autographed Text Transliteration* (2010) 118 and 232-235.
3 Above xiii.
4 O'Flaherty and Smith (trans) *The Laws of Manu* (1992) 410-420.
5 Wiehahn "Notes" in Wiehahn Commission *The Complete Wiehahn Report with Notes by Prof NE Wiehahn* (1982) xiii.
6 Above xiii.

Under the Jewish Mosaic-Rabbinical law dating back to the 3rd century CE *inter alia* the exploitation of workers were prohibited, workers had to be paid in cash, overtime was prescribed, traveling time to work counted as time worked, feast days were paid holidays, parties were required to give notice of termination of services and strikes carried no penalty.[7] Roman law regulated employment by means of the *locatio conductio operarum*, an agreement whereby a person consented to place his services at the disposal of another who consented to pay remuneration. Rules regulating this agreement were contained in the *Codex Justinianus,* promulgated in 529.[8] Many basic conditions of employment were also prescribed by Roman labour laws.[9]

In England,[10] medieval master-servant relations were codified in the Statute of Laborers, 1349 (a response to labour shortages after the Black Plague) and the Statute of Artificers, 1563 (which set local wage rates, limited labour mobility, and penalties for masters or servants who ended the employment relationship prematurely).[11] Early Dutch law contained a series of *placaaten* regulating domestic work.[12] After the First Industrial Revolution, labour legislation as a form of social regulation proliferated throughout the world.[13] As workers moved from the household to the workplace, a space that promised free labour and freedom of contract,[14] they were instead met with squalor, poverty, disease and exploitation and suffered severe reductions in their living standards, thus necessitating legislative interventions.[15] In South Africa the first Master and Servants Act was adopted by the Cape Colony in 1841 and by the time of unionisation, there were similar laws in all four colonies.[16]

7 Above xiv.
8 For example *D* 19 2 38 and *D* 19 2 19 9.
9 Wiehahn (n 5) xv.
10 See Le Roux *The Regulation of Work: Whither the contract of Employment? An Analysis of the Suitability of the Contract of Employment to Regulate the Different Forms of Labour Market Participation by Individual Workers* (2008 thesis University of Cape Town) 12 ao.
11 Linder *The Employment Relationship in Anglo-American Law: A Historical Perspective* (1989) 46-51.
12 Grogan *Workplace Law* (2014) 4.
13 According to Sinha, Sinha and Shekhar *Industrial Relations, Trade Unions, and Labour Legislation* (2006) 265 labour legislation as a form of social legislation seeks to deal with the problems arising out of the occupational status of persons.
14 Atkinson "Out of the household: master-servant relations and employer liability law" 2013 *Yale Journal of Law and the Humanities* 205 205.
15 Woodward "Wage rates and living standards in pre-industrial England" 1981 *Past and Present* 28.
16 Grogan (n 12). See also Van Jaarsveld and Van Eck *Kompendium van Arbeidsreg* (2006) 6-8.

In what follows, the rise of legislation as the increasingly preferred means of regulating society will be considered. The rise of legislation is significant as an increase of legislation strengthens arguments on the importance of the interpretation of statutes.[17] Firstly, the chapter will consider the term "legislation". Secondly, the rise of legislation will be considered with emphasis on the advantages and disadvantages thereof. Thirdly, the rise of legislation in the context of labour law will be considered through an examination of the purpose(s) of labour law and the rise of legislation as the increasingly preferred way to regulate work, within the context of the rise of a-typical employment relationships. It will be argued that the primacy of collective bargaining has given way to the primacy of legislation.

Fourthly, the study will consider the rise of legislation as a means to regulate work in South Africa, with emphasis on the significant amount of enacted law adopted following the advent of constitutional democracy. Finally, it will be concluded that regulation by means of legislation has become the dominant source of law, and that, within the context of global pressures and a re-evaluation of the purpose(s) of labour law, legislation is an indispensable source of law for the regulation of work, necessitation increased analysis and appraisal of the interpretive methodologies, approaches and principles.

2 *Legislation defined*

All statutes have five distinguishing characteristics:[18] Firstly, statutes are law texts.[19] Other legal instruments share this characteristic. The following are all examples of law-texts: "constitutions, statutes, reported precedents, contracts in writing, wills,

[17] See Chapter 1 § 4.1.

[18] Du Plessis *Re-interpretation of Statutes* (2002) 1-18.

[19] Above 1. According to the author (5-7) all law texts have the following characteristics: Firstly, a text is an entity with an existence of its own. This is so as textual production and interpretation are two distinct processes. After a text is produced the author has had its say and the text will stand on its own. The author cannot control the interpretation that the reader will ascribe thereto. Secondly, it is textured. A text is coherent and structured and has "logic" of its own. Thirdly, it is written as opposed to spoken. Fourthly, it is authentic. Accordingly text in its original format can be distinguished from translations, annotations, commentaries and the like. Fifthly, it wields authority. Sixthly, text is intended to be a topic of discussion. Seventhly, it is the creative effort of a traceable author.

international treaties, heads of argument, pleadings in civil proceedings and so on."[20] Any behaviour that creates a legal norm is a text.[21] Secondly, statutes are enacted.[22] This means that legislative authority, such as a national or provincial parliament or someone authorised thereto by these authorities, must have ordained statutes. Thirdly, statutes are normative and not narrative.[23] Statutes therefore create norms or standards and do not contain statements of alleged or relevant facts that are related to the purpose of the document. Some law-texts are both narrative and normative and there is therefore no watertight distinction between law-texts as either narrative or normative. Whether we describe a law-text as either narrative or normative will therefore depend upon the function thereof. Statutes can be narrative in the sense that all statutory provisions are designed to potentially cater for specific factual situations but also normative in the sense that the statutory provision has been designed to provide for these situations in a predictable or typical manner.[24] As such statutes are generally characterised as normative law-texts.

Fourthly, statutes are "prescriptive" (in contradiction to "persuasive").[25] Statutes are considered to be prescriptive as they contain rules and principles that have the coercive force of law.[26] They have binding force because the authors of statutes are vested with law-making authority derived, directly in the case of original legislation or ultimately in the case of delegated legislation, from the supreme Constitution.[27] Fifthly, statutes are abstract (in contradiction to concretised).[28] As such statutes denote ideas such as rule, principles and procedures that are meant to apply in general and not to a specific or concrete situation.

[20] Above 12.
[21] Barak *Purposive Interpretation in Law* (2005) 1.
[22] Du Plessis (n 18) 1.
[23] Above 1 and 12.
[24] Above 12.
[25] Above 1.
[26] The question why statutes do carry the force of law has been a vexed question in modern jurisprudence that has been related to the debate if the question of what law is must be separated from the question of what the law should be. Refer in general to Austin "Extract from *The Province of Jurisprudence Determined*" in Freeman (ed) *Lloyd's Introduction to Jurisprudence* (2008) 291–303; Hart *The Concept of Law* (1961) Chapter 2 and Chapter 5; Hart "Positivism and the Separation of Law and Morals" 1958 *Harvard Law Review* 593 – 629; Raz "Authority, law and morality" 1985 *The Monist* 295; Meyerson *Jurisprudence* (2013) 107 – 134; Fuller "Positivism and fidelity to law – a reply to Prof Hart" 1958 *Harvard Law Review* 630 – 672.
[27] Du Plessis "The status and role of legislation in South Africa as a constitutional democracy: some exploratory observations" 2011 *Potchefstroom Electronic Review* 92 94.
[28] Du Plessis (n 18) 1.

Taken as such the interpretation of statutes as a field of study encompasses the interpretation of acts, bills, by-laws, codes, commands, decrees, determinations, dictates, dictums, directives, edicts, enactments, fiats, guidelines, laws, notices, orders-in-council, orders, ordinances, proclamations, pronouncements, regulations, resolutions, rules, rulings, and statutes. Legislation is generally taken to refer collectively to enacted laws or a set of laws.

3 *The rise of the legislation-state*

Society has become characterised as regulating its affairs extensively by means of legislation. Every day some new need emerges that requires legislative bodies to deal with or to reorganise social affairs, and regulation is most often the primary way in which these needs are addressed.[29] German scholars tend to characterise states according to what is taken as the province of their main activity.[30] There is *der Kriegerstaat* (the war-state), *der Rechtsstaat* (a state organised around the principle of the rule of law and individual rights), *der Handelstaat* (a state devoted to the advancement of trade), *der Polizeistaat* (the police-state) and so on. Seeley has noted that we live in a legislation-state,[31] which is a form of state devoted to the business of legislation.[32] The legal profession has not always given pride of place to legislation as a source of law. In commenting on the excessive output of legislation by American state legislatures and Congress, Pound noted in 1908 "the indifference, if not contempt, with which that output is regarded by courts and lawyers".[33] The author noted the academic and judicial choice to profess the superiority of judge-made law.[34] Because of this, legislatures thought it better to draft legislation in general terms, leaving details of vital importance to be filled in by judicial law making.[35]

[29] Waldron *The Dignity of Legislation* (1997) 7.
[30] Seeley *Introduction to Political Science: Two Series of Lectures* (1896) 140.
[31] The author has noted that this is an increasingly global phenomenon.
[32] Above. The legislation-state is not to be confused with the *Rechtsstaat*. See also Van Staden "The role of the judiciary in balancing flexibility and security" 2013 *De Jure* 470 470.
[33] Pound "Common law and legislation" 1908 *Harvard Law Review* 383 383.
[34] Above 384.
[35] Above 383.

There has been a shift in the preference of judge-made law over legislation in the South African context. In *Sarrahwitz v Martiz*,[36] a case dealing with an insolvency dispute, the Constitutional Court expressed its preference for dealing with legislation instead of the common law. The Court considered the constitutionality of a legislative provision notwithstanding the fact that the application for leave to appeal was based on the contention that the common law was invalid.[37] The reason advanced was that there exists a principle that the Constitutional Court will only under exceptional circumstances be burdened with the development of the common law.[38]

It may therefore be argued that legislation has become an indispensable source of contemporary law, if not the most important source, both numerically[39] and in terms of pride of place given thereto by the legal profession. This is so as the legislature is capable of responding quickly and effectively to frequently fluctuating circumstances.[40] As such, legislation has become indispensable for the regulation of the modern state. According to Du Plessis "[s]tatutes as regulative instruments pertain to almost every conceivable sphere of interaction in the state".[41] However, as Seeley points out, the legislation-state is a modern phenomenon:

> "The state in other times ... was not supposed to be concerned with legislation. Communities had indeed laws, and at times, though rarely, they altered them; but the task of alteration hardly fell to the state. In earlier times, the state ..., was hardly supposed capable of making law. It could conduct a campaign, levy a tax, remedy a grievance, but law was supposed to be in a somewhat different sphere. Law was a sacred custom; the state might administer, or enforce, or codify it; but legislation, the creating, or altering, or annulling of law, was conceived as a vey high power, rarely to be used, and concerning which it was doubtful who possessed it. ... Often religion was called in, and commonly some degree of fiction was used to conceal the too daring alteration that was made."[42]

Even though authored in 1896, this statement is still appropriate. The author concludes that we have broken with the tradition of earlier times.[43] This is not to say

[36] 2015 4 SA 491 (CC).
[37] Par 18. For a critique of the judgment see Van der Linde and Van Staden "Judicial development (and activism) in insolvency law" 2017 *TSAR* 414.
[38] Par 21.
[39] Parliament has adopted a staggering amount of new acts. Between 1996 and 2016 Parliament adopted 1123 acts (including 17 constitutional amendments) at the rate of about 57 a year.
[40] *Martin v Murray* 1995 ILJ 589 (C) 601E-H.
[41] Du Plessis (n 18) 21.
[42] Seeley (n 32) 144-145.
[43] Above.

that legislation is entirely a modern phenomenon.[44] Although some have advanced the idea that the rise of written law coincided with the quest for social justice and the rise of democracy, evidence suggest that written laws were adopted in response to specific problems which traditional (unwritten) laws (or customs) could not resolve.[45]

These written provisions contained specific provisions as opposed to general principles or values. Evidence suggests that written laws in early Greece and Rome served to secure the political predominance of the elite classes.[46] Nevertheless it may be argued that the rise of written legislation, through being accessible to all, may have at least indirectly contributed to civil egalitarianism.[47] It is important to note that written law was by no means the most important source of law during the archaic period but merely supplemented oral law, unwritten customs and traditional rules.[48] From here it is ostensibly possible to trace the emergence of the legislation-state wherein written law has become the dominant source of law and where oral law, unwritten customs and traditional rules have declined in reaction to societal problems.

Pragmatically, there are some important benefits and disadvantages to legislation.[49] Legislation is easily accessible and knowable and legislation also contributes to legal certainty as it is written documents.[50] In *Byers v Chinn*[51] the former Appellate Division held that published notices are the only practical way of informing the individuals concerned of their rights and duties.[52] In *President of the Republic of*

[44] Much evidence of written law has, for example, been found dating from the archaic period in Greece (800 BCE – 480 BCE). See Gagarin *Writing Greek Law* (2008) 110. Other examples of the development of legislation in other cultures are also abounding. From about the seventh century BCE laws became extensively recorded in writing. See Papakonstantinou *Lawmaking and Adjudication in Archaic Greece* (2015) 128.

[45] Robinson *The First Democracies: Early Popular Government Outside Athens* (1997) 70.

[46] Raaflaub (ed) *Social Conflicts in Archaic Rome: New Perspectives on the Conflict of the Orders* (1986) 262-300. In fact, some of the very first enacted laws were so rigorous, harsh, severe and cruel that our modern adjective for describing such laws – draconic – are derived from Draco, archon at Athens in 621 BCE, under whom small offenses had heavy punishments.

[47] Robinson (n 45).

[48] Gagarin (n 44) 108-109.

[49] Du Plessis (n 18) 22.

[50] Above. Although the author lists this benefit as two distinct points they are seemingly interrelated as it may be argued that legislation is easily accessible and knowable because it is written documents.

[51] 1928 AD 322.

[52] 330.

South Africa v Hugo[53] the Constitutional Court stated that a person should be able to know the law so that they can conform their conduct to the law.[54]

Legal certainty is a central requirement of the rule of law and as such, legislation furthers a central constitutional value.[55] Raz describes this idea as follows: law should be made known to all so that people can be aware of their rights and responsibilities. When a dispute arises, people should be given the opportunity to present arguments in an open court before impartial judges who justify their decisions publicly. For the author, the emphasis is therefore on predictability "and all ability to conduct one's life without being frustrated by governmental arbitrariness or unpredictability".[56]

Conversely, it is true that legal certainty is often not a reality, as judicial intervention is needed to assign meaning thereto.[57] Legislation is often too detailed and long-winded.[58] According to Raz the growth of the legal profession and a highly articulated legal culture has meant that legal issues are formulated in technical terms which are removed from the way ordinary people understand their conduct and interactions with others.[59] The law has thus become inaccessible, conceptually remote and alienating. Under these circumstances the rule of law does not advance justice.[60] The rule of law does not only require that legislation must be drafted in sufficiently clear terms so that it is accessible to all subjects.[61] The rule of law requires judicial faithfulness to the legislature, and calls on the judiciary to act to interpret legislation.[62]

Another benefit to legislation is that it leaves room for flexibility. It can be easily adopted or amended. Ironically earlier written law, such as those examples dating from the Greek Archaic period could not be easily amended as they were, quite literally, written in stone. Because thereof, a sense of permanency resulted that helped

53 1997 4 SA 1 (CC).
54 Par 101.
55 Maxeiner "Some realism about legal certainty in the globalization of the rule of law" 2008 *Houston Journal of International Law* 27 30. Section 1(*c*) of the Constitution states that the Republic is founded upon the values of "supremacy of the Constitution and the rule of law".
56 Raz "The politics of the rule of law" 1990 *Indian Journal of Constitutional Law* 1 2.
57 Du Plessis (n 18) 8.
58 Above.
59 Raz (n 56) 3.
60 Above.
61 In Chapter 3, § 4.2 it is argued that it is not always desirable to draft legislation in precise terms.
62 Raz (n 56) 9.

to give these rules authority.[63] In modern times it has become important that policy makers should be able to speedily respond to societal problems. Conversely, too much legislation can stunt the organic growth of the legal system,[64] and, some have bemoaned the rise of the legislation-state at the cost of the common law.[65]

Blackstone noted that "every man of superior fortune thinks himself a legislator" and that "the Common Law of England has fared like other venerable edifices of antiquity, which rash and unexperienced work-men have ventured to new-dress and refine, with all the rage of modern improvement".[66] This attitude has persisted into modern times. Some even claimed that legislation was not law at all.[67] As Waldron notes, this claim is rooted in the tradition of legal realism which claimed that "[a] bill does not become law simply by being enacted" but only "when it starts to play a role in the life of the community, and we cannot tell what law it is that has been created – until the things begins to be administered and interpreted by the courts".[68]

This view, that legislation should only be seen as a possible source of law, is contrary to the normal usage of the concept of law.[69] There is a view held by some that legislation lacks the dignity of other sources. As opposed to the common law, which has been refined and developed over centuries, statutes "thrusts itself before us as a low-bred parvenu, all surface and no depth, all power and no heritage, as arbitrary in its provenance as the temporary coalescence of a parliamentary of congressional majority".[70] It can therefore be questioned why judge-made law is our idea of law, while statutes legislation is perceived to be a trespasser thereof.[71] Modern positivists have been more concerned with the processes whereby law is developed in courts.[72]

63 Gagarin (n 44) 87.
64 Du Plessis (n 18) 8.
65 Waldron (n 29) 9.
66 Blackstone *The Commentaries of the Laws of England of Sir William Blackstone Volume 1* (1876, 2013) 6-7.
67 See Langdell "Dominant opinions in England during the nineteenth century in relation to legislation as illustrated by English legislation, or the absence of it, during that period" 1906 *Harvard Law Review* 151.
68 Waldron (n 29) 10.
69 Above 11.
70 Above 10-11.
71 Above 11.
72 Above 15.

There is a more important reason why legislation is important. According to Lock, legislation can be seen as the manifest will of the people in a democracy.[73] This is not to say that Locke was a proponent of unlimited legislative powers or the proliferation of legislation. He may be seen as the father of the American tradition of judicial review of legislation.[74] For Locke legislation must define with more precision those rules that already exist in the common law and in the state of nature.[75]

A defence of legislation ultimately rests upon a defence of majoritarianism. The processes of democracy elects the legislature that will select the shape and character of rules for political decision-making.[76] According to Waldron, we should respect legislation as "the achievement of concerted, co-operative, coordinated or collective action in the circumstances of modern life".[77] There exists in any society disagreement with regard to religion, ethics and philosophy.[78] The dignity of legislation lies therein that society has succeeded in taking steps designed to serve societal purposes and that the legislature has succeeded in doing so against a background of disagreement (even though some have complied grudgingly).[79]

Legislation therefore leads to tension between majoritarianism and constitutionalism as unelected judges can assess and review the constitutional validity of laws made by democratically legislatures and strike down whatever is inconsistent with the Constitution. Courts are often faced by the charge that they disrespect the horizontal differentiation of legislative, executive and judicial authority of the democratic state. Courts are therefore called upon to practice judicial self-restraint.[80] The charge is often that courts in these instances make policy decisions which strain against the political will or preferences of the majority.[81] This tension is often described as the

[73] Laslett *Locke Two Treatises of Government* (1988) 425.
[74] Waldron "The dignity of legislation" 1995 *Maryland Law Review* 633 634. Although for Locke the appropriate response to legislative abuse was not litigation but rather revolution.
[75] Waldron (n 29) 67.
[76] Above 163-164. See Duxbury "Review of *The Dignity of Legislation* by Jeremy Waldron" 2000 *The Cambridge Law Journal* 210 211.
[77] Above 156.
[78] Above 155.
[79] Above 154.
[80] Du Plessis "Interpretation of the Bill of Rights" in Woolman, Roux and Bishop (eds) *Constitutional Law of South Africa* Juta (2014) 32-100 – 32-101.
[81] Bridge "The Supreme Court, factions, and the counter-majoritarian difficulty" 2015 *Polity* 420 421.

counter-majoritarian difficulty,[82] and it may be argued that this difficulty is inherent to regulation by means of legislation in the context of a justiciable constitution.

The call for judicial self-restraint can be seen as being rooted in the acknowledgement that legislation is dignified because it was adopted against a background of disagreement. Some aver that the labelling of this phenomenon as a "difficulty" is lamentable.[83] Instead it has been argued that the role of the courts should be viewed as a safety net against tyrannical majoritarianism.[84] Botha argues that it is unrealistic and unreliable to try and resolve the counter-majoritarian difficulty because the tensions it generate could be creative in sculpting the constitutional order and may lead to an institutionally mediated dialogue between the judiciary and the legislature.[85] Debate about the desirability or boundaries of judicial review of legislation and the counter-majoritarian difficulty aside, it should be noted that the concern is debated exactly because society has become increasingly regulated by means of legislation.

4 *The regulation of the employment relationship by means of legislation*

4.1 The disequilibrium in the employment relationship

Two primary relationships existed before the dawn of the industrial age. The independent contractor was regulated by means of contract. The mutual rights and responsibilities of the parties to the master and servant relationship were judicially included in the relationship according to tradition or public policy. The relationship however came into existence through agreement.[86] During the eighteenth and nineteenth centuries the industrial bourgeoisie searched for a more integrated and disciplined workforce than was provided by independent contractors.[87] They wanted workers to be subjected to the same sort of control as servants, whose position was

[82] Above.
[83] The terms was first described by Bickel *The Least Dangerous Branch* (1962) 16.
[84] Eule "Judicial review of direct democracy" 1990 *The Yale Law Journal* 1503 1525.
[85] Botha "Democracy and rights: constitutional interpretation in a postrealist world" 2000 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 561 578–581.
[86] Olivier "Die belang van status en kontrak vir die diensverhouding" 1993 *Tydskrif vir die Suid-Afrikaanse Reg* 17 19.
[87] Merritt "The historical role of law in the regulation of employment - abstentionist or interventionist?" 1982 *Australian Journal of Law and Society* 56 57.

regulated by virtue of their status, and because it was clear that the continuous (or open-ended) nature of the employment relationship could not be adequately regulated by contract alone.[88]

The contract of employment was created to allow the old master-servant relationship to be built into a construct of contract as part of the *naturalia* of the contract.[89] For employees the law of contract ironically embodied values of freedom, equality, self-government and legal competence, and was seen as liberating and facilitative.[90] The employer's traditional duty to attend to the welfare of employees was not included within the contract of employment. Furthermore, legislation, proclamations and ordinances also began to arrange aspects of the employment relationship from 1657, but these largely also strengthened the employer's position.[91] Victorian judges were content to reaffirm the reality of subordination, as it was seen as necessary to the social structure and by the late nineteenth century this reality was summed up in the so-called control-test for establishing the existence of an employment relationship.[92]

The contract of employment that emerged specified the rights of workers and the obligations of employers, while the rights of the employer and the obligations of the worker remained open and status-like.[93] Kahn-Freund therefore described the contract of employment as "command disguised as agreement".[94] The New Zealand Human Rights Commission has stated that in reality the employment relationship is an on-going human relationship unlike ordinary commercial contracts. It is based on inequality of bargaining power between the interests of labour and capital.[95]

88 Above.
89 Although this was said of the English law, Olivier (n 86**)** 21 and 22 states that the development of the employment contract in our legal system has run the same course of development. For a full account of the emergence of the contract of employment see Le Roux (n 10) 11-101.
90 Selznick Law, Society and Industrial Justice **(**1969) 53.
91 Olivier (n 86) 22.
92 Clark and Wedderburn "Modern labour law: problems, functions and policies" in Wedderburn *et at Labour Law and Industrial Relations: Building on Kahn-Freund* (1983) 127 147.
93 Wedderburn "Labour law, corporate law and the worker" 1993 *ILJ* 517 523.
94 Davies and Freedland *Kahn-Freund's Labour and the Law* (1983) 11.
95 New Zealand Human Rights Commission "Submission on the Employment Relations Bill" http:// www. hrc.co.nz/index.php?p=13681&id=13709 (23-01-2016) par 1.4.

This idea of inequality has been in existence since the first industrial revolution,[96] and was a central thesis of Marx who argued that employers use their stronger bargaining power to drive wages.[97] According to Marx, the theoretical voluntary nature of the contract of employment strained against reality, as workers have no real choice to enter into a contract of employment. Such contracts treat workers as commodities.[98] Although the contract of employment was supposed to be based on the formal equality and freedom of all persons it stood in complete contradiction to reality.[99]

Selznick illustrated how the contract strained against social realities by examining some of the premises of the modern law of contract.[100] Firstly, the principle of voluntarism with its *leitmotif* of freedom strains against the reality of commitment, open-endedness, and structure. Secondly, contractual commitments are specific rather than unclear, and they are not open-ended as is the case in the employment relationship. Thirdly, the principle of mutuality requires that there must be consideration on each side. When one party fails to perform accordingly, the remedies available to the other party are therefore either cancellation of the contract or upholding the contract. In the employment relationship, where the main objective is the achievement of common ends, an insistence on full reciprocity may be self-defeating. Fourthly, the principle of "boundedness" requires that only the parties to a contract may claim its benefits or be required to meet its obligations, and that they should be free from external interference. Over time participants may also include other parties, such as trade unions or creditors.[101]

According to Kahn-Freund the main object of labour law has traditionally been held to be a countervailing force to the inequality of bargaining power that exists between the employers and employees.[102] He stated that:

[96] Hogbin *Power in Employment Relationships: Is there an Imbalance?* (2006) 1.
[97] Above vii.
[98] Engels *The Principles of Communism* (1847) par 5.
[99] Clark "Towards a sociology of labour law: an analysis of the German writings of Kahn-Freund" in Wedderburn (n 92) 80 95.
[100] Selznick *Law, Society and Industrial Justice* (1969) 55-59.
[101] As summarised by Van Staden and Smit "The regulation of the employment relationship and the re-emergence of the contract of employment" 2010 *Tydskrif vir die Suid-Afrikaanse Reg* 702 704-705.
[102] Davies and Freedland (n 94) 18.

> "[T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and subordination may be concealed by that indispensable figment of the legal mind known as the 'contract of employment'. 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."[103]

The rules governing labour relations are therefore an attempt to *mitigate* this disequilibrium.[104] As capital resources cannot be utilised effectively without the ability of employers to exercise command over employees, a degree of subordination will always have to be present in the employment relationship.[105]

The object of labour law is therefore not to destroy the disequilibrium but rather to find the correct balance between the powers of the parties to the employment relationship.[106] The most important ways in which the employment relationship is regulated are legislation, collective agreements and the contract of employment.[107] Despite the fact the contract of employment has been described as the "cornerstone of the edifice of labour law",[108] it has done very little historically to address this disequilibrium. It may be argued that the contract of employment has been responsible for this disequilibrium.

It is largely because of the failure of the common-law contract of employment to recognise the true nature of the employment relationship that labour law has developed.[109] An obvious response to address this inequality of positions is the adoption of legislation. According to Du Toit, legislation interfaces with the contract of employment in five distinct ways:[110] Firstly, legislation can fill a gap in the

[103] Kahn-Freund *Labour and the Law* (1972) 8. The Constitutional Court in *Sidumo v Rustenburg Platinum Mines* 2008 2 SA 24 (CC) par 72 held that "[t]he relationship between employer and an isolated employee and the main object of labour law is set out in [this] now famous dictum".
[104] Above 15 and 18.
[105] Above.
[106] Van Staden and Smit (n 101) 705.
[107] Van Niekerk (ed) *Law@work* (2014) 57.
[108] Kahn-Freund "Legal framework" in Flanders and Clegg *The System of Industrial Relations in Great Britain* (1954) 44 45.
[109] Hock "Covenants in restraint of trade: do they survive the unlawful and unfair termination of employment by the employer?" 2003 *ILJ* 1231 1237.
[110] Du Toit "Oil on troubled waters? The slippery interface between the contract of employment and statutory labour law" 2008 *SALJ* 95.

common law that governs the contract of employment.[111] Secondly, legislation can expressly or implicitly override the terms of a contract.[112] Thirdly, labour legislation may only be applicable to those who find themselves party to a contract of employment.[113] Fourthly, legislation can coexist with certain common-law principles and values such as mutual trust and confidence and the duties of fair dealing and good faith.[114] Fifthly, legislation can impose new rights and obligations that may compete with common-law rights and obligations but do not override them.[115]

Legislation has, however, not been accepted as an effective way to mitigate the disequilibrium in the employment relationship. According to Davies and Freedland, history has shown that legislation is not very effective in mitigating the disequilibrium between the parties of the employment relationship. According to the authors:

> "acts of Parliament, however well intentioned and well designed, can do something, but cannot do much to modify the power relationship. The law has important functions but they are secondary if compared with the impact of the labour market. Even the most efficient inspectors can do but little if the workers dare not complain to them about infringements of the legislation that they are seeking to enforce. The law does, of course, provide its own sanctions **...** but in labour relations, legal norms cannot often be effective unless they are backed by social sanction as well. Therefore collective bargaining is much more effective than legislation has ever been or can ever be."[116]

Additionally, in *WL Ochse Webb and Pretorius v Vermeulen*[117] it was accepted that it will not be beneficial to any party to the employment relationship if the employment concept was static and rights and obligations cast in stone. Employers need flexibility to make decisions in a dynamic work environment. In turn, employees are not only paid a wage but they also exact a continuing obligation of fairness from the employer.[118] Legislative interventions were therefore limited to three methods of redressing the inherent inequality between employers and employees.[119] Firstly, legislation imposed minimum conditions of employment for employees.[120] Secondly,

[111] Above 128.
[112] Above.
[113] Above.
[114] Above.
[115] Above 129.
[116] Davies and Freedland (n 94) 19-21.
[117] 1997 ILJ 361 (LAC).
[118] 3651-366A.
[119] Grogan (n 12) 4.
[120] Labour Relations Act 66 of 1995.

legislation promoted the concept of collective bargaining.[121] Thirdly, legislation created special tribunals to enforce workplace rules.[122]

4.2 Rethinking the primacy of collective bargaining

According to Kahn-Freund's theory of collectivism, labour law is to be formed as "an accommodation arising out of the conflict between the collective forces in society" and the role of the state is to "recognise and encourage the idea of self-determination in the law".[123] According to this model the primary way in which the employment relationship was to be regulated was therefore collective bargaining.[124] Arthurs alluded to the fact that labour law was often understood to refer only to the law of collective labour relations (contrasted from employment law and other legal sub-fields such as workers' compensation, health and safety, and pension law).[125]

The most prominent argument against the adoption of national legislation is that the adoption of national legislation would place states in an unfavourable position on international markets.[126] International norms and agreements were therefore seen as a way of counteracting this problem and avoiding the so-called "race to the bottom".[127] This idea was also incorporated within the Constitution of the International Labour Organization, 1919 (Part XIII of the Treaty of Versailles), which states that "the

[121] Basic Conditions of Employment Act 75 of 1997.
[122] Such as the Commission of Conciliation, Mediation and Arbitration, the Labour Court and the Labour Appeal Court.
[123] Clark (n 99) 97.
[124] The International Labour Organisation *Organizing for Social Justice – Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (2004) has described collective bargaining as "a process in which workers and employers make claims upon each other and resolve them through a process of negotiation leading to collective agreements that are mutually beneficial. In the process, different interests are reconciled. For workers, joining together allows them to have a more balanced relationship with their employer. It also provides a mechanism for negotiating a fair share of the results of their work, with due respect for the financial position of the enterprise or public service in which they are employed. For employers, free association enables firms to ensure that competition is constructive, fair and based on a collaborative effort to raise productivity and conditions of work".
[125] Arthurs "Labour law after labour" in Davidoff and Langille (eds) *The Idea of Labour Law* (2011) 16.
[126] Valticos and Potobsky *International Labour Law* (1995) 20.
[127] Smit "Towards social justice: an elusive and challenging endeavour" 2010 *Tydskrif vir die Suid-Afrikaanse Reg* 1 3.

failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own states".[128]

Kahn-Freund indicated that labour legislation plays three distinct roles.[129] Firstly, legislation can support an autonomous system of collective bargaining ("the auxiliary function"). Secondly, legislation can provide a code of substantive rules to govern terms and conditions of employment ("the regulatory function"). Thirdly, legislation can provide the rule of "what is allowed and what is forbidden in the conduct of industrial hostilities" ("the restrictive function").[130] From the above it is clear that Kahn-Freund defined the functions of legislation in the employment context *vis-á-vis* that of the primacy of collective bargaining and primarily saw the function of legislation as secondary to that of the processes of collective bargaining.

In response to contemporary challenges of employment such as the decline of union membership and the rise of atypical employment, Hepple argues that there is a need to re-invent and modernise the three functions of labour law, and to add a new one.[131] The auxiliary function must now assume a form that is appropriate to decentralised employment relations.[132] The regulatory function has become even more important so as to provide adequate protection for the growing number of workers working under non-standard work relationships.[133]

It is contended that the restrictive function must also be rethought and certain features removed that have undermined the positive contribution of trade unions to democratic society, so as to grant appropriate rights to take industrial action.[134] Hepple also argues that a fourth "integrative function", or "positive welfare measures", should be added to combat the social exclusion of unemployed or partially employed persons.[135] The author writes:

[128] Valticos and Potobsky (n 126) 21.
[129] Kahn-Freund "Industrial relations and the law – retrospect and prospect" 1969 *British Journal of Industrial Relations* 301.
[130] Above 302.
[131] Hepple "The future of labour law" 1996 *Comparative Labour Law* 626 646.
[132] Above.
[133] Above.
[134] Above.
[135] Above.

> "These might include the right to acquire vocational skills and further education, financial inducements to employers to engage the long-term unemployed, protection against age discrimination, and child care and parental rights which would make it easier to combine work with family responsibilities."[136]

In recent times factors such as globalisation, deregulation and technological change have significantly impacted on the employment relationship. Legislation must also invariably deal with the phenomenon of "atypical" or "non-standard" forms of employment.[137] The emergence of these non-standard forms of employment has also compounded the problems associated with the informal economy. Although the informal economy is an issue that is separate from non-standard employment, it is clear that the two issues are closely connected.[138] In most countries the growth of the informal economy has been paralleled by the growth of atypical employment.[139] The International Labour Organisation (ILO) defined the term informal economy as:

> "all economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements. Their activities are not included in the law, which means that they are operating outside the formal reaches of the law; or they are not covered in practice, which means that – although they are operating within the formal reach of the law – the law is not applied or not enforced; or the law discourages compliance because it is inappropriate, burdensome, or imposes excessive costs."[140]

The ILO has identified a number of situations where workers could be unprotected because their employee status was unclear or denied. That is where the law is unclear, too narrow in scope or otherwise inadequate; the employment relationship is disguised under the form of a civil or a commercial arrangement; the employment relationship is ambiguous; the worker is an employee, but it is not clear who the employer is, what rights the worker has, and against whom these rights can be enforced; and lack of compliance and enforcement.[141] Although atypical employees in theory may be employees, there is, in practice, a difficulty in extending the protection

[136] Above 646-647.
[137] See Waas and Van Voss *Restatement of Labour Law in Europe: Vol I: The Concept of Employee* (2017) B iv A.
[138] Smit and Fourie "Perspectives on extending protection to atypical workers, including workers in the informal economy, in developing countries" 2009 *TSAR* 516 517.
[139] Hussmanns "Defining and measuring informal employment" http://www.ilo.org/public/english/ bureau/stat/ download/papers/meas.pdf (31-03-2010) 4.
[140] ILO "Resolution concerning decent work and the informal economy" Conclusions adopted by the 90th session International Labour Conference (2002) par 3. See also ILO "Decent work and the informal economy" Report VI 90th session International Labour Conference (2002).
[141] ILO "Report of the committee on the employment relationship" Provisional record no 21 91st session International Labour Conference (2003) par 5 and 6.

of the labour legislation to them and therefore there is "a considerable gap between the legislative say-so and workers enjoying these rights".[142] This is primarily because of the immense difficulty in organising atypical employees and the fact that traditional methods of enforcing labour rights have proved unsuccessful. Labour inspectorates do not have the resources to police the informal economy and a lack of access to resources (and legal aid) means that litigation is feasible for only a few employees. Benjamin calls for strategies that will reduce the level of informality of inadequately protected workers such as improving the enforcement and implementation of existing legal rights while creating new categories of legal rights; or extending existing rights to apply in a meaningful way to the informal economy.[143]

Despite the fact that Kahn-Freund indicated that the main object of labour law is to be a countervailing force to the inequality of bargaining power,[144] Benjamin argues that, because of contemporary phenomenon, it is inescapable for us to rethink the function of labour law in society beyond merely mitigating the disequilibrium in the employment relationship.[145] The author's point of departure is to dispute the fact that the employment relationship is always in a position of inequality, or to the same degree.[146] He refers to the fact that highly educated and skilled workers may well be able to demand employment on desired terms and to find alternative employment.[147] According to the author, this point does not militate against labour law, but merely questions if all employees require the protection thereof.[148]

To this, the author adds that labour legislation was in certain cases not adopted to mitigate the disequilibrium in the employment relationship but rather to advance other purposes.[149] The author points to the United Kingdom, Australia and New Zealand

[142] Benjamin "Informal work and labour rights in South Africa" 2008 *Industrial Law Journal* 1579 1587.
[143] Above 1601.
[144] Kahn-Freund (n 103) 8.
[145] Benjamin "Labour law beyond employment" 2012 *Acta Juridica* 21.
[146] Above 22.
[147] Above 22-23.
[148] Above 23.
[149] Above. Arthurs (n 125) 14 has also indicated that "the substantive content of labour law has changed over time. In the early years of the industrial revolution, it sought to protect the most vulnerable workers against physical and moral brutality, then to ensure that they worked in safe and salubrious conditions and ultimately to require that they be paid enough to meet 'the normal needs of the average employee regarded as a human being living in a civilized community'. However,

during the 1970s where legislation was enacted to enhance the power of employers and from South Africa during the 1950s when the purpose of labour law was political marginalisation and profitable exploitation.[150] Benjamin's assessment is undoubtedly correct. Normatively, saying that the purpose of labour law has not always been to mitigate the disequilibrium in the employment relationship or that not all workers have been in a weaker position does not mean that the object of labour law should be to advance the interests of the economically weaker party. The author is not wrong to question what the purpose of labour law should be in modern society. Indeed, there are different types of labour law with differing purposes in a modem economy.[151] For the author labour law could be used as an instrument of economic policy, for instance to control inflation and to pursue economic growth and global competitiveness.[152]

Within the context of unemployment, inequality, skills shortage and the rise of atypical employment it may be argued that the normative purpose of labour law should be reconsidered. Weiss has said that labour law must respond to the dramatically changed reality of work. Labour law, a product of industrialisation, must therefore be developed in view of current social and economic realities.[153] It has been argued that to say that the purpose of labour law is the mitigation of inequalities inherent in the labour relationship is a thin and limited account of the discipline.[154]

In recent times debates about labour law has been recast into what can be called "labour marked regulation". This includes matters that impact on the construction and governance of labour markets (such as social security, training and education, labour

from the end of the 19th century, and through much of the 20th, labour law was largely focused [sic] on collective issues." See also Le Roux (n 10) 6 where the author states that "the contract of employment embodies certain normative aims, and a review of the contract of employment and a consideration of its future therefore also requires a review of these normative values and their validity."

150 Above.

151 Above 24-25.

152 Above 27-28. See also Deakin and Wilkinson "The law of the labour market: industrialization, employment and legal evolution" 2006 *Industrial and Labour Relations Review* 2.

153 Weiss "The future of labour law in the context of global challenges" 2015 Paper presented at the 17th ILERA World Congress, Cape Town http://www.ilera2015.com/dynamic/full/Manfred_Weiss_keynote.pdf (15-01-2016). This point is also strengthened by the ILO's decent work agenda which advances the creation of sustainable work in the context of global pressures.

154 Langille "Imagining post 'Geneva Consensus' labor law for post-'Washington Consensus' Development" 2009-10 *Comparative Labour Law and Policy Journal* 523 550.

placement and mobility, job creation and immigration law).[155] In a similar vein Klare has indicated that labour law has four purposes: promoting allocative and productive efficiency and economic growth, macroeconomic management, establishing and protecting fundamental rights and addressing imbalances in the bargaining powers of workers and employees.[156] For Arthurs, labour law should be founded on and advance fundamental human rights,[157] and empower workers by facilitating their capacities.[158] The author also argues that the purpose of labour law has always been to enable workers to seek justice in the workplace.[159] The author therefore argues for a new approach to labour law that will necessitate greater ambitions.

Labour lawyers will have to rethink the reach of labour law to extend to all policy domains that influence the work relationship and labour market, to all normative regimes that justify the ends and limit the means of concerted action; to all workers whether or not they qualify technically as employees under labour legislation and to all workers including unemployed workers and workers in the informal sector.[160] Many authors have attempted to recast the purpose of labour law. Langille, for example, suggests that labour law should develop human capital,[161] Frazer argues that labour law should be reimagined as labour market regulation[162] and Davidov points out that there is a deliberate retreat from the identification of inequality as a distinguishing feature of the labour market that necessitates regulatory intervention.[163] Such a retreat is specifically important as it also means that the importance of legislation as source of law within the employment context should be reconsidered.

According to Arthurs the focus on collective bargaining and economic conflict in the 19th and 20th centuries left many questions unresolved:

[155] Benjamin (n 145) 25.
[156] Klare "Countervailing workers' power as a regulatory strategy" in Collins *et al* (eds) *Legal Regulation of the Employment Relation* (2000) 68.
[157] Arthurs (n 125) 23.
[158] Above 24.
[159] Above 27.
[160] Above.
[161] Langille "Labour law's back pages" in Davidov and Langille (eds) The *Boundaries and Frontiers of Labour Law* (2006) 101. See also Langille "Labour policy in Canada – new platform, new paradigm" 2002 *Canadian Public Policy* 134.
[162] Frazer "Reconceiving labour law: the labour market regulation project" 2008 *Macquarie Law Journal* 21.
[163] Davidov "The (changing) idea of labour law" 2007 *International Labour Review* 311.

> "First: how to integrate collective bargaining outcomes with macro-economic policies? ... Second: how to address labour market issues that collective bargaining could not resolve because they affected workers before or after entering employment? ... And third: how to protect workers in non-union workplaces?"[164]

Collective bargaining can do little to address the plight of workers who find themselves in non-standard or atypical forms of employment as it is difficult to unionise these workers, and it is even more difficult for collective bargaining to address the plight of workers who find themselves outside of the work relationship entirely if certain foundational problems cannot be overcome.[165] The ILO has warned that organising atypical workers does not simply mean recruiting members. It also means connecting atypical workers with current members, potential members and other groups in society who do not share a commonality of interests.[166]

Similarly Weiss has averred that the most pressing problem in the context of segmentation and fragmentation of the workforce is the challenge of establishing solidarity between diverse groups with diverse interests and how to organise efficient collective representation for these workers.[167] In times past, the interests of workers were homogeneous which was an ideal precondition for unionisation. Protection by means of collective bargaining could be easily achieved.[168] In modern times, unions must reconcile the unique interests of their potential members in order to successfully form a collective identity. They must also set up specific forms of interest organisation in order to realise an effective collective interest representation.[169]

Although there have been some cases where atypical employees have been successfully organised,[170] such examples are few and far between.[171] Studies have found that trade unions are resistant to organising employees in atypical employment

[164] Arthurs (n 125) 15.
[165] Weiss (n 153) 8.
[166] ILO "Trade unions and the informal sector: towards a comprehensive strategy" 1999 Background paper for the International Symposium on Trade Unions and the Informal Sector, Geneva.
[167] Weiss (n 153) 7.
[168] Weiss (n 153) 1.
[169] Pernicka "The evolution of union politics for atypical employees: a comparison between German and Austrian trade unions in the private service sector" 2005 *Economic and Industrial Democracy* 201 204.
[170] Above.
[171] See Tilly *et al Final Report: Informal Worker Organizing as a Strategy for Improving Subcontracted Work in the Textile and Apparel Industries of Brazil, South Africa, India and China* (2013).

relationships, and, if they do attempt to organise these workers, they are often met with numerous and pressing challenges.[172] Studies have also indicated that, chief amongst these, workers are often resistant to unionisation because they believe that they are better off unregulated (*inter alia* because they do not have to pay taxes).[173] The unionisation of these workers does not mean that the union will be able fulfil all of its traditional functions. For example, the union may not be able to successfully engage in collective bargaining. Consider the case of home-based domestic workers; even though a union might be able to organise such workers, it is difficult to foresee a situation where the union can successfully negotiate with many thousands of employers. This is not to say that such unions cannot be of any use. They will be able to assist workers in disciplinary matters and in the enforcement of their rights. Unions can also improve the monitoring and enforcement of labour standards.[174] The conclusion of a collective agreement will not be realistic and thus the traditionally held belief in the primacy of collective agreements will have to be rethought.

4.3 The primacy of legislation

This thesis argues that with the decrease in the efficacy of collective bargaining the importance of legislation has grown and will continue to grow in an attempt to provide sufficient protection for these workers. Smit and Fourie argue that, as the informal economy grows, the need for tailor-made legislative intervention becomes inescapable to extend protection to non-standard employees, including those in the informal economy.[175] For the authors "good regulation" that provides for basic terms and conditions but is not excessively onerous to comply with – resulting in evasion thereof is paramount.[176] Additionally, as the function and purpose of labour law is reconsidered this expanded space will not be filled by collective agreements but rather by legislation.

[172] Above 4
[173] Above 5.
[174] Above 2.
[175] (n 138) 516.
[176] (n 138) 533.

The description of this development is not a normative comment on the desirability of the increase in the importance of labour legislation. It is merely a factual description that supports a re-evaluation of the importance of statutory interpretation within the context of labour law specifically. Globally, regulation by means of legislation has also faced its share of problems as some workers do not meet statutory criteria of entitlement or they do not meet the requirement to be termed employees. Others work in remote workplaces beyond the reach of often overburdened and/or underfunded labour inspectors or unions. Employers are often small and struggling or powerful and hostile to unionisation and regulation.[177]

It is the task of labour lawyers, workers, business and government alike to come up with effective and innovative solutions to these problems. Ironically such solutions will most likely predominantly be the amendment of legislation or the adoption of even more legislation. I say predominantly so because this development does not mean that other forms of regulation such as collective agreements or the individual contract of employment[178] cannot still play an important auxiliary function in the

[177] Arthurs (n 125) 21.

[178] Grogan *Workplace Law* (2007) 3 has indicated that: "[i]n spite of legislative intervention in the employment relationship, the common law [sic] of employment remains relevant. Generally, labour legislation applies only to parties to contracts of employment. That relationship remains regulated by the common law to the extent that legislation is inapplicable." in *Fedlife Assurance Ltd v Wolfaart* 2001 ILJ 2407 (SCA) 2414 the Supreme Court of Appeal held that the purpose of the LRA is to "provide an additional right to an employee whose employment might be terminated lawfully, but in circumstances that were nevertheless unfair"; therefore the employee's common-law rights still exist". In *Gcaba v Minister for Safety and Security* 2010 1 SA 238 (CC) par 55 the Constitutional Court confirmed, "legislation must not be interpreted to exclude or unduly limit remedies for the enforcement of constitutional rights". Legislation therefore creates new remedies which exist alongside contractual remedies, in some cases replacing them, while in other cases the contractual remedies can only be used once the statutory remedy has been exhausted. See Olivier (n 86) 31. Although statutory regulations amend and replace those of the common law, the common-law position is confirmed in some cases. It is also possible to contract for better conditions than those stipulated in legislation or collective agreements where these prescribe minimum terms and conditions. In *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 8 BLLR 699 (SCA) par 5, the Supreme Court of Appeal held that the common law contract of employment has developed sufficiently in terms of the Constitution to include the right to a pre-dismissal hearing, with the result that every employee now has a common-law contractual claim in addition to a statutory unfair labour practice right to a pre-dismissal hearing. In *Boxer Superstores Mthatha v Mbenya* 2007 ILJ 2209 (SCA) par 3, on the strength of the *Old Mutual* decision, it was held that a dismissal can be unlawful because of the fact that it was procedurally and substantively unfair. In effect, the court held that the High Court had jurisdiction over unfair dismissals provided that the claim was pleaded as that of an unlawful dismissal. In *Murray v Minister of Defence* 2008 6 BLLR 513 (SCA) par 5 and 6 it was held that the common law had been developed to recognise the contractual duty of all employers to act fairly towards employees and that the common-law contract of employment was therefore sufficiently developed to include protection against constructive dismissal. In *South African Maritime Safety Authority v McKenzie* 2010 3 SA 601 (SCA) par 54 and 55 the Supreme

regulation of the employment relationship.[179] The judiciary can also address many of these problems through its powers of interpretation,[180] as can government in addressing key structural problems. Nevertheless the argument can strongly be made that labour law is primarily regulated by means of legislation and that the primacy of collective bargaining in labour law has given way to the primacy of legislation.

In modern society, employment needs more regulation than that offered by the common law and many forms of work cannot be explained by the contract of employment.[181] This view is supported by the economist Kuznets, who in 1955 argued that social legislation is a vital force "aimed to counteract the worst effects of rapid industrialization and urbanization and to support the claims of the broad masses for more adequate shares of the growing income of the country".[182] It has become an inescapable reality that the employment relationship has become primarily regulated by means of legislation, a trend which will undoubtedly continue as union membership continues to decline and as global pressures intensify in the times of the recently described "fourth industrial revolution", a technological revolution that will profoundly alter the way we live, work, and relate to others. It will also see the displacement of workers by machines and a job market increasingly segregated into low-skill/low-pay and high-skill/high-pay segments that will lead to social tensions.[183]

Court of Appeal has gone against the grain of the *Old Mutual*, *Boxer Superstores* and *Murray* decisions and has endorsed the argument that due to the fact that legislation already provides sufficient protection the common law was in no need of being developed. In the *McKenzie* case the Court cautioned against the improper use of tacit and implied terms, the unnecessary development of the common law and attempts to aver that the common law is to be developed "by importing into contracts of employment generally rights flowing from the constitutional right to fair labour practices". The court held that the incorporation of "the whole statutory scheme ... lock, stock and barrel into the contract of employment ... would not add anything [sic] to the rights that are possessed by all employees under the LRA ..." and that such an incorporation would therefore be pointless. According to the Court the *Murray* case seems to be authority "for no more than the proposition that an employee who is not subject to the LRA enjoys the same right as other employees not to be constructively dismissed, whatever else might have been said *en passant*".

179 See Van Staden and Smit (n 106) Olivier (n 86) 40-41. *MEC for the Department of Health, Eastern Cape v Odendaal* 2009 5 BLLR 470 (LC) par 52.

180 See Van Staden (n 32).

181 Le Roux "Employment: a Dodo, or simply living dangerously?" 2014 *ILJ* 30 30.

182 Kuznets "Economic growth and income inequality" 1955 *The American Economic Review* 1 17. I would like to thank Professor Simon Deakin who alerted me to this source.

183 Schwab, World Economic Forum "The Fourth Industrial Revolution: what it means, how to respond" http://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond (23-01-2016): "The First Industrial Revolution used water and steam power to mechanize production. The Second used electric power to create mass production. The Third used electronics and information technology to automate production. Now a Fourth Industrial Revolution is building on the Third, the digital revolution that has been occurring since the middle of the last

It is foreseen that legislation will be used extensively to address global problems that arise in the context of the fourth industrial revolution but also to serve broadened purposes of labour law.

5 *Labour legislation in South Africa*

A vast body of enacted law is applicable to the employment relationship in South Africa.[184] These include: the Constitution (including section 23 and other provisions);[185] the National Economic, Development and Labour Council Act;[186] the Labour Relations Act[187] (including regulations,[188] guidelines and notices issued by the Minister of Labour, rules of the CCMA, rules of the Labour Court,[189] rules of the Labour Appeal Court,[190] codes of good practice issued by NEDLAC and essential service notices); the Basic Conditions Employment Act[191] (including regulations,[192] determinations by the Minister of Labour[193] and codes of good practice);[194] the Employment Equity Act[195] (including regulations and codes of good practice);[196] the Skills Development Act[197] and Skills Development Levies Act[198] (including regulations);[199] the Occupational Health and Safety Act[200] (including regulations);[201]

century. It is characterized by a fusion of technologies that is blurring the lines between the physical, digital, and biological spheres."

184 For an exposition of the labour legislation that had been in force in South Africa prior to the adoption of South Africa's first justiciable Constitution, refer to Grogan (n 12) 4-5 and Bendix *Industrial Relations in South Africa* (2010) 53 ao. The advent of constitutionalism in South Africa radically changed the constitutional basis of the South African legal system and it became clear that existing labour legislation was not in line with the new constitutional order. In 1994, the Department of Labour appointed a Ministerial Legal Task Team to draft new labour legislation.

185 See Chapter 4 § 2.7 for an exposition of the constitutional rights that impact upon the work relationship.

186 35 of 1994.

187 66 of 1995.

188 Three sets of subordinate legislation have been promulgated.

189 Four sets of subordinate legislation have been promulgated.

190 Five sets of subordinate legislation have been promulgated.

191 75 of 1997.

192 Seven sets of subordinate legislation have been promulgated.

193 90 sets of subordinate legislation have been promulgated.

194 Four sets of subordinate legislation have been promulgated.

195 55 of 1998.

196 Eight sets of subordinate legislation have been promulgated.

197 97 of 1998.

198 9 of 1999.

199 40 sets of subordinate legislation have been promulgated.

200 85 of 1993.

201 51 sets of subordinate legislation have been promulgated.

the Compensation for Occupational Injuries and Diseases Act[202] (including rules and regulations);[203] the Unemployment Insurance Act[204] and Unemployment Insurance Contributions Act[205] (including regulations);[206] the Mine Health and Safety Act[207] (including regulations);[208] and the Employment Services Act.[209]

Labour legislation in South Africa has a relatively youthful status, which has almost entirely been adopted following the advent of constitutional democracy. Despite this labour legislation has been subject to various rounds of amendments.[210] From the above it is clear that an overwhelming number of statutes regulate the employment relationship in South Africa and that this relationship is dominated by legislation. Nearly the entire body of law was created in the two decades following the fall of apartheid.

In addition, a vast array of international standards, incurred by the Republic as a member state of the International Labour Organisation, also impact upon the employment relationship in South Africa.[211] In monist states, international law and municipal law are seen as a single conception of law. In dualist states, such as South

[202] 130 of 1993.
[203] 39 sets of subordinate legislation have been promulgated.
[204] 63 of 2001.
[205] 4 of 2002.
[206] 9 sets of subordinate legislation have been promulgated.
[207] 29 of 1996.
[208] At least 4 sets of subordinate legislation have been promulgated.
[209] 4 of 2014. No regulations have been promulgated in terms of this act.
[210] 46 original legislative acts and 3 sets of subordinate legislation have supplemented the primary legislation.
[211] These include: International Labour Organisation constitution, 1919 (Part XIII of the Treaty of Versailles); The Declaration of Philadelphia, 1944; Freedom of Association and Protection of the Right to Organise Convention, 1948; Right to Organise and Collective Bargaining Convention, 1949; Equal Remuneration Convention, 1951; Voluntary Conciliation and Arbitration Recommendation, 1951; Collective Agreements Recommendation, 1951; Discrimination (Employment and Occupation) Convention, 1958; Discrimination (Employment and Occupation) Recommendation, 1958; Workers' Representatives Convention, 1971; Workers' Representatives Recommendation, 1971; Collective Bargaining Convention, 1981; Collective Bargaining Recommendation, 1981; Termination of Employment Convention, 1982; Termination of Employment Recommendation, 1982; Protection of Workers; Claims (Employer's Insolvency) Recommendation, 1992; Protection of Workers' Claims (Employer's Insolvency) Convention, 1992; Part-time Work Convention, 1994; Recommendation 182: Part-time Work Recommendation, 1994; Safety and Health in Mines Convention, 1995; Safety and Health in Mines Recommendation, 1995; Home Work Convention, 1996; Recommendation 184: Home Work Recommendation, 1996; The Declaration on Fundamental Principles and Rights at Work, 1998; The Declaration on Social Justice for a Fair Globalisation, 2008.

Africa, international law and municipal law are seen as two distinct systems of law.[212] The impact of international labour standards therefore depend upon the standards being adopted in legislation or legislation being interpreted in furtherance of these standards.[213] The Labour Relations Act (the "LRA") has the stated aim "to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation".[214]

In South Africa labour legislation has been described as subordinate constitutional legislation.[215] That is legislation that is "designed to amplify and give more concrete effect to key provisions of the Constitution and the Bill of Rights". The LRA was enacted to "give effect to and regulate the fundamental rights conferred by section 27" of the interim Constitution although section 27 did not explicitly required nor envisaged legislation to be adopted. Sections 23(5) and (6) of the Constitution does, authorise the adoption of legislation to regulate collective bargaining and to recognise union security arrangements contained in collective agreements.[216]

The Constitutional Court has firmly established the principle that "[w]here there is legislation giving effect to a right in the Bill of Rights, a claimant is not permitted to

[212] Dugard *International Law – A South African Perspective* (2005) 47.
[213] Above.
[214] S 1(*b*).
[215] Du Plessis (n 27) 95. However, it should be noted that the existence of subordinate constitutional legislation is not always regarded to be on solid footing. In *Sasol Oil v Metcalfe* 2004 5 SA 161 (W), a case that involved two conflicting provisions in the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") and the Environment Conservation Act 73 of 1989, Willis J argued that the purpose of the PAJA was to give effect to the right to just administrative action, as enshrined in s 33 of the Constitution. The court held that considering that the PAJA was "constitutional legislation" and "triumphal legislation" it had to prevail where it was inconsistent with ordinary legislation (165H-I). In response Devenish "The application of the *generalia specialibus non derogant* maxim in the interpretation of statutes" 2005 *SALJ* 72 75 has argued that "s 2 of the 1996 Constitution provides for the Supremacy of the Constitution and the Constitution alone" and that "national legislation made in terms of the Constitution does not enjoy any kind of formal supremacy… as it merely has the status of an ordinary act of parliament, like all other acts of parliament, although it may be very important and is indeed seminal legislation". Similarly, Rautenbach "Introduction to the Bill of Rights" in LexisNexis (eds) *Bill of Rights Compendium* (2011) has questioned why not all legislation cannot be considered to give effect to the rights in the Constitution: "The injunction in section 1 of the Constitution that all law must be consistent with the Constitution means that all law must give effect to the Constitution" (1A-93.2). On appeal the SCA in *MEC for Agriculture, Conservation, Environment and Land Affairs, Gauteng v Sasol Oil* 2006 2 All SA 17 (SCA) par 29 noted the criticism of Devenish but found it unnecessary to decide the point.
[216] Above 96.

rely directly on the Constitution".[217] This means that litigants are prohibited from relying directly on section 23 of the Constitution but that they must either rely on the provisions of the applicable labour legislation or attack the constitutionality thereof.[218] The litigant can therefore not circumvent the statute and rely directly on the Constitution. This does not mean that the Constitution will play no role in adjudication of labour matters as the legislative provision in the labour context must be interpreted in terms of section 39(2) of the Constitution so as to "promote the spirit, purport and objects of the Bill of Rights".[219] Subsidiary constitutional legislation can also increase the protection conferred by the Constitution and may not decrease the protection afforded by the Constitution, unless such a decrease will comply with section 36 of the Constitution (the limitation provision).[220]

The adoption of labour legislation has traditionally been met with three points of criticism.[221] Firstly, it is argued by detractors that the common-law contract of employment provides sufficient protection to both parties of the employment relationship and that legislative interventions are therefore unwarranted.[222] Such arguments invariably fail to recognise the inequality of bargaining positions inherent in the employment relationship.[223] It should be acknowledged that the South African Constitution specifically recognises the inadequacies of the common-law contract of employment.[224] Le Roux, who has likened the contract of employment to a "dodo", has argued that work is no longer exclusively performed via the contract of employment and that, within the context of the informal economy, work is not even

[217] *Sali v National Commissioner of the South African Police Service* 2014 9 BLLR 827 (CC) par 4; 72 and n 2. See also *S v Mhlungu* 1995 3 SA 867 (CC) par 59; *MEC for Education: KwaZulu Natal v Pillay* 2008 1 SA 474 (CC); and *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) par 51.

[218] *South African National Defence Union v Minister of Defence* (above) par 52.

[219] For criticism of this development see Woolman "The amazing, vanishing Bill of Rights" 2007 *South African Law Journal* 262 263 and Woolman "True in theory, true in practice: why direct application still matters" in Woolman and Bishop (eds) *Constitutional Conversations* (2008) 113; and for an opposing view see Mickelman "On the uses of interpretive charity: some notes from abroad on application, avoidance, equality and objective unconstitutionality" 2008 *Constitutional Court Review* 1.

[220] Du Plessis (n 27) 97.

[221] Van Niekerk *Regulating Flexibility and Small Business: Revisiting the LRA and BCEA – A Response to Halton Cheadle's Concept Paper* (2007) 4-7. See also Cheadle "Regulated flexibility: Revisiting the LRA and the BCEA" 2006 *ILJ* 663.

[222] See Brassey "Fixing the laws that govern the labour market" 2012 *ILJ* 1 where the author has advocated a return to the common law.

[223] Refer to § 4.1 hereof.

[224] Van Niekerk (n 221) 5.

primarily performed via the contract of employment.[225] Secondly, it is often argued that legislation which is intended to protect workers often have the unintended consequence of only protecting the employed.[226]

Thirdly, it is argued that the adoption of (an ever increasing amount of) labour legislation will place South Africa at a competitive disadvantage on global markets. When one considers the staggering quantity of enacted law that has been adopted in South Africa, it seems redundant to enquire into normative questions such as if the employment relationship should be regulated by means of legislation. In the light of the above it is trite that few would argue that legislation is not the dominant way in which the employment relationship is regulated and because of this it is easily understood why some argue that the labour market in South Africa is inflexible.[227]

Building a skilled labour force and creating sufficient employment represent considerable challenges for South Africa. The World Economic Forum ranks the South African labour market efficiency at 97th out of 138 economies.[228] The economy also has a high unemployment rate of 27,7 percent (with youth unemployment estimated at over 32,4 percent).[229] Despite such indicators, it is important to note that an examination by Hepple of South African labour legislation has found that, with the exception of the USA, there is no persuasive evidence that the laws on hiring workers and making them redundant are more burdensome on employers in South Africa than elsewhere.[230]

The central point is that the regulation of the employment relationship should not be cast in stone and that legislative intervention would quite often be needed to address and respond to challenges of a socio-economic nature. A prime example of such legislative responses in the recent 2014 amendments[231] to the Labour Relations Act which contains responses to the increased informalisation of labour to ensure that

[225] Le Roux (n 181) 36.
[226] Above.
[227] Above.
[228] Schwab (ed) *World Economic Forum The Global Competitiveness Report* 2016–2017 (2016) 324.
[229] Statistics South Africa *Quarterly Labour Force Survey Quarter 1: 2017* (2017) 11.
[230] Hepple "Is South African labour law fit for the global economy?" 2012 *Acta Juridica* 1 7.
[231] Labour Relations Amendment Act 6 of 2014.

vulnerable workers receive adequate protection and are employed in conditions of decent work.[232] The amendments move beyond a concept of employment that is dependent upon the existence of a contract of employment,[233] and extends the protection afforded to employees in employment on a fixed-term contract of employment,[234] employees employed by temporary employment services,[235] and employees in part time employment.[236] These amendments also seek to introduce a measure of flexibility by introducing earning thresholds for the applicability of protection.[237] The purpose of labour law, within the South African context, must be informed by the Constitution, the quest for social justice and the achievement of constitutional values.[238]

6 *Conclusion*

Regulation by means of legislation has become the dominant source of law in modern society. Legislation holds various advantages and disadvantages, but it also involves various role players (the legislature, the courts and society at large) in the legislative and interpretative process. It also does not exist within a vacuum. Legislation can be used more effectively than other sources of law to respond to societal pressures. Because of global pressures on the work relationship, the easiest and arguably most appropriate response will be to intervene with tailor made legislative provisions designed to provide innovative responses for those in traditional employment relationships, those at the margin or outside thereof, and those in a-typical work relationships.

Irrespective of normative arguments about the desirability of legislation as a form of social control, labour law is already largely (if not primarily) regulated by legislation. The use of legislation will only proliferate as society seeks solutions to contemporary challenges and as it becomes apparent that the common-law contract of employment

[232] Memorandum on the Objects of the Labour Relations Amendment Bill, 2012.
[233] S 186(*a*) as amended by s 30*(a)* of Act 6 of 2014.
[234] S 186(*b*) as amended by s 30*(a)* of Act 6 of 2014 and 198B as inserted by s 38 of Act 6 of 2014.
[235] S 198A as inserted by s 38 of Act 6 of 2014.
[236] S 198C as inserted by s 38 of Act 6 of 2014.
[237] S 198A-C.
[238] See n 185 above.

and collective agreements are ineffective to address these challenges. This occurrence also calls for an increase in scholarship as to the coverage of these laws and it is averred that an extensive interpretation by the courts of the term "employee" will become ever more necessary in order for these laws to have their intended social impact. This is so as the protection afforded by labour laws are generally only extended to those who are deemed "employees".

The proliferation of legislation to regulate the work relationship will therefore require increased scholarship as to the proper approaches and methodologies of interpreting these legislative provisions. As such, arguments as to the importance of statutory interpretation within this context is strengthened. A central question to such inquiries will ultimately be an inquiry into the purpose that labour legislation must fulfil, taking special cognisance of the South African context. The purposes of labour law should be reimagined to extend beyond mitigating the imbalance in the employment relationship so as to serve a wider array of societal purposes and to respond to global pressures on the work relationship. Labour scholars will have to have an appreciation of the significance of legislation and knowledge of how legislation should be interpreted.

PART B: THE TELEOLOGICAL MODEL OF INTERPRETATION

CHAPTER 3

Approaches to the interpretation of statutes

"The courts are the capitals of law's empire, and judges are its princes."[1]

1 *Introduction*

The goal of statutory interpretation is central to the understanding of the theories and methods of statutory interpretation.[2] There is, however, no consensus as to what this goal should be. Historically, the goals of statutory interpretation (and accordingly theories thereof) have been dependent on the views of the interpreter in relation to various factors.[3] These will be the topic of consideration of this chapter. The judicial power of interpretation derives from the Constitution of the Republic of South Africa,

1 Dworkin *Law's Empire* (1986) 273.
2 Cross *Theory and Practice of Statutory Interpretation* (2009) 1.
3 Above 2.

1996 (the Constitution), yet the Constitution does not prescribe a single accepted thesis of interpretation.[4]

In South Africa, the views that underlie any given theory of statutory interpretation are dependent upon the Constitution. They are considerations of the relevance of the intention of the legislature, the nature and function of language, the role of the judiciary in the interpretation of statutes and the time-frame within which statutes operate. An inquiry into questions of this nature must inevitably start with the Constitution.[5] A constitution cannot however comprehensively guide the balancing of these underlying notions as cases may test the boundaries between vagueness and precision in language, text and purpose or intent, the role of judges, time-bound or contemporary interpretation and these notions in themselves.[6]

The chapter will explore theoretical underpinnings of a constitutionally appropriate theory or model of statutory interpretation. The chapter will consider the historic use of theories of statutory interpretation in South Africa. The theoretical underpinnings central to theories of interpretation will consequently be explored. Thereafter the chapter will consider implicit and explicit constitutional waymarks that should inform our understanding of the teleological model of interpretation.

2 *Theories of statutory interpretation*

2.1 Statutory interpretation prior to 1994

In 1998 Klare observed that South African lawyers display a relatively strong faith in words and texts and that legal interpretation tended to be formalistic.[7] However, although positivistic interpretation dominated the interpretation of statutes prior to the advent of constitutional democracy in South Africa, it would be wrong to assume that

4 Cross (n 2) 2.
5 *Holomisa v Argus Newspapers Ltd* 1996 6 BCLR 836 (W) 863.
6 Solan "Linguistic issues in statutory interpretation" in Tiersma and Solan (eds) *Language and the Law* (2012) 88 89.
7 Klare "Legal culture and transformative constitutionalism" 1998 *South African Journal of Human Rights* 146 168.

all judges adopted a single theoretical approach.[8] This is so because a judge may hold a particular view of the relevance, of the intention of the legislature, the nature and function of language, the role of the judiciary in the interpretation of statutes and the time-frame within which statutes operate.[9] These viewpoints may be the result of conscious or unconscious perceptions that will have a decisive impact upon the interpretation that is attached to a statutory provision.[10]

Throughout history no single theory has dominated statutory interpretation. In Roman law two distinct periods can be classified: "In the period of the *ius strictum* the interpreter was bound by the word and the form. In the period of the *eaquitas* he sought the intention that lay behind the word and the form."[11] The "equity of a statute" has also been equated with "liberality, broad construction, legislative intent, judicial legislation, analogical reasoning, and statutory purpose".[12] But even then, it would have been the case that there was no singularly accepted theory of statutory interpretation as judges had different attitudes to statutory interpretation.

Instead, it was likely the case that there existed, even at times when *ius strictum* or *eaquitas* was at its zenith, divergent opinions as to the proper approach to interpretation.[13] This point can be illustrated with reference to divergent texts of the *Digest.* Some of the texts can be said to be anti-literalist:[14] *prior atque potentior est quam vox mens dicentis* ("the intention of the person speaking is preferable, and more important than his words");[15] *scire lege non hoc est verba earum tenere, sed vin ac potestam* ("to know the laws is not to be familiar with their phraseology, but with their force and effect");[16] and *benignius leges interpraetandae sunt, quo voluntas earum conservetur* ("laws should be interpreted liberally, in order that their intention

8 Du Plessis *Re-Interpretation of Statutes* (2002) 100.
9 Devenish *Interpretation of Statutes* (1992) 25.
10 Fish *Doing What Comes Naturally*: *Change Rhetoric, and the Practice of Theory in Legal Studies* (1989) 358.
11 Devenish (n 9) 23.
12 Blatt "The history of statutory interpretation: a study in form and substance" 1985 *Cardozo Law Review* 799 800.
13 Cowen "Prolegomenon to a restatement of the principles of statutory interpretation" in Cowen (ed) *Cowen on Law* (2009) 112. Originally published in 1976 *Tydskrif vir die Suid-Afrikaanse Reg* 131.
14 Above 113.
15 *D* 33 10 7 2.
16 *D* 1 317.

may be preserved").[17] Other texts can be said to be literalist:[18] *cum in verbis nulla ambiguitas est, non debet admitti voluntatis quaestio* ("where there is no ambiguity in the words made use of, no question as to the intention of the testator should be raised");[19] and *in re igitur dubia melius est verbi edicti servire* ("therefore, the question being doubtful, it is better to adhere strictly to the words of the Edict").[20]

Roman-Dutch law was also not led by a single theory. Cowen illustrates this point with reference to the conflicting judgments of Steyn CJ and Rumpff AJA in *Administrateur, Transvaal v Carletonville Estates*[21] where the judges relied on different passages of work of Schomacher in support of different conclusions.[22] It is clear, however, that the authors, such as Donellus, Forster and Maestertius, steeped in natural law ideas, advocated a liberal approach to the construction of statutes. Devenish averred that the overwhelming weight of Roman-Dutch authority law supported purposive rather than literal interpretation.[23]

Purposivism was the dominant form of interpretation in Europe during the middle ages as detailed statutes were hard to produce and circulate. Early legislators voted on general goals and not on precise language. Purposivism also permitted judges to focus on the spirit of the law instead of the exact wording.[24] De Groot and Voet advocated a purposive methodology against the background of natural law.[25] Wessels wrote that Voet viewed the law as a branch of morals and that the object of all law is to regulate conduct according to the sense of rights and wrong of the community. As such, equity is essential to interpret the meaning of a provision.[26] Voet stated that "[e]ven in the case of written laws a judge should bend himself to taking primary account of equity in his interpretations".[27] De Groot's definition of equity as the correction of deficient

17 *D* 1 3 18.
18 Cowen (n 13) 113.
19 *D* 32.25.1.
20 *D* 14.1.1.20.
21 1959 3 SA 150 (A).
22 153 and 161.
23 Devenish (n 9) 23.
24 Jellum "The theories of statutory construction and legislative process in American jurisprudence" in Araszkiewicz and Płeszka *Logic in the Theory and Practice of Lawmaking* (2015) 193.
25 Above 42.
26 Wessels *The History of Roman-Dutch Law* (1908) 327.
27 Voet *Commentarius ad Pandectas* 1 1 2 and 1 15.

laws reflects a similar approach.[28] During its 17th and 18th century zenith it was this approach that was brought to the Cape and that particularly impacted upon Blackstonian English law (which also had a strong impact on American statutory interpretation notwithstanding the demise thereof in its birthplace).

Statutes were rare in early common-law jurisdictions. In England, statutes were only rarely enacted to modify the common law.[29] Statutory interpretation also commenced when judges were legislators. It was the practice that the maker of the statute must preferably be the interpreter thereof.[30] Statutory interpretation could not exist prior to the separation of these branches as there was nothing "out there" to interpret.[31] Judge Hengham famously retorted to council in 1305: "Do not gloss the statute; we understand it better than you, for we made it."[32] In the following centuries the legislature and judiciary separated. The term "interpretation" was utilised for the first time in 16th century and the use of the term was actively condemned prior thereto.[33]

The 14th century saw the birth of purposive interpretation. Plowden explained that law consists of a body and soul, the letter of the law being the body and the sense and reason of the law is the soul. The soul of the law was sought by judges and, if there was any defect in the law, it was reformed by equity "which is no part of the law, but a moral virtue which corrects the law".[34] Popkin records four important observations about Plowden's approach to statutory interpretation:

> "First, he does not shy away from the word 'discretion' to describe judging. Second, statutes are not their texts. Third, equitable interpretation is good: it is a 'moral virtue' that 'corrects' the law. Fourth, judges have an unself-conscious sense of their legal competence."[35]

But purposive interpretation was overthrown by the Glorious Revolution, the establishment of the sovereignty of parliament, and the works of Locke who favoured a new approach during the 18th and 19th centuries.[36] Literalism was established as the

28 Devenish (n 9) 43.
29 Jellum (n 24) 175.
30 Above 18.
31 Popkin *Statutes in Court: The History and Theory of Statutory Interpretation* (1999) 9.
32 *Avon* YB 33 & 35 Edw 1, 82 (Rolls Series).
33 Devenish (n 9) 19.
34 Popkin (n 31) 11 and 12.
35 Above.
36 Devenish (n 9) 20.

dominant theory of interpretation as it was thought that the increase in the detail in which legislation was drafted called therefore.[37] The literal rule of statutory interpretation was adopted: The rule provides that "[i]f the precise words used are plain and unambiguous, in our judgment we are bound to construe them in their ordinary sense, even though it does lead to an absurdity or manifest injustice".[38] The corollary of the literal rule, the golden rule, was also developed during this time and seeks to mitigate the literal rule. Zander describes the rule as a safety valve to allow the courts to escape from undesirable outcomes.[39] According to this rule

> "the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid the absurdity and inconsistency, but no farther."[40]

In recent times there has been a shift towards purposive interpretation in England.[41]

Although it was Roman-Dutch law that was first transplanted into the Cape, it was the English common law of the 19th century, steeped in the tradition of literalism and positivism with its literal and golden rules that was to guide the interpretation of statutes prior to 1994 as a result of British colonisation of the Cape. This was so due to the, clearly erroneous,[42] decision of *De Villiers v The Cape Divisional Council* that:

> "[i]f the rules of the Roman Dutch Law (following those of the Roman Law) for the proper construction of statutes were to guide this Court, there would be no difficulty in construing the clause. … But in construing statutes made in this Colony after the cession to the British Crown, this Court should, in my opinion, be guided by the decisions of the English Courts, and not by the Roman Dutch authorities. It is, no doubt, quite true that the Proclamation of 6th August, 1813, is more like an edict of a Roman Emperor than a modern Act of Parliament, and that it bears evident traces of having been originally drawn by a Dutch lawyer in the Dutch language; but as it officially issued from an English Governor in the English language, it must be subject to the rules of construction laid down for English statutes by the decisions of English Courts of Law. Some of the older decisions of these, Courts lay down rules which bear a close similarity to those of the Civil Law. 'Every statute', says Lord Cohe, 'ought to be expounded, not according to the letter but according to the meaning'. There seems no doubt, however, that the enlarged or extensive interpretation of statutes which was admitted in former times has given way … to a strict observance of the literal and grammatical sense of the words employed. The current of modern decisions seems to be in favour of considering the literal meaning of the words in which the statute is expressed as the primary index to the intention with which the

37 Dias *Jurisprudence* (1985) 244.
38 *Abley v Dale* 1851 138 ER 519 525.
39 Zander *The Law Making Process* (2004) 149.
40 *Grey v Pearson* 1843–60 All ER Rep 21 (HL) 36.
41 *Bolton School v Evans* 2006 EWCA (Civ) 1653.
42 See Devenish (n 9) 21 and Steyn *Die Uitleg van Wette* (1974) xxiv.

> statute was made, and to abide by the literal meaning even where it varies from other indications of the actual intention of the Legislature."[43]

This decision was lamented by many as it resulted in a move away from Roman-Dutch ideas, which were rooted in natural law, to English law textualism rooted in positivism.[44] Others argued that English law was better suited to modern conditions.[45] Some claimed that the values of Roman Dutch law could still serve as an important source for interpretation in South Africa.[46]

The South African judiciary showed[47] allegiance to literal interpretation as a result of the reception of English rules of statutory interpretation.[48] This is not to say that there were no dissenting views. Steyn, a proponent of intentionalism, believed that the (real, subjective) intention of the legislature must be given affect to, even superseding the golden rule.[49] Pronouncement of allegiance to intentionalism was often nothing more than lip-service as courts proclaimed to give effect to the intention of the legislature but in fact did not look beyond the text.[50] There were also instances where reliance was placed upon contextual interpretation[51] or purposive interpretation.[52]

43 1875 *Buch* 50 and 64.

44 Bell and Engle *Cross Statutory Interpretation of Statutes* (1978) 18; Devenish (n 9) 22 and Wessels (n 26) 293.

45 Devenish (n 9) 22.

46 Cowen (n 13).

47 In fact, the dominant approach to statutory interpretation in South Africa was not literalism in its simplest form but rather "literalism-cum-intentionalism". See Du Plessis "Interpretation of statutes and the Constitution" in *LexisNexis* (ed) *Bill of Rights Compendium* (2011) 2C-57.

48 As Du Plessis (n 47) 2C-55 points out, the golden rule, as described above, was widely followed by South African courts. The author at 2C-68 n 17 lists the South African cases where the golden rule were confirmed.

49 Steyn (n 42) 2.

50 Refer to n 47 above.

51 In his famous minority judgement in *Jaga v Dönges; Bhana v Dönges* 1950 4 SA 653 (A), Schreiner JA held at 664H that the "legitimate field of interpretation should not be restricted as a result of excessive peering at the language to be interpreted without sufficient attention to the contextual scene" and, at 662G, that "the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress … that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and *purpose,* and, within limits, its background".

52 "Purposivism", states Du Plessis (n 47) 2C-59, "attributes meaning to a legislative provision in light of the purpose that provision seeks to achieve in the context of the instrument of which it forms part".

2.2 Common-law theories of statutory interpretation

Eskridge and Frickey have warned readers not to expect that anybody's theory of statutory interpretation is an accurate statement of what courts actually do.[53] This is so as judges differ on the factors that underlie a theory of statutory interpretation, often blend approaches, may find that a given approach does not work in a given case, or join the opinions of others.[54] All theories have failings. Nevertheless, three theories of statutory interpretation have dominated statutory interpretation in jurisdictions that share the common-law tradition: literalism, intentionalism and purposivism.[55]

Literalism (or textualism)[56] maintains that meaning must be deduced from the very words that were of the statute, to the exclusion of other interpretive criteria.[57] The theory is best described by its Afrikaans designation: *letterknegtigheid*, which translates as subservience to the letter. Intentionalism (or "actual specific intent")[58] maintains that meaning must be determined by ascertaining the real, subjective intention of the legislature.[59] Purposivism (or "hypothetical intent")[60] holds that meaning must be deduced through asking what the objective purpose of the law is.[61] It holds the view that the law is designed to solve specific societal problems.[62]

53 Eskridge and Frickey "Introduction" in Hart and Sacks (eds) *The legal Process: Basic Problems in the Making and Application of Law* (1994) 1169.

54 Jellum (n 24) 182.

55 Above 181-199.

56 "Literalism" and "textualism" is often used as synonyms. See Popkin (n 31) 194. According to the author, the better approach is to refer to literalism as "'spurious' textualism" or "the practice of interpreting a text without adequate attention to the way authors write and audiences understand language". For purposes of this study no such distinction is made as it is incompatible with the South African common-law tradition and as such a distinction can be regarded as a mere semantic exercise or as a distinction without a difference. On this account literalism can be seen as an extreme form of textualism. As Jellum (n 24) 183-184 states, "[t]extualism comes in gradations". There are extreme, moderate and "soft plain meaning" theories of textualism, with various degrees of variance thereof. The use of two distinct binary terms to denote (only two) textualist positions are therefore counterproductive. Importantly, it should be noted that proponents of literalism in South Africa have also advocated different versions thereof and that not all have advocated extreme positions thereof. In this study the two terms are used interchangeably.

57 Du Plessis "Interpretation of the Bill of Rights" in Woolman, Roux and Bishop (eds) *Constitutional Law of South Africa* (2014) 32-29 and Popkin (n 31) 263.

58 Popkin (n 31) 185.

59 Du Plessis (n 57) 32-31.

60 Popkin (n 31) 185.

61 Du Plessis (n 57) 32-35.

62 Purposivism has traditionally been expressed as the so-called mischief rule. According to this rule, a court interpreting a statutory provision must ask four questions: "first, what the common law was before the enactment of the provision; second, what the mischief and defect were for which the

The key difference between purposivism and intentionalism is that, instead of asking what was actually intended, purposivism asks what a reasonable legislature would have reasonably wanted.[63] Both theories reject the notion that meaning can be deduced solely from the words. Although both start with the statutory language, they do not stop there even if the text is clear. They examine other sources of meaning.[64] What they disagree about, however, is what sources may be used and what they seek by examining extra–textual sources of meaning. Intentionalist search for the actual intent of the legislature and purposivists search for the hypothetical intent of a reasonable legislature, attempting to address a societal problem with a specific remedy.[65] Literalists attack purposivists and intentionlists because, they aver, looking beyond the enacted text raises constitutional concerns associated with the separation of powers. Purposivists and intentionlists argue that literalists misunderstands the nature of language and are wrong to believe that language can constrain meaning.

The debate between advocates of these theories is central to the field of statutory interpretation. It is difficult to pin down what the debate is about as various difficulties must be confronted. The theories are broad churches and there is not necessarily a single position for each of these theories. The boundaries between the theoretical positions are not clear-cut as the advocates find common ground. The debate is often complicated by a reformulation or re-labelling of pre-existing theories of statutory interpretation. Additionally, *bona fide* attempts to acknowledge pragmatic aspects of language have spawned new theories of statutory interpretation, which are not necessarily different to existing theories. It is important to clarify these labels because contemporary debate is phrased in terms thereof.[66]

Du Plessis argues that the South African judiciary has utilised two further theories of statutory interpretation: contextualism and literalism-cum-intentionalism. Contextualism holds that the meaning of legislative provisions should be determined

common law did not provide; third, what remedy Parliament resolved and appointed 'to cure the disease of the common- wealth'; and, fourth, the true reason for the remedy." See Du Plessis (n 57) 32-31.

63 Above.

64 Jellum (n 24) 190-191.

65 Above.

66 Jellum (n 24) 181-199.

through a consideration of the background conditions and context of the law.[67] It is difficult to normatively justify contextualism as an independent theory. Contextualism does not necessarily challenge literalism.[68] Every action of communication contains different kinds of content. In addition to semantic content, "which is the type of content that is fully determined by the lexical meaning of the words used",[69] there are other types of content that are context dependent. Assertive content "is the content that the speaker actually says or asserts by an occasion of speech in the context of the expression".[70] Assertive content is determined, *inter alia*, by "the semantic content of the sentence uttered, the communicative intentions of the speaker, the shared presuppositions of speaker-hearers, and obvious features of the context of utterances".[71] Implicated content is the content that a speaker is committed to even though they have not said it. There may also be presuppositions that are relied on by speakers and taken for granted in the context of a conversation. [72]

Recall that, in terms of the literalist position, meaning of a legislative provision must be deduced from the very words in which they are couched. Literalists do not only believe that words have semantic content, but also that they have assertive content that is context dependent.[73] Context is important as it helps the listener figure out what the communicative intentions of the speaker are.[74] Literalists accept and adopt this view. Scalia has stated that, "[i]n textual interpretation, context is everything".[75] In *Chisom v Edwards*[76] Scalia J, writing in dissent, stated that interpretation starts by finding the ordinary meaning of the language in its textual context.[77] The Supreme Court of Appeal[78] has approved a similar dictum by Sir Anthony Mason CJ:

67 Du Plessis (n 57) 32-35.
68 Jellum (n 24) 183-184.
69 Marmor "Introduction" in Marmor and Soames (eds) *Philosophical Foundations of Language and Law* (2013) 1 6.
70 Above.
71 Above 8.
72 Above 7.
73 Marmor "Textualism in context" 2012 *USC Law Legal Studies Paper No 12-13* 1 7.
74 Above.
75 Scalia "Common-law courts in a civil-law system: the role of United States federal courts in interpreting the constitution and laws" in Gutmann (ed) *A Matter of Interpretation* (1996) 37 37.
76 111 S. Ct. 2354 (1991).
77 2369.
78 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) par 18.

> "Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise."[79]

Contextualism also does not challenge purposivism or intentionalism. It is impossible to determine true or hypothetical intentions without having regard to the background provisions and the legislative history of the adoption of a legislative provision. If interpreters were only to have regard to the text to determine the intention of the legislature, the theory degenerates into literalism (or literalism-cum-intentionalism). In any event, literalists acknowledge that meaning is context-dependent. Similarly, purposivism without contextualism will be an empty theory as we determine purpose of the law from circumstances that brought about the legislation, the mischief it aimed to remedy and from assumptions about what a reasonable legislature would have wanted to achieve. [80] The Supreme Court of Canada in *R v Big M Drug Mart Ltd*[81] illustrated the importance of context to purposive theory:

> "The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be ... a generous rather than legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection."[82]

In terms of literalism-cum-intentionalism the purpose of statutory interpretation is to determine the intention of the legislature. It was however presumed that the legislature "encoded" or "couched" its intention within the words of the legislation. But as Du Plessis points out, this was essentially a literalist position as

> "it is assumed that there is a grammatical structure that allows for a fixed, 'ordinary effect' of the language" and "that the (most) correct use of the language, in conformity with its grammatical structure and rules, will make for an objective perspicuity in the advantages of which all (reasonable?) users of the language can share."[83]

[79] *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 315.
[80] Marmor (n 73) 4.
[81] (1985) 13 C.R.R. 64.
[82] 103. This passage was endorsed by the Constitutional Court in *Ferreira v Levin; Vryenhoek v Powell* 1996 1 SA 984 (CC) par 46 and 172.
[83] Du Plessis (n 47) 2C-55.

Du Plessis dismisses the idea that language can have such a fixed effect that the intention of a speaker can be conveyed to the listener. Notions of intention in the literal interpretation of law cannot be underestimated. Legislation is a speech act: "A hearer who wants to grasp what the speaker says aims to grasp what the speaker intended to communicate, legal speech cannot be a kind of striking exception."[84] This position is not contrary to the literalist position. Literalists do not view language as consisting merely of semantic content. The intention of the speaker is important to determine the assertive content of the speech act. Teleological interpretation is a relative of purposivism that can also be labelled as "broad" purposivism.[85]

3 *Theoretical underpinnings*

3.1 The relevance of the intention of the legislature

Legislative intent is of fundamental importance to the interpretation of statutes. Legislation is a speech act that is communicated intentionally.[86] Texts without authors and intended meanings are not texts and texts are only texts in regard to their intended meanings.[87] As Rosen shows, legislators may have various different kinds of intentions.[88] They have lexical intentions ("the intention to use a certain word or construction"),[89] semantic intentions ("the intention to mean this or that by their words"), communicative intentions ("the intention to cause certain beliefs or expectations in their audience in a characteristic way"), and practical intentions ("the intention to cause downstream non-legal effects, eg to promote economic growth"). Importantly, they have legal intentions ("the intention to bring about certain changes in the law by means of their pronouncements").[90]

84 Marmor (n 73) 9.
85 See Le Roux "Directory provisions, section 39(2) of the Constitution and the ontology of statutory law *African Christian Democratic Party v Electoral Commission*" 2006 S*APR/PL* 382 ao.
86 Marmor (n 73) 3.
87 Alexander and Prakash "'Is that English you're speaking?' some arguments for the primacy of intent in interpretation" 2003 *Public Law and Legal Theory Research Paper Series* 1 13.
88 Rosen "Textualism, intentionalism and the law of contract" in Marmor and Soames (eds) *Philosophical Foundations of Language and Law* (2013) 130 132-133.
89 Above 132.
90 Above 133.

There are three distinct conception of the relevance of legislative intent.[91] The first, what Popkin labels "actual specific intent", requires that judges ask if the legislature had any specific intent about the facts of the case.[92] "Instead of averring that a provision 'means X or Y', a court will typically assert that 'the legislature intended X or Y'."[93] To find specific intent, intentionalists will start with the text, but they will not stop there.[94] They reject ordinary meaning for a meaning that furthers specific legislative intent.[95] As Popkin states, intentionalism conceived in this way is not workable as

> "(1) legislatures probably did not think of the issue; (2) legislatures might want to avoid a decision and pass the buck to the court; and (3) change prevents legislatures who adopted the law from appreciating the actual impact of a statute on future events."[96]

It has been questioned how a legislature (composed of a body of persons) can have a specific intent.[97] It has also been argued that

> "the tools available for courts trying to figure out legislative intent are such that the courts are bound to yield skewed and biased results, mostly favoring the vocal supporters of a law who use strategic manoeuvres to overemphasize their legislative agenda over of the views of the median legislators who formed the majority."[98]

There are constitutional reasons to reject intentionalism. In *Matiso v The Commanding Officer, Port Elizabeth Prison*[99] it was stated that the intention of the legislature does not apply in a system based on the supremacy of the Constitution, as the Constitution is sovereign and not Parliament.[100] Interpreters who searched for the actual intent of legislatures did so because of the supremacy of Parliament. In a constitutional democracy the Constitution is binding on all branches of the state and has priority over any rules made by the legislature.[101] Meaning must be determined

91 Popkin (n 31) 185. The author claims that there are two conceptions of intentionalism. On a closer reading, however, it is clear that there are in fact three such conceptions.
92 Above.
93 Du Plessis (n 57) 32-31.
94 Jellum (n 24) 190. Such as statements made during he legislative process, early draft versions of the bill and policy documents.
95 Above.
96 Popkin (n 31) 187. See also Marmor "On some pragmatic aspects of strategic speech" in Marmor and Soames (eds) *Philosophical Foundations of Language and Law* (2013) 83 97.
97 Above.
98 Marmor (n 73) 2-3.
99 1994 3 SA 592 (SE).
100 597B-597H.
101 Currie and De Waal *The Bill of Rights Handbook* (2013) 9. See also ss 2 and 8 of the Constitution.

not with reference to the intent of any legislature but with reference to a supreme constitution. Scalia has said that it is incompatible with democratic government to have meaning determined by the intention of the legislature.[102]

The chief response has been the objectification of legislative intent.[103] The literalist response, what Du Plessis terms "literalism-cum-intentionalism",[104] gives rise to the second conception of the relevance of legislative intent.[105] In England, Lord Diplock has held that "the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it".[106] In the same case Lord Scarman held that "[i]f Parliament says one thing but means another, it is not ... for the courts to correct it … . We are to be governed not by Parliament's intentions but by Parliament's enactments."[107] Lord Reid has explained that "[w]e are seeking not what Parliament meant but the true meaning of what they said".[108] Scalia has stated that it is the law that governs and not the intention of the legislature.[109] Prior to the advent of constitutional democracy in South Africa the dominant theory of statutory interpretation assumed that

> "[t]he legislature couches or encodes its intention in the language of the statutory provision to be construed. When the words used for this purpose are clear and unambiguous, their literal, grammatical meaning must prevail and they must be given their ordinary effect. This, it is believed, will disclose and convey, without further ado, the true intention of the legislature and thereby the 'correct' meaning of the provision construed."[110]

The purposivist response ("hypothetical intent") gives rise to the third conception of the relevance of legislative intent.[111] It requires the interpreter to enquire into the objects, purposes or intentions of a hypothetical, reasonable legislature.[112] This response has also been the objectification of legislative intent, but it also rejects the

[102] Scalia (n 75) 16.
[103] Above 17.
[104] Du Plessis (n 57) 32-32.
[105] Popkin (n 31) 185. It should however be noted that there are literalist positions that reject the relevance of the intention of the legislature outright.
[106] *Duport Steels Ltd v SIRS* 1980 1 All ER 529 (HL) 541.
[107] Above.
[108] *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG* 1975 1 All ER 810 (HL) 814. Refer also to the *Sussex Peerage Case* 1844 8 ER 1034 where Tindal CJ held that "[t]he words themselves alone do, in such case, best declare the intention of the lawgiver".
[109] Scalia (n 75) 17.
[110] Du Plessis (n 57) 32-32.
[111] Popkin (n 31) 185.
[112] Above.

idea that the intention of the legislature can be couched within the words used by the legislature. Purposivism has an advantage over intentionalsm as purposivists can interpret statutes in situations that the legislature did not contemplate. Purposivism allows laws to change with technological, social, legal, and other circumstances.[113] By contrast, intentionalism is unhelpful when a statute is applied to a new circumstance not foreseen by the legislature. Again, the use of hypothetical intent has also been subject to criticism. Although purposivists rely on factors such as text, history, context, values and legal comparisons to discover purpose,[114] these sources may be inconclusive. The proposed answer is for courts to "presume that legislatures are 'made of reasonable persons pursuing reasonable purposes, reasonably'". Literalists criticise the subjectivity of this approach and point to the fact that there may be competing ideas of how to further the purpose and that statutes often have many (sometimes competing) purposes.[115]

3.2 The nature and function of language

If it seems that a provision doesn't have to be interpreted, that is because you have interpreted it already. Interpretive principles are always at work.[116] This is so because a statute is a legal instrument and a legal instrument is, according Endicott, "a normative text with a technical effect" in that "the law itself has techniques for determining the effect of the normative text".[117] This is not to say that legislative provisions may not be more precise than others (or perhaps more vague than others). According to the author, "[a] legal instrument is vague if its language is imprecise, so that there are cases in which its application is unclear".[118]

The central point is that "there is no straightforward, general relation between the language used in a legal instrument to make law, and the law that is made".[119] A

[113] Jellum (n 24) 194-195.
[114] Du Plessis (n 57) 32-159.
[115] Jellum (n 24) 195.
[116] Sunstein *The Partial Constitution* (1993) 104. This presupposition stands in stark contrast to the maxim *clara non sunt interpretanda* (transparent text requires no interpretation).
[117] Endicott "The value of vagueness" in Marmor and Soames (eds) *Philosophical Foundations of Language and Law* (2013) 14 15.
[118] Above 16.
[119] Above 16.

paradoxical question that has often been posed is how legislation can be certain whilst still achieving flexibility. Legal certainty is required by the rule of law, which, in turn, requires predictability of outcome.[120] The Constitutional Court has held that laws must be written in a clear and accessible manner and that impermissibly vague provisions violate the rule of law, a founding value of our Constitution.[121] On the other hand, no two sets of facts are ever exactly the same, requiring that legislation should be sufficiently flexible to cover a multitude of situations.[122]

Vague language is often viewed as "bad", whilst precise language is viewed as "good". It is argued that a precise legal standard is not necessarily better than a vague one[123] and that rules of interpretation may give a vague effect to a precise term.[124] Similarly, rules of interpretation may give a precise effect to a precise term. Meaning can only be determined through the processes of interpretation. This is contrary to the literalist position, which assumes that there is a fixed and stable ordinary effect of language.[125] Some have described a linguistic turn in legal interpretation where meaning is not discovered from a construable text, but made in dealing with it.[126]

Values are expressed in vague language. This is the concern of those who express a preference for "black letter law".[127] The concern is understandable. The purpose of any provision is to create a norm to which citizens may conform their conduct. When a norm is vague it is incapable of guiding conduct (nor does it control the conduct of the officers or public officials responsible for applying the norm or resolving a dispute). How then is it possible for these individuals to conform their conduct to the norm? Concerns related to the separation of powers are also raised. This is so as the

[120] Maley "The language of the law" in Gobbons (ed) *Language and the Law* (1994) 17.
[121] *National Credit Regulator v Opperman* 2013 2 SA 1 (CC) par 49. S 1(*c*) of the Constitution states that the Republic is founded upon the values of "supremacy of the constitution and the rule of law". See also *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) par 102 where the Constitutional Court stated that "[t]he need for accessibility, precision and general application flow from the concept of the rule of law. A person should be able to know of the law, and be able to conform his or her conduct to the law."
[122] Above.
[123] Endicott (n 117) 19.
[124] Above 16.
[125] Du Plessis (n 57) 32-159.
[126] Above 32-44 and Boshoff *Die Interpretasie van Fundamentele Aansprake in 'n Heterogene Samelewing* (2000 thesis Rand Afrikaans University) 157-162.
[127] Woolman "True in theory, true in practice: why direct application still matters" in Woolman and Bishop (eds) *Constitutional Conversations* (2008) 135.

task of giving content to a vague norm is transferred first to an applying official but ultimately to the courts. In effect, vague norms open the doors for judicial law making. Even the most adamant defenders of positivism concede this point.[128]

Our legal system consists of vague and precise norms and, it will be argued, that vague norms are not always "bad", but sometimes politically desirable. Legislatures may choose to frame legislative provisions in a vague manner. The effect would be to create a vague norm so that its application is unclear.[129] The judiciary is given discretion to decide for itself what the norm means. Additionally, there may be instances where, although the text of a legislative provision is seemingly precise the technical effect of legal language means that rules of interpretation may give a vague effect to a precise term. This is so because there is no general relation between the language of a provision and the law that is made.

To understand why vagueness can be valuable, the starting point must inevitably be to ask why precision is valuable. Precision has guidance value because a precise standard makes it clear what people's rights and obligations are. Precision also has process value because it directs officials in a legal system.[130] From here it is easy to formulate the chief points of criticism against the judiciary's reliance on values: the vagueness of values does not make it clear what the obligation of affected parties are. But when a legislature decides to draft a norm vaguely that does not mean to say that this is always a result of poor legislative drafting. It might be useful for the legislature to leave it to the judiciary to give content to a legislative norm. According to Endicott this choice has power allocation value and private ordering value.[131]

Substantively, the effect of vague terms is to delegate to courts the power to determine the content thereof. This is justifiable because judges possess specialised expertise to develop norms and, because the doctrine of precedent will allow them to develop the norm incrementally, to revise general principles through the processes of

[128] Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994) 332 and Waluchow *Inclusive legal Positivism* (1994) 157. According to Waluchow this is so as the statute in such cases obliges judges to seek guidance from non-legal sources.
[129] Endicott (n 117) 16.
[130] Endicott (n 117) 19.
[131] above 26-28.

appeal. The processes of the courts mean that general rules would develop after taking cognisance of parties to a dispute in which the value is deployed. It may be valuable to leave persons affected by a rule uncertain as to its application as parties will have an incentive to come up with creative ways to avoid accountability, which might not have occurred to the legislature. The uncertainty created incentivises parties to avoid the risk of being found to have contravened the value.[132]

It is important to note that what is vague or precise is a contextual matter,[133] and that it would be wrong to describe values as either totally vague or precise. Every communication act contains different kinds of content. In addition to semantic content communication acts contain assertive content, implicated content. There may be presuppositions that are relied on by speakers and taken for granted in the context of a conversation.[134] It is indisputable that values are vague terms but this does not mean that these terms do not contain at least assertive content. It also does not mean that the interpretive choice of the presiding officer will be as arbitrary as flipping a coin. The judiciary will not have an unfettered discretion. Not any decision will do. Task of the interpreter will be to figure out what the (reasonable) drafter of the Constitution intended to convey through its choice of words and to this end the assertive content, which is context dependent, must be taken into account.

Following from the above, it would be logical to ask how we could determine what the assertive content of a value is. The starting off point should be to acknowledge that actors in the legal profession constantly partake in this exercise. A decision about the appropriate interpretation of a legislative provision can only be said to be "good" if it is principled (and not arbitrary). The principles on which these cases are determined are not only contained in the legislative provision itself but also in other sources of our legal system. When terms are employed that may be said to be vague it merely means that the principles outside of the legislative provision are perhaps more important than the provision itself.

[132] Above.
[133] Saomes "What vagueness and inconsistency tell us about interpretation" in Marmor and Soames (eds) *Philosophical Foundations of Language and Law* (2013) 31 32.
[134] Marmor (n 73) 6 and Marmor (n 69) 8.

The shift in the interpretive approach endorsed by the Constitutional Court (from "the strict legalistic to the substantive")[135] can be illustrated with reference to the way the Court has sought to determine if a statutory provision in peremptory (when statutes require exact compliance and when failure to comply will leave the ensuing act null and void) or directory (when a statute requires substantial compliance only and when non-compliance thereof will not result in ensuing acts being null and void).[136] There were cases in which our courts, even before the advent of constitutionalism, "insisted that the distinction between directory and peremptory provisions does not rest on semantic or textual considerations (alone), but requires reference to extra-textual (or contextual) factors".[137]

Nevertheless in the great bulk of pre-constitutional cases matters of compliance were decided on rules such as the following: a word or words with an imperative or affirmative character indicate a peremptory provision (eg "shall" or "must"),[138] permissive words indicate a discretion and are directory (eg "may" or "can"),[139] words in negative form are peremptory,[140] positive language is directory,[141] flexible or vague terms are directory,[142] and so on.[143] Due to the shift in interpretive approach by the judiciary, which favours extra-textual factors over textual elements, Du Plessis has questioned the relevance of this distinction:

> "[I]t may be that the majority judgment of the Constitutional Court in *African Christian Democratic Party* has dealt the distinction between peremptory and directory provisions a blow, since the court raised the question whether a provision can be ever so peremptory that *eo nomine* compliance with it has to be preferred to realising its purpose, and the court itself, in point of fact, answered this question in the negative. The Supreme Court of Appeal previously also voiced rejection of a categorical distinction between peremptory and directory provisions... and the ACDP case thus actually confirmed an already existing move away from such a distinction."[144]

In *Steenkamp v Edcon Ltd* the Constitutional Court had to determine what the consequences of non-compliance with section 189A(2)(*a*) of the LRA is ("an employer *must* give notice of termination of employment in accordance with the

135 *African Christian Democratic Party v Electoral Commission* par 25.
136 Botha *Statutory Interpretation: An Introduction for Students* (2005) 109.
137 Le Roux (n 85) 389.
138 *Messenger of the Magistrate's Court, Durban v Pillay*1952 3 SA 678 (A).
139 *Amalgamated Packaging Industries v Hutt* 1975 4 SA 943 (A).
140 *Samuel Thomas Myers v Pretorius* 1944 OPD 144.
141 *R v Sopete* 1950 3 SA 769 (EC).
142 *Leibrandt v SA Railways* 1941 AD 9.
143 Botha (n 136) 111.
144 Du Plessis (n 47) 2C-131.

provisions of this section").[145] The employer retrenched over 3000 employees and gave the employees notices of termination of their contracts of employment. These notices were given prior to the expiry of the periods prescribed by section 189A(8) of the LRA and therefore were in breach of the Act.[146] The Act allows aggrieved parties to strike in the event of non-compliance with the section[147] or to approach the Labour Court for an appropriate order.[148] The Act does not explicitly provide that any dismissal in contravention of the Act would be invalid. The applicants however argued that the 30-60 day period allowed under the Act suspends the employer's power to dismiss and relegate the relief available under section 189A(7).[149]

The applicant's arguments were based on the literalistic archetype that the Act used the word "must" and therefore that the employer was obliged to comply with the prescribed procedures before dismissing the employees. Failure to do so, they argued, resulted in an invalid dismissal.[150] Tellingly, the majority of the Court did not utilise the distinction between peremptory and directory provisions to resolve the question as to what the consequences of non-compliance with section 189A(2)(*a*) of the Act was. Rather it may be argued that the distinction was merely used as a semantic device to frame the distinction after the fact. Instead both the majority[151] and the minority[152] asked what the purpose of the statutory provision was to determine its consequence (although it may be argued that the minority used purpose to determine if the provision was peremptory or directory).

The majority and the minority however disagreed as to what the purpose of the provision is. The minority argued that the purpose of the provision was to "create a

145 2016 37 ILJ 564 (CC) par 6. Emphasis added.

146 S 189A(8) reads: "If a facilitator is not appointed(a) a party may not refer a dispute to a council or the Commission unless a period of 30 days has lapsed from the date on which notice was given in terms of section 189(3); and(b) once the periods mentioned in section 64(1)(a) have elapsed (i) the employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the Basic Conditions of Employment Act; and (ii) a registered trade union or the employees who have received notice of termination may (aa) give notice of a strike in terms of section 64(1)(b) or (d); or (bb) refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of section 191(11)."

147 S 189A(8) and (9).

148 These orders may include: 189A(13) "an order (a) compelling the employer to comply with a fair procedure; (b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure; (c) directing the employer to reinstate an employee until it has complied with a fair procedure; (d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate."

149 Par 30.

150 Par 43.

151 Par 99, 101, 147, 182, 183, 184, 185 and 186.

152 Par 20, 23, 26, 33, 36, 46, 60 and 74.

dismissal-free zone during which consensus may be sought and alternatives may be explored"[153] and that the purpose of the act would be contravened if this "dismissal-free zone" was disregarded. As such the minority found the dismissal to be null and void.[154] The majority disagreed. Instead the majority found that the concept "invalid dismissal" was not part of the Act and that it was therefore inappropriate to import a remedy designed for "unfair dismissals" (reinstatement) for invalid dismissals.[155] The Court found that the dismissal of the employees in contravention of the statutory time periods could have been unfair, but that they had not claimed this. In any event the Court found that the remedies provided in the section were "adequate" and, as such that "there seems to be no justification for the conclusion that the purpose of the legislation is to visit an act committed in breach of the provision with nullity".[156]

3.3 The role of the judiciary in the interpretation of statutes

Considerations of separation of powers, democracy, rule of law, and the role of a judge in a democracy have important consequences for the way that statutes are interpreted.[157] "The theory of statutory interpretation a judge adopts is based, in large part, on that judge's view of the proper power distribution of the judiciary and the legislature – in other words, on that judge's view of separation of powers."[158] One conception of separation of powers is that the principle means that specific functions duties and responsibilities are allocated to distinctive institutions with defined areas of competence.[159] On this view, which is described as the "airtight compartment approach", judges interpret law, Parliament makes the law and the executive

[153] Par 45.
[154] Par 60 and 86.
[155] Par 180 and 188 ao.
[156] Par 183.
[157] Barak *Purposive Interpretation in Law* (2005) 88.
[158] Jellum (n 24) 177.
[159] Seedorf and Sibanda "Separation of powers" on Woolman, Roux and Bishop (eds) *Constitutional Law of South Africa* (2014) 12.1. In *South African Association of Personal Injury Lawyers v Heath* 2001 1 SA 883 (CC) par 25 it was held that "[t]he separation of the judiciary from the other branches of government is an important aspect of the separation of powers required by the Constitution, and is essential to the role of the courts under the Constitution. Parliament and the provincial legislatures make the laws but do not implement them. The national and provincial executives prepare and initiate laws to be placed before the legislatures, implement the laws thus made, but have no law-making power other than that vested in them by the legislatures. . . . Under our Constitution it is the duty of the courts to ensure that the limits to the exercise of public power are not transgressed. Crucial to the discharge of this duty is that the courts be and be seen to be independent."

implements it. There should be no overlap.[160] The courts as Montesquieu stated is a "mouth that pronounces the words of the law".[161] This approach is invoked as an objection to judges having (too much) discretion in their interpretive tasks, and the approach only allows judges to create law when a statute is vague.[162]

The Constitutional Court has rejected a strict separation between the three branches of government.[163] The rejection of such a separation has, however, not prevented the Constitutional Court from acknowledging that each branch has a specific mandate. In *Minister of Health v Treatment Action Campaign (2)*,[164] the Court clearly made this point when it stated that

> "although there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation."[165]

In *Doctors for Life International v Speaker of the National Assembly*[166] the Constitutional Court warned that

> "[c]ourts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution."[167]

The Court stressed that separation of powers concerns, although important, "cannot be used to avoid the obligations of a court to prevent the violation of the Constitution".[168] It can be said that the Constitutional Court has instead adopted the conception of separation of powers, referred to as the "checks and balances" approach, that judges do some legislating such as in the case of the judicial review of legislation and invoking the golden rule of statutory interpretation to prevent unjust law.[169]

[160] Popkin (n 31) 241.
[161] Montesquieu *The Spirit of the Laws* (translated by Nugent) (1748) 191.
[162] Above.
[163] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) par 112.
[164] 2002 5 SA 721 (CC).
[165] Par 199.
[166] 2006 6 SA 416 (CC).
[167] Par 37.
[168] Par 200.
[169] Popkin (n 31) 241.

Both these approaches are rooted in literal modes of statutory interpretation.[170] These modes of interpretation are often defended by separation of powers arguments by literalists or formalists. On their view, judges "create law" when they look beyond the text of the statutory provision and rely on features such as "purpose", "values" or "principles" which they deem to lie outside of the law.

They defend the use of literalist modes of interpretation on four grounds. Firstly, they argued that, should we allow judges to disregard the literal meaning, it is difficult to explain why law is authoritative for judges.[171] The more scope we give judges, the more we permit them to treat legal rules not as "proper" rules but merely as "guides".[172] Secondly, it is averred that disregarding the literal meaning represents a threat to the rule of law because citizens will be uncertain how the rules will be applied before a court has had the opportunity to interpret them.[173] Thirdly, it is argued that judges may make mistakes when trying to do justice based on the teleological approach and therefore subvert Parliament's legislative programs.[174] Fourthly, it is reasoned that judges are not accountable to an electorate. They claim that notions of intention or purpose are disguises for judicial law making.[175]

Such formalism, that only the text of a statute is relevant to interpretation, places the role of the legislature above that of the judiciary,[176] and is rooted in a particular view

[170] Some formalists, such as Schauer "Formalism" 1988 *Yale LR* 509 521 even rejected the idea that judges could reject unjust or absurd interpretations. In South Africa, adherence to the so-called golden rule of statutory interpretation meant that the grammatical and ordinary sense of the words may be modified, so as to avoid the absurdity and inconsistency, *but no farther* (see n 41 above). As such South African literalism, even at its zenith, was not as formalistic. Nevertheless, meaning was still primarily to be discerned from the very words a provision was couched in. Refer to n 47 above.

[171] Meyerson *Jurisprudence* (2011) 145.

[172] Above.

[173] Above 146. According to Eskridge "Dynamic statutory interpretation" 1987 *University of Pennsylvania Law Review* 1479 1483 "the traditional understanding of the 'rule of law' requires that statutes enacted by the majoritarian legislature be given effect, and that citizens have reasonable notice of the legal rules that govern their behavior."

[174] Above 147.

[175] Above 147. Scalia (n 75) 17-18 has argued that, "under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field".

[176] Jellum (n 24) 178.

of the nature of the law.[177] Some positivists, for example, argue that the law consists only of "pedigreed sources" and consequently that courts cannot rely on consideration outside the text.[178] Ethical or democratic positivists put more faith in the legislature than the judiciary and believe that legislatures should assume full responsibility for the making of moral or policy choices.[179] Although ethical positivist believe that it may by possible that there is moral criteria for the validity of law, that moral criteria in law is not morally desirable and that their application should be avoided where possible.[180] On this view, legislation should be drafted in precise and unambiguous language so that judges do not need to rely on moral or political considerations.[181] They believe that judges are under an obligation to apply clear legal rules.[182]

On the other side of the spectrum, that considerations outside of the law such as purpose and values are more important than the legislative text, places the role of the judiciary above that of the legislature.[183] On this view:

> "every statutory interpretation case requires a judge to make a policy choice by adopting one statutory meaning and thereby rejecting at least one other meaning. Further, this choice will affect future cases because of *stare decisis* – the concept that similar cases should be decided

[177] Meyerson (n 171) 147. According to Barak (n 157) 54 there exists an interrelationship between jurisprudential theories and interpretative theories. According to the author "legal philosophy expresses its distinctiveness 'practically' through its treatment of interpretation".

[178] An Austinian approach to the interpretation of statutes, for example, would require that only "positive laws" or "laws strictly so called" should be taken into consideration when interpreting a statutory provision. As such only the legislative text, as a sanction backed command handed down by a sovereign, can be taken into consideration. Matters of 'positive morality' would be deemed irrelevant to the interpretive task. Austin's Command Theory as an aggregate of nothing but rules also does not take societal values and principles or standards such as equity, good faith and reasonableness into account. See Austin "Extract from *The Province of Jurisprudence Determined*" in Freeman (ed) *Lloyd's Introduction to Jurisprudence* London (2008). Similarly, Raz *The Authority of Law: Essays on Law and Morality* (1975) 39-40 and 47-48 argued that law necessarily only consists of source-based or pedigreed standards, and that moral value can never be criteria for legal validity. See also Raz "Authority, law and morality" 1985 *The Monist* 295 316. For Raz law is an exercise in authority and "nothing can possibly count as an exercise of authority if its net effect is to leave [a person] in the position of having to figure out the issue for himself". See Waldron "Vagueness and the guidance of action" in Marmor and Soames (eds) *Philosophical Foundations of Language and Law* (2013) 58 68.

[179] Above 102-103. See also Campbell *The Legal Theory of Ethical Positivism* (1996) 3; Waldron "Normative and ethical positivism" in Coleman (ed) *Hart's Postscript: Essays on the Postscript to the Concept of Law* (2001) 421 ao and Dyzenhaus "The genealogy of legal positivism" 2004 *Oxford Journal of Legal Studies* 39 62.

[180] Meyerson (n 171) 102.

[181] Campbell (n 179) 64.

[182] Meyerson (n 171) 103.

[183] Jellum (n 24) 178.

> similarly. Thus, judges do not simply interpret law; judges act in concert with the legislature to develop law; while legislatures make law, judges inevitably assist them in the process."[184]

Such a view may be justified on several perspectives of the nature of law. Realists argue that legal doctrine is indeterminate and that legal doctrine could be used to support contradictory outcomes.[185] They claim that non-legal factors are more important than legal factors in adjudicating cases.[186] Such a view would have the consequence of untethering interpretation as a field of study as it would mean that judges do not decide cases on legal grounds. Such an approach would lead to unpredictability of the law, a presupposition that is denied in this study. It also leaves citizens with no way to determine what conduct is expected of them.[187] In hard cases, Hart argues that courts do go beyond their traditional function of merely interpreting the rules of law and that they "perform a rule producing function":[188]

> "In all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance which general language can provide. There will be plain cases constantly recurring in similar contexts to which general expressions were clearly applicable … but there will also be cases where it is not clear whether they apply or not."[189]

In hard cases, judges have an unapologetic creative function; they act as political decision makers. The source of this legislative power is "not a reflection of judicial imperialism" but rather "an indication of the uncertainty inherent in the law itself".[190]

[184] Above.
[185] Meyerson (n 171) 190.
[186] Meyerson above 191. See Holmes *The Common Law* (1923) 1. Similarly, in the postmodernist movement it was argued that it is impossible to achieve finality in interpretation because meaning is endlessly deferred and incapable of being fully determined. See Derrida *Positions* (1981) 41. The author argued that it is only possible to create the illusion of stable meaning through binary options. The Critical Legal Studies movement took the attack further. They claimed that "the law is so full of contradictory values and so obviously the outcome of political conflict that judges can never make fully coherent sense out of it". See Howarth "Making sense out of nonsense" in Gross and Harrison *Jurisprudence: Cambridge Essays* (1992) 30.
[187] Above,
[188] Hart *The Concept of Law* (1961) 135. Barak "The role of a supreme court in a democracy" 2002 *Hastings Law Journal* 1205 1205-1206, in endorsing this view of law has said that "there are hard cases. In such cases, the law is uncertain. There is more than one meaning to be given to the legal text. There is more than one solution to the legal problem. In such cases, law declaration also involves law creation. Prior to the judicial determination, the law (the constitution, the statute, the common law) spoke-even after all rules of interpretation were used-with a number of voices. After the judicial determination the law speaks with a single voice. The law was changed. A new meaning was created. The creation of a new norm-to be binding on all courts by the rule of precedent-is the main function of the supreme court in a democracy. Such creation involves discretion. The judge of a supreme court is not a mirror, passively reflecting the image of the law. He is an artist, creating the picture with his or her own hands. He is 'legislating' - engaging in 'judicial legislation'."
[189] Hart (above) 123.
[190] Barak (n 157) 1206.

In these cases judges rely on their sense of what is best.[191] In easy cases, Hart believes that judges should not stray from the rule as stated, even if they believe that the result is undesirable. Most cases will fall within the core of determinate meaning.[192]

Hart does not believe it to be entirely the function of language whether or not a case falls within the core of easy cases or the penumbra of hard cases. A case can fall within the core because the purpose of the rule is clear.[193] Hart did not consider purposive interpretation of a rule to be a threat to the separation between law and morality because rules may also have an evil (or immoral) purpose.[194] A case can conceivably fall within the core of easy cases because its' language is entirely certain.

According to Kelsen, every act of law-applying would be regarded as an act of law-creating: "The function of laying down the law is a properly constitutive one, it is a making of law in the real sense of the word. … The judicial decision is itself an individual legal norm."[195] When a norm is applied to a new set of facts, any decision would "add something" that might be significant for future cases. New norms would enter our legal system through the doctrine of precedent.[196]

There are those, however, who deny that judges exercise discretion when they look beyond the text to interpret legislative provisions.[197] According to Dworkin, the law is comprised of rules and principles. Whereas rules either apply or do not apply, principles can be relevant to a given case without being decisive.[198] Principles will always carry some weight but not conclusive weight, and judges will have to decide how much weight a principle will carry (taking into consideration other competing principles) when applied to the circumstances of a given case.[199] This distinction is central to Dworkin's thesis that the law is always determinate, and he avers that

[191] Hart (n 188) 275.
[192] Above 123 and 150.
[193] Hart *Esays in Jurisprudence and Philosophy* (1983) 106.
[194] Hart "Positivism and the Separation of Law and Morals" 1958 *Harvard Law Review* 593.
[195] Kelsen "Extract from *The Pure Theory of Law*" in Freeman Lloyd's Introduction to Jurisprudence (2008) 331.
[196] Patterson "Hans Kelsen and his *Pure Theory of Law*" 1952 *California Law Review* 5 9.
[197] Dworkin *Taking Rights Seriously* (1977) concedes that judges will have discretion in the weak sense of the word because principles "cannot be applied mathematically but demand the use of judgment".
[198] Above 23.
[199] Above 22-28.

although rules cannot always provide clear answers, principles can always supply answer. Judges can therefore go beyond established and explicit rules and still come to a decision according to the law. Judges do not create law when they rely on principles to interpret rules, as these rules are present in the law. In any event, judges are constrained by the fact that a satisfactory interpretation must fit the pre-interpretive legal materials and make the law the best (read "most morally valuable") it can be.[200] Accordingly, determining what the law *should* be based on the criteria of "fit" and "value" is equal to determining what the law is.[201]

There are also separation of power arguments which, although focussing on the role of the courts, argue that when judges look beyond text, that this allows the courts to legislate without completing the required processes for enactment of legislation.[202] It is argued that it is only the text, and not any general or specific intent, which is adopted through constitutionally appropriate procedures by the legislature.[203] The text is often a compromise between political factions.[204] As such the text (in being such a compromise) may possibly be narrower or more restrictive than the primary objectives of any real or hypothetical legislature.[205]

3.4 The time frame within which statutes operate

Scalia and Garner uses the following example to support their argument that words must be given the meaning they had when the text was adopted:

> "Queen Ann is said (probably apocryphally) to have commented about Sir Christopher Wren's architecture at St. Paul's Cathedral that it was 'awful, artificial, and amusing' – by which she meant that it was awe-inspiring, highly artistic, and thought-provoking. All three words have since undergone what linguistics call *pejoration*: Their meaning have degenerated so that they now bear mostly negative connotations. It would be quite wrong for someone to ascribe to Queen Ann's 18th-century words their 21st-century meanings. To do so would be to misunderstand – or misrepresent – her meaning entirely."[206]

[200] Dworkin *Law's Empire* (1986) 104.
[201] Dworkin *Justice in Robes* (2006) 145.
[202] Chomsky "Unlocking the mysteries of Holy Trinity: Spirit, letter, and history in statutory interpretation" 2000 *Columbia Law Review* 901 951.
[203] Above. See s 73 of the Constitution.
[204] Above.
[205] Above.
[206] Scalia and Gardner *Reading Law: The Interpretation of Legal Texts* (2012) 78.

Historically, common-law jurisdictions have adopted similar rules.[207] The South African judiciary has also adopted such an approach to the construction of legal documents, in that legislative provisions must be understood in accordance with the usage and linguistic conventions at the time of adoption.[208] This canon of interpretation can be seen as an exception to the canon that "language of a legislative instrument must be understood in its ordinary signification" – the so-called "ordinary-meaning" rule.[209] Du Plessis has suggested that the canon be reformulated as follows: "The interpreter must observe usage and the conventions of the natural language ... in which the text (a statute or the Constitution) has been drafted".[210]

Intentionalism is innately originalist as, in terms thereof, the paramount rule is that the real intention of the legislature at the time of adoption, once discerned, must be given full effect.[211] This rule was therefore, even prior to the advent of constitutional democracy, criticised because it encouraged excessive over the shoulder peering that is based upon a wrong construction of an historic legislature's thoughts.[212] But it is not true that all originalist arguments are intentionalist and such criticism fails to effectively deal with textualist arguments that words must be given the meaning they had when the text was adopted.[213] Reference to intentionalism in South Africa was in

[207] Scalia and Gardner above 79 refer to the earliest statute directed to statutory interpretation which made it an offence to argue the opposite of the rule. The Scottish Parliament in 1427 adopted an act entitled "That nane interpreit the Kingis statutes wrangeouslie." It read: "Item, The King of deliverance of councel, the manner of statute forbiddis, that na man interpreit his statutes utherwaies, then the statute beares, and to the intent and effect, that they were maid for, and as the maker of them understoode: and quha so dois the contrarie, shall be punished at the Kingis will." Similar approaches were advocated by Coke *The Fourth Part of the Institutes of the Laws of England* (1797) 324–325, Lock *An Essay Concerning Human Understanding* (1801) 133 and Blackstone *Commentaries on the Laws of England* (1770) 60.

[208] *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein* 1985 4 SA 773 (A) 804D; *Minister of Water Affairs and Forestry v Swissborough Diamond Mines Pty Ltd* 1999 2 SA 345 (T) 352A-B. Refer however to *Golden China TV Game Centre v Nintendo Co Ltd* 1997 1 SA 405 (A) par 13 where is was found that the purpose of the statute in question requires that words should be interpreted flexibly to keep pace with the fast pace of technical change so as to avoid the legislature constantly having to update the statute.

[209] Du Plessis (n 47) 2C102 - 2C103. *Union Government (Minister of Finance) v Mack* 1917 AD 731 739; *Mayfair South Townships Pty Ltd v Jhina* 1980 1 SA 869 (T) 879H; *HMBMP Properties Pty Ltd v King* 1981 1 SA 906 (N) 909A; *Nyembezi v Law Society Natal* 1981 2 SA 752 (A) 757H; *S v Du Plessis* 1981 3 SA 382 (A) 403H and *S v Henckert* 1981 3 SA 445 (A) 451G–H.

[210] Above.

[211] Refer to n 49 above.

[212] Cowen "The interpretation of statutes and the concept of 'the intention of the legislature'" 1980 *THRHR* 347 391.

[213] Such confusion seems to be widespread. Du Plessis (n 47) 32–41 states that "intentionalism and its place in constitutional interpretation remains a live issue in the world's oldest constitutional

any event mostly lip service as it was assumed that the legislature encoded its intention within the text of statutes.[214]

The Constitutional Court in *Association of Personal Injury Lawyers v Heath* rejected originalist intentionalism outright.[215] As such it is important to understand the use of the rule in its historic textual context. Textualism need not necessarily be originalist as "[a] textualist might insist on reading the text in accordance with its meaning at the time of interpretation, as opposed to at the time of its enactment".[216] Scalia advocated a textualist originalist view "that judicial interpretation should aim to discern the objective indication of the words as they would have been understood at the time of their enactment".[217] On this view judges in a democracy may not "tinker with statutes" and consequently the meaning of a statute cannot change over time.[218]

The debate as to the time frame within which statutes are to be construed has been most strong within the field of constitutional interpretation. James Madison, author of the American Constitution, asked:

> "Can it be of less consequence that the meaning of a constitution should be *fixed or known*, than that the meaning of a law should be so? Can, indeed, a law be fixed in its meaning and operation, unless the constitution be so"?[219]

In South Africa, a number of arguments have been raised against originalist reasoning primarily because they are "reminiscent of intentionalist-speak in statutory interpretation",[220] although the Constitutional Court has regularly asked what the framers of (both the Interim and Final) Constitution had "intended".[221] Although it

democracy: in the United States of America, originalists have maintained that the US Constitution must be read and understood as faithfully as possible in accordance with the original intent of its framers. Indeed, it is fair to say that in some form or another, original intent is endorsed by a plurality if not a majority of the US Supreme Court." One of the foremost advocates of originalism, Scalia J, can hardly be said to advocate intentionalism and instead uses textualist arguments to justify originalism.

214 Du Plessis (n 47) 2C-57.

215 2001 1 SA 883 (CC) par 19.

216 Stack "The divergence of constitutional and statutory interpretation" 2004 *University of Colorado LR* 1 10 n 20.

217 Above 10.

218 Scalia (n 75) 40.

219 Scalia and Gardner (n 206) 80.

220 Du Plessis (n 47) 32–41.

221 *S v Makwanyane* 1995 3 SA 391 (CC) par 392; *S v Mhlungu* 1995 3 SA 867 (CC) par 100, 102 and 105; *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 1 SA 984 (CC) par 15; *Bernstein v Bester*

may be true that originalist reasoning may be inappropriate due to constitutional reasons, the problem that occurs, is that such arguments ignore the textual argument for originalism. For Scalia and Gardner the real aim of the rule should be to ascertain "original meaning, as opposed to original intention".[222]

Originalism is not a challenge to purposivism. Purposivists start with the text but do not end there.[223] This means that adherence to originalism does not mean that an interpreter will also adhere to intentionalism or literalism. Additionally, purposivists would not have deduced – on Scalia and Gardner's example of Queen Ann's commenting of St Paul's Cathedral that it was awful, artificial, and amusing – that she meant to say that the cathedral was unpleasant, synthetic, and comical. They would have determined that she meant that the cathedral was awe-inspiring, highly artistic, and thought provoking by determining the purpose of the statement. Purposivists achieve this feat by considering the text but also by considering factors such as history, values, context and legal comparative experience.[224]

4 *Other constitutional waymarks*

The Constitution contains various explicit and implicit waymarks that are essential for the interpretation of statutes.[225] The Constitution, for example, does not explicitly mention the principles of interpretation in conformity with the Constitution or the separation of powers. These principals impact on the interpretation of statutes and can be deduced from the explicit provisions of the Constitution or the structure thereof.[226] The Constitutional Court has held that implicit provisions of the Constitution are just

1996 4 BCLR 449 (CC) par 53; *Du Plessis v De Klerk* 1996 3 SA 850 (CC) par 45; *Executive Council of the Western Cape v Minister for Provincial Affairs and Constitutional Development of the RSA; Executive Council of KwaZulu-Natal v President of the RSA* 2000 1 SA 661 (CC) par 39-41 and *S v Twala (Human Rights Commission Intervening)* 2000 1 SA 879 (CC) par 9-17.

[222] Scalia and Gardner (n 206) 92. According to Scalia (n 75) 17 "it is simply incompatible with democratic government, or indeed even with fair government, to have the meaning of law determined by what the lawgiver meant, rather than what the lawgiver promulgated".

[223] *United States v Am. Trucking Ass'ns, Inc*. 310 U.S. 534 1940 543–544. In this case the US Supreme Court held that "[t]here is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation."

[224] Du Plessis (n 57) 32-159.

[225] Above 32-116.

[226] Above 32-133.

as much part of the Constitution as express provisions.[227] In what follows the most important constitutional waymarks are considered.

4.1 Application

Woolman summarises the doctrine contained in section 8 of the Constitution:[228]

- "All law governing disputes between the state and natural persons or juristic persons is subject to the direct application of the Bill of Rights.
- All state conduct that gives rise to disputes between the state and natural persons or juristic persons is likewise subject to the direct application of the Bill of Rights.
- Disputes between natural persons and/or juristic persons *may* be subject to the direct application of the Bill of Rights, if the specific right asserted is deemed to apply.
- Where direct application of the right asserted occurs in terms of s 8(2), and the court further finds a non-justifiable abridgment of that right, then the court must develop the law in a manner that gives adequate effect to the right infringed."[229]

This section delineates the ambit of the Bill of Rights and determines the impact thereof on existing law, the functions of the legislature, the executive, the judiciary and organs of state, and on natural persons and on juristic persons.[230] As such these matters have a significant impact on the interpretation of statutes.[231] Although this section is not primarily an interpretive clause in the same way that section 39 of the Constitution is, significant guidance may be sought from the provision to determine, for example, if a law binds the state or a natural or juristic person and to determine how rights should be limited and the common law developed.

[227] *South African Association of Personal Injury Lawyers v Heath* 2001 1 SA 883 par 20.

[228] The section reads as follows: "(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1). (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person."

[229] Woolman "Application" in Woolman, Roux and Bishop (eds) *Constitutional Law of South Africa* (2014) 31-7.

[230] Du Plessis (n 57) 32-126.

[231] Above.

4.2 Basic (or founding) values

The Constitution is a value-laden document. It encompasses the hopes and aspiration of our society. Section 1 enshrines the values of human dignity, equality, the advancement of human rights and freedoms, non-racialism and non-sexism, supremacy of the Constitution and the rule of law, universal adult suffrage, a national common voter's roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.[232] These provisions are significant interpretive waymarks. Its status is underscored by the requirement that 75 per cent of the National Assembly, and the six out of the nine provinces in the National Council of Provinces, is needed to amend section 1.[233]

These values can be described as the aims of South African society, which are to be achieved by "political and other means under the Constitutions guidance and control".[234] It "connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law".[235] The object of the Constitution is to achieve a society that is reflective of these values. The attainment of these values is *sine qua non* for the achievement of a socially just society – which is the central vision of the Constitution.[236] Similarly, the purpose of the LRA "is to advance economic development, social justice, labour, peace and the democratisation of the work place".[237] This obligation is also recorded in the Basic Conditions of Employment Act.[238]

The Constitution is not only composed of values but also of rules, as it is the primary source of citizens' rights and obligations. The judiciary has placed values, and not rules, at the centre of its jurisprudence and demonstrated a preference for dealing with values, even when more precise "rules" of the Constitution such as those found in the

[232] Similarly s 195 contains values that are important for the interpretation of provisions dealing with public administration, which may be relevant within the context of public sector employment.
[233] Du Plessis (n 57) 32-119.
[234] Michelman "Expropriation, eviction and that gravity of common law" 2013 *Stellenbosch Law Review* 245 245.
[235] Klare "Legal culture and transformative constitutionalism" 1998 *South African Journal of Human Rights* 146 150.
[236] Preamble of the Constitution.
[237] S 1 of Act 66 of 1995.
[238] S 2 of Act 75 of 1997.

Bill of Rights are potentially relevant.[239] This is so as the Constitutional Court has established the principle that when legislation gives effect to a right in the Bill of Rights, a claimant cannot rely directly on the Constitution".[240]

This does not mean that the Constitution will play no role in adjudication, as legislative provision in question must be interpreted so as to promote the spirit, purport and objects of the Bill of Rights.[241] Interpretation of statutes on the approach adopted by the Constitutional Court is essentially teleological. This approach distinguishes between the spirit or purport of a statute and its words. The former is allowed to supersede the latter.[242] Teleological interpretation does not require reference to the mere purpose of the statute, but to all other considerations and values that can be applied, such as the values that exist within the legal system as a whole, including constitutional values.[243] The effect of the preference for indirect application of the Constitution over direct application means that the Court has consequently also favoured values over the (arguably more) concrete rules of the Constitution.[244]

Constitutional values are not a catalogue of all possible values in our legal system.[245] Constitutional values interact with common law values in a significant way. In the context of the interpretation of statutes several foundational values may be found. Canons and presumptions of statutory interpretation are foundational values because they represent the "political and moral concerns and traditions of the community".[246] These principles may also be described as public values.[247] These canons are

[239] Woolman "The amazing, vanishing Bill of Rights" 2007 *South African Law Journal* 262 263.
[240] *Sali v National Commissioner of the South African Police Service* 2014 9 BLLR 827 (CC) par 4, 72 and n 2. See also *S v Mhlungu* 1995 3 SA 867 (CC) par 59, *MEC for Education: KwaZulu Natal v Pillay* 2008 1 SA 474 (CC) and *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) par 51.
[241] S 39(2).
[242] Devenish *Interpretation of Statutes* (1992) 39-40.
[243] Devenish (above) 45.
[244] Refer to Woolman "True in theory, true in practice: why direct application still matters" in Woolman and Bishop (eds) *Constitutional Conversations* (2008) 113.
[245] Du Plessis (n 8) 151-152.
[246] Dworkin *Taking Rights Seriously* (1977) 67. L du Plessis (n 8) 149.
[247] Elhauge *Statutory Default Rules: How to Interpret Unclear Legislation* (2008) 3. The common law has, *inter alia*, presumed that: delegated legislative powers are to be exercised by the *delegatus* itself; legislation applies to general instances general as opposed to specific instances; legislation does not alter the existing law more than is necessary; legislation does not bind the state in the event that, if the state were bound, it would hamper the fulfilment of an essential function; legislation does not contain a *casus omissus*; legislation does not contain invalid or purposeless provisions;

verbalisations of values vital to the sustenance of a just and effective legal order".[248] These values include equity, reasonableness, equality, legality, legal certainty, public interest and the like. It is therefore possible to rely on these canons when they are consistent with the Constitution and have not been subsumed under the Constitution, or when they have been left unaffected thereby. If these values have been subsumed under the Constitution then the constitutional values will take precedence.[249] Du Plessis has identified the possibility that the presumptions can "augment, enrich and enhance" the Constitution.[250] The author submits that the presumptions could fulfil a number of useful functions:

> "First they can supplement, facilitate and mediate resort to constitutional values ... Second, they can advance foundational values consistent with – but not explicitly spelled out in – the Constitution. Third, they can amplify foundational values embodied in the Constitution ... Finally, they can guide constitutional interpretation itself and amplify certain of its procedures."[251]

Du Plessis still utilises an explanation that insists upon a distinction between constitutional values and "foundational" common-law values. This is a logical distinction as common-law values originate from a source different than a justiciable constitution. There are some who hold the view that the origin of the value should not play such a seminal role in describing their status. Michelman writes:

> "Is it beyond imagining that you would sometimes think of the animating human rights ideals of your country's constitutional bill of rights as being essentially continuous with a human rights tradition ensconced in your country's historical, common law *corpus juris*? These ideals would belong to the set ... of your country's public values. Thus perceiving the set to encompass both constitutional and common-law values, principles, or ideals, you might sometimes think of testing the constitutionality of a questioned statutory solution to a rights controversy by looking to see how the statute's specific dictates and implicit principles compare with those of the extant and historic common-law solutions."[252]

legislation does not have extraterritorial effect; legislation does not operate retrospectively; legislation does not violate international law; legislation does not interfere with the jurisdiction of the courts; legislation is not unjust, inequitable or unreasonable; legislation is presumed to be constitutional; legislation promotes the public interest; references in legislation to acts and conduct are references to legal acts and conduct; remedial legislation must be construed generously; the existing meaning of words and phrases must be preserved; and words and phrases bear the same meaning throughout a legislative text. Refer to Van Staden "A comparative analysis of common-law presumptions of statutory interpretation" 2015 *Stellenbosch Law Review* 550 ao for a full discussion of these values.

248 Du Plessis (n 8) 151.

249 Above 152.

250 Above.

251 Above 153.

252 Michelman "The Bill of Rights, the common law, and the freedom-friendly state" 2003 *University of Miami Law Review* 401 401.

In fact the Constitutional Court has already done so.[253] It may be argued that the Constitution, through calling for the development of the common law and its values through the prism of the Constitution, supports such an argument.[254] The point is that the presumptions of statutory interpretation may be important, beyond merely supplementing, facilitating and mediating, they resort to constitutional values, as the values inherent in the common-law presumptions may be viewed as public and thus constitutional values. On such a view, common-law values may in fact in themselves be seminally important, foundational values. Giving effect to extra-constitutional norms can also protect rights.[255]

4.3 Interpretation of statutes and the Bill of Rights

Section 39(1)(*a*) of the Constitution reads as follows: "When interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom". Section 39(2) of the Constitution reads as follows: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

Because the interpretation of the Bill of Rights and other legislation are dealt with in different subsections of section 39, this may suggest that there is a difference between constitutional and statutory interpretation. Because theories of statutory interpretation are characterised by the factors discussed above (that is the relevance of the intention of the legislature, the nature and function of language, the role of the judiciary in the interpretation of statutes and the time-frame within which statutes operate), it is not possible to hold different theories for different statutes to be interpreted. In the context of the United States, some have drawn a distinction between the approaches to constitutional and "normal" or "ordinary" statutory interpretation.[256] The author

[253] Above 402. The author refers to the early cases of *Bernstein v Bester* 1996 4 BCLR 449 (CC) and *S v Zuma* 1995 4 BCLR 401 (CC).
[254] S 39 of the Constitution and *Carmichele v Minister of Safety and Security* 2001 10 BCLR 995 (CC) par 39.
[255] Du Plessis (n 57) 32-14.
[256] See Stack "The divergence of constitutional and statutory interpretation" 2004 *University of Colorado LR* 1.

concedes that in contemporary scholarship, there is an uncharacteristic agreement between defenders of opposing theories of statutory interpretation that constitutional and statutory interpretation should converge rather than differ.[257]

De Ville has argued that both subsections command a similar interpretive approach because a theory of statutory interpretation indicates the role of the court *vis-à-vis* the legislature.[258] Because an approach is derived from the Constitution, a major difference in the interpretive approach between the Constitution and statutes is therefore not warranted.[259] Similarly, both Scalia[260] and Eskridge[261] (who are theoretically opposed) have invoked separation of powers, democratic and rule of law arguments to justify their respective positions that theories of statutory and constitutional interpretation should converge.

Put differently, an interpreter cannot justify the use of different theories of statutory interpretation when interpreting different documents because the interpreter cannot justifiably have different attitudes in regard to conceptions of the relevance of the intention of the legislature, the nature and function of language, the role of the judiciary in the interpretation of statutes and the time-frame within which statutes operate. This is so as these factors are not (necessarily) influenced by the document that happens to be the subject of interpretation, but rather independently thereof by constitutional theory or "theories of authority".[262] Theories of statutory interpretation depend upon theories of authorities.[263] It would therefore be problematic to reconcile for example a literalist approach to "ordinary" statutory interpretation with a purposive approach to constitutional interpretation.[264] This does not mean to refute the existence of particular differences between constitutional interpretation and the

[257] Above 3.
[258] De Ville *Constitutional and Statutory Interpretation* (2000) 58.
[259] Above.
[260] Scalia (n 75).
[261] Eskridge and Frickey "The Supreme Court, 1993 term-foreword: law as equilibrium" 1994 *Harvard Law Review* 26 77.
[262] Raz "On the authority and interpretation of constitutions: some preliminaries" in Alexander (ed) *Constitutionalism: Philosophical Foundations* (1998) 153 157.
[263] Above.
[264] Botha *Statutory Interpretation: An Introduction for Students* (2005) 114.

interpretation of other enacted law. It only challenges the idea that the approach to the interpretation of the Constitution and other enacted law is different.[265]

When both subsections are read together, taking into account the argument developed above that there can be no difference between an approach to constitutional interpretation and normal interpretation, it is clear that the Constitution endorses a teleological model to both modes of interpretation. In fact it may be argued that an interpretation that promotes the values that underlie an open and democratic society based on human dignity, equality and freedom will necessarily promote the spirit, purport and objects of the Bill of Rights (*et vica verca)*. In the case of constitutional interpretation the Constitution therefore requires a teleological mode of statutory interpretation. The purpose of the Constitution is to transform South African society into a society that is reflective of the Constitution's foundational values. The purpose of the Constitution and its values are therefore two sides of the same coin.

The Constitution obliges us to advance constitutional values. If this was not the case then the purpose, object or spirit of the Constitution could not be promoted. Because there can be no difference between (normal) statutory interpretation and constitutional interpretation, ordinary interpretation must also advance the purpose of the statute (in light of constitutional values). It is not possible for purposes of a statutory provision to be at odds with constitutional values. If it is averred by a litigant that the purpose of a statutory provision does not advance constitutional values, it will be incumbent on a

[265] Du Plessis (n 8) 134-135: "(a) The Constitution, as supreme law, is a long-lasting, enacted law-text at the apex of the legal system. (b) The Constitution is justiciable and, therefore, a standard for the assessment of the validity of both 'law' and 'conduct' in every (legislative and executive) echelon of government. (c) The Constitution verbalises, in characteristically broad, inclusive and open-ended language, values and beliefs associated with democracy and the constitutional state (or *Rechtsstaat*)." In *Hunter v Southam Inc* 1984 2 SCR 145 155 the Supreme Court of Canada held: "The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts not to read the provisions of the Constitution like a last will and testament lest it become one."

court to cure the defect by interpreting the provision in conformity with the Constitution or to a remedy the defect in terms of section 172 of the Constitution.

4.4 Interpretation in conformity with the Constitution

Interpretation in conformity with the Constitution is a reading strategy associated with constitutional interpretation.[266] The principle was best described in *Hyundai Motor Distributors*:[267] "judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section".[268] In *Van Rooyen v The State*[269] the Constitutional Court held that "legislation must be construed consistently with the Constitution and thus, where possible, interpreted so as to exclude a construction that would be inconsistent with ... [the Constitution]".[270] The principle is also described as a presumption of constitutionality.[271] If this is not possible then it is incumbent upon the courts to declare the relevant provision invalid.[272] Similarly, the US Supreme Court has adopted the so-called "constitutional-doubt canon",[273] and has stated that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.[274]

The Court has also confirmed that this principle is "beyond debate".[275] This principle was endorsed by section 35(2) of the 1993 Constitution which stated that:

[266] Du Plessis (n 57) 32-138.
[267] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC).
[268] Par 23.
[269] 2002 5 SA 246 (CC).
[270] Par 88.
[271] Du Plessis (n 57) 32–138.
[272] S 172(1)(*a*) of the Constitution.
[273] Scalia and Garner (n 206) 247.
[274] *United States ex rel. Attorney General v Deleware & Hudson Co* 213 US 366 (1909) 408.
[275] *Edward J DeBartolo Corp v Florida Gulf Coast Bldg & Constr Trades Council* 485 US 568 (1988) 575. According to Scalia and Garner (n 206) 251 this principle together with the principle that "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter" are known as the "rules of constitutional avoidance". The authors argue that the two principles should not be conflated, as the constitutional-doubt canon is a matter of statutory interpretation whilst the latter principle is a rule of judicial procedure. There exists a similar principle in South African law. In terms of the principle of subsidiarity "[w]here there is legislation giving effect to a right in the Bill

> "[n]o law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation."[276]

Although this section is not repeated in the 1996 Constitution, it is accepted that courts are required to read in conformity with the Constitution in terms of section 39(2) of the Constitution.[277] It was stated in *De Lange v Smuts* that the principle is "a sound principle of constitutional interpretation" which is also recognised by other open and democratic societies based on human dignity, equality and freedom such as the United States of America, Canada and Germany.[278] In *Ynuico Ltd v Minister of Trade and Industry* it was explained that the origins of this rule may be found in the common law rule of interpretation of *ut res magis valeat quam pereat* which had its origins in Roman law and had been tested and applied over many centuries.[279]

Because it is mostly believed to be narrower than other possible readings, reading in conformity with the constitution is generally referred to as "reading down".[280] The principle should not be equated to only restrictive interpretation as it might be possible for generous readings to conform to the Constitution and restrictive readings

of Rights, a claimant is not permitted to rely directly on the Constitution". Refer to *Sali v National Commissioner of the South African Police Service* 2014 9 BLLR 827 (CC) par 4, 72 and n 2. This does not imply that the Constitution will play no part, as s 39(2) of the Constitution obliges the judiciary to "promote the spirit, purport and objects of the Bill of Rights" in all cases when interpreting any legislation. This is referred to as indirect application.

[276] Refer also to s 232(3) of the Constitution of the Republic of South Africa Act 200 of 1993. In *Bernstein v Bester* 1996 2 SA 751 (CC) par 59 n 87 it was observed that "[t]he formulation of this subsection bears a close resemblance to the rule of construction adopted by the United States Supreme Court as formulated by Justice Brandeis in *Ashwander v Tennessee Valley Authority* [1936] USSC 36; 297 US 288 (1936) 346 as the seventh principle enunciated in that case". The court also went on to show how various other jurisdictions also apply this rule. *Verfassugnskonforme Auslegung*, as this principle in known as in German law, is according to Bakker "Verfassungskonforme Auslegung" in Bakker, Heringa and Stroink *Judicial Control: Comparative Essays on Judicial Review* (1995) 9 9 "an essentially German concept" which can be traced back to the decision of the *Bunderverfassundsgericht* of 7 May 1953 where it was expressed as follows: "*Ein gesetz ist nicht verfassungswidrig, wenn eine Auslegung möchlich ist, die im Einklang mit dem Grundgestz steht, und das Gesetz bei dieser Auslegung sinvoll bleibt*."

[277] Currie and De Waal *The Bill of Rights Handbook* (2013) 65.

[278] 1998 3 SA 785 (CC) par 85. This *dicta* was endorsed in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors Pty Ltd In re: Hyundai Motor Distributors Pty Ltd v Smit* 2001 1 SA 545 (CC) par 23.

[279] 1995 11 BCLR 1453 (T) 1468G-J. This rule was set out in *Digest* 1.3.19 *(in ambigua voce legis ea potius accipienda est signification, quae vitio caret)* which had been accepted through Roman-Dutch law into our law in *R v Pickering* 1911 TPD 1054 and *R v Correia* 1958 1 SA 533 (A) 542.

[280] Du Plessis (n 57) 32-138.

not to.[281] This is generally referred to as "reading up".[282] According to Rautenbach the purpose of the rule is to "avoid indiscriminate invalidation of legislative provisions and to encourage the laundering and refreshing of existing fixed interpretations".[283] In *Wary Holdings Pty Ltd v Stalwo Pty Ltd* it was found that where two interpretations are possible, the interpretation that better reflects the Constitution should be adopted.[284] The Constitutional Court has found that limits must be placed on the application of this principle so that an interpretation should not be unduly strained.[285]

4.5 Limitation of rights

Section 36 of the Constitution is the most openly and frequently relied on interpretive waymark.[286] This is so as the provision embodies the operative provisions that set constitutionally acceptable limits to rights. It has not been considered how section 36 affects ordinary statutory interpretation. Arguably, the section affects ordinary statutory interpretation in two distinct ways.

[281] *Daniels v Campbell* 2004 5 SA 331 (CC) par 31.
[282] Du Plessis (n 57) 32-141.
[283] Rautenbach "Introduction to the Bill of Rights" in LexisNexis (eds) *Bill of Rights Compendium* (2011) par 1A18.
[284] 2009 1 SA 337 (CC) par 46.
[285] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors Pty Ltd In re: Hyundai Motor Distributors Pty Ltd v Smit* 2001 1 SA 545 (CC) par 24. Refer also to Rautenbach "The Bill of Rights and statutory interventions with common law delictual remedies in compensation schemes for road accidents and work-related injuries and diseases" 2011 *TSAR* 527 538-540. Rautenbach (n 283) par 1A18 lists the limits of the principle: The rule can be applied only if a law can reasonably be interpreted in conformity with the Constitution. The rule only applies only to the interpretation and not to the interpretation of the Bill of Rights. This means that the judiciary should not interpret the Bill of Rights in such a (limited) way so as to validate the statute under consideration. Section 36 of the Constitution, must be considered to determine if an interpretation is one which can be said to be in conformity with the Constitution. This point will be considered in the following paragraph. Rights may also be constitutionally limited and the principle does therefore not involve promoting the rights of individuals at all costs. An interpretation that is otherwise consistent with the Constitution is not permissible if it would extend the scope of a crime. An interpretation in conformity with the Constitution must be clear and precise. Interpretation in conformity with the Constitution is a reading strategy as supposed to a constitutional remedy. The principle only applies when the constitutionality of a provision is in issue. The rule does not apply when the provision when only one meaning can be attached to it and there is no alternative reasonable interpretation.
[286] Du Plessis (n 57) 32-127. The section reads as follows: (1) "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (*a*) the nature of the right; (*b*) the importance of the purpose of the limitation; (*c*) the nature and extent of the limitation; (*d*) the relation between the limitation and its purpose; and (*e*) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Firstly, when the courts interpret legislation in conformity with the Constitution, section 36 must be considered to determine if an interpretation is one that can be said to be in conformity with the Constitution. The principle of interpretation in conformity with the Constitution is comprised of distinct steps.[287] At the outset it must be determined whether two or more meanings can reasonably be inferred from the text. Thereafter it must be determined whether these interpretations are consistent with the Bill of Rights. To do so it must be considered if a provision limits a right and, if so, whether the limitation is justifiable in terms of limitation clauses. If for example, two interpretations are possible which both limit constitutional rights, the one will survive which has less serious consequences.[288]

Secondly, the section is particularly value-laden. Consider the phrase "an open and democratic society based on human dignity, equality and freedom".[289] Section 36 is therefore important within the context of a teleological model of statutory interpretation where the primary objective is to give effect to the purpose of a statutory provision in light of constitutional values.

4.6 Rights

Section 7 of the Constitution is similar to section 1 and it's founding provisions.[290] It reasserts the Bill of Rights as the cornerstone of democracy, reaffirms the obligation of the state to make good on the promises of the Constitution, and reiterates that rights may only be limited in accordance with section 36 of the Constitution. The ideals embodies in the section would come to naught if not advanced through interpretation. The value statement contained in section 7 is therefore of particular importance within the context of teleological interpretation.

[287] Rautenbach (n 283) par 1A18.
[288] s 36(1)(*c*).
[289] s 36(1).
[290] The section reads as follows: "(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. (2) The state must respect, protect, promote and fulfil the rights in the Bill of rights. (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill."

Constitutional rights impact upon labour law in three distinct ways: Firstly, the validity of legislation can be tested against these rights. Secondly, legislation must be interpreted to give effect to these rights. Thirdly, rights can be used to develop the common law.[291] Within the context of the interpretation of labour legislation several rights impact upon labour relations:[292] section 9 (the equality clause); section 10 (the guarantee of human dignity); section 13 (the right to privacy); section 14 (the right to privacy); section 17 (the right to assembly, demonstration, picket and petition); section 18 (the right to freedom of association); section 22 (the right of all citizens to choose their trade, occupation and profession freely); section 27 (the right of access to health services and social security, including appropriate social assistance where necessary); section 32 (the right to access to information); and section 33 (the right to administrative action that is lawful, reasonable and procedurally fair).[293]

4.7 The Preamble to the Constitution

In *S v Mhlungu*[294] the Constitutional Court stated that the Preamble

> "should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretive value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicate its fundamental purposes."[295]

Although the Preamble does not give rise to rights and duties of its own, it is widely regarded as an important interpretive aid.[296] The Constitutional Court has treated the

[291] Van Niekerk and Smit (eds) *Law@work* (2015) 36.
[292] above 35.
[293] above and Cooper "Labour relations" in Woolman, Roux and Bishop (eds) *Constitutional Law of South Africa* (2014) 53-2 n 2.
[294] *S v Mhlungu* 1995 3 SA 867 (CC) par 112. The principle was confirmed in *Van Vuuren v Minister of Correctional Services* 2010 12 BCLR 1233 (CC). The Preamble of the Constitution: "We, the people of South Africa, recognise the injustices of our past; honour those who suffered for justice and freedom in our land; respect those who have worked to build and develop our country; and believe that South Africa belongs to all who live in it, united in our diversity. We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; improve the quality of life of all citizens and free the potential of each person; and build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations. May God protect our people. *Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso. God seën Suid-Afrika*. God bless South Africa. *Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika*."
[295] par 47.
[296] Devenish *The South African Constitution* (2005) 27-29.

Preamble as a purpose statement.[297] The Preamble, especially within the context of a teleological approach to the interpretation of statutes, should be understood to imply a purposive approach to interpretation, and to be an important source for determining what those purposes are.[298] The courts have relied on the Preamble to determine interpretive purposes without imposing the literalist qualification that reliance is only acceptable where the language of the Constitution is ambiguous or unclear.[299]

5 *Conclusion*

The theory of statutory interpretation that an interpreter prescribes to, strongly influences a particular interpretative outcome. It was also noted that the goal of statutory interpretation is central to the understanding of the theories and methods of statutory interpretation. Literalists, intentionalists and purposivists have distinct understandings as to the goal of statutory interpretation. Literalists hold the view that the goal of statutory interpretation is to discern and give effect to the meaning of the very words in which a statutory provision is couched. Intentionalists hold the view that that the goal of statutory interpretation is to discern and give effect to the real or subjective intentions of the legislature, whilst purposivists view the goal of statutory interpretation discerning meaning by asking what the objective purpose of the law is. History has shown that none of these theories have dominated the approach of statutory interpretation in the Anglo-American legal tradition.

These theoretical positions in turn rest upon the following considerations: the relevance of the intention of the legislature, the nature and function of language, the role of the judiciary in the interpretation of statutes, and the time-frame within which statutes operate. Whilst literalists reject the notion that the intention of the legislature can be relevant (or that such intentions should (exclusively) be discerned from the language employed by the legislature), intentionalists are primarily concerned with

[297] *Bato Star Fishing (Pty) v Minister of Environmental Affairs* 2004 4 SA 490 (CC) par 72-73; *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) par 52 and *Islamic Unity Convention v Independent Broadcasting Authority* 2002 4 SA 294 (CC) par 43.

[298] Fowkes "Founding provisions" in Woolman, Roux and Bishop (eds) *Constitutional Law of South Africa* (2014) 13-3.

[299] Du Plessis (n 57) 32-118.

the real intentions of the legislature whilst purposivists in turn are concerned with the intentions of a reasonable or hypothetical legislature.

Whilst literalists assume that there is a grammatical structure inherent in all language that allows for a fixed and stable ordinary effect of language, intentionalists and purposivists hold that meaning is not discovered in and retrieved from a construable text, but that is made in dealing with the text (although intentionalists and purposivists disagree as to the sources that may be considered to determine meaning). Theorists also diverge in their views related to vague and precise legal language. This study has however showed that vagueness may be an important legislative instrument and that all statutory language undergoes processes of interpretation.

There is also a disagreement amongst those who adhere strictly to the text and those who are willing to determine meaning with reference to extra-textual sources that is rooted in differing views of power distribution and the separation of powers. These views are strongly influenced by the theorist's view of the nature of law. Literalists, for example, reject the idea that interpreters may use extra-textual sources, as they would view this action as amounting to a usurpation of the legislative powers of Parliament. Similarly there can be disagreement amongst different theorist as to the time-frame within which statutes operate, although such disagreement is not necessarily connected to adherence to any specific theory of statutory interpretation.

Although the Constitution does not profess allegiance to a singularly accepted theory of interpretation, it is clear that significant guidance is given in the Constitution as to the proper approach of statutory interpretation. The implicit and explicit waymarks in the Constitution should inform our understanding of the teleological model of interpretation. In fact the Constitution provides much more guidance than just the interpretive clause on interpretive practices.

PART C: INTERPRETATION OF “EMPLOYEE”

CHAPTER 4

The historical dimension

"[L]egal history, perhaps paradoxically, frees us from the past, allows us to make our own decisions by seeing that there is nothing inevitable or preordained in what we currently have."[1]

1 *Introductory remarks on the elements of interpretation*

Teleological interpretation requires interpreters to have regard to all the elements of a statutory provision to determine what the broad purposes of a provision are. These elements are: the text, context, values, history and comparative environment of a provision.[2] Due to the centrality of text to the interpretation of statutes, most authors present the elements in the order that they are listed above. In this study, however, the historical dimension is presented first. This is so as an understanding of the historical way in which the question as to who should be included within the employment relationship will better orientate the reader to the challenges faced by interpreters of

[1] Phillips "Why legal history matters" 2010 *Victoria University of Wellington Law Review* 293 295.
[2] See Chapter 1 § 4.4.

the term "employee" and will also allow the reader to contextualise the other elements of interpretation within its historical context.

It has also been stated that the elements of statutory interpretation are consistently on the move, overlapping and interacting.[3] The implication of this for the study is that many aspects could ostensibly be discussed under several. The elements of statutory interpretation are not entities or part of an equation in which statutory meaning is to be determined.[4] So, for example, there exists a high degree of overlap between the contextual dimension of any statutory provision and the other elements thereof. This is because there exists also textual context, teleological context, historical context and comparative context. As such, certain choices have been made as to where particular matters relevant to the interpretation of the term "employee" is to be discussed.

As teleological interpretation does not present itself as akin to a mathematical theorem in which each element of interpretation is to be given relational weight vis-à-vis the other elements thereof, it is practically not of much importance of where a matter is considered. The point is merely that all the matters discussed within this study should be considered in interpreting the term "employee". In this Chapter, the legislative and jurisprudential responses to the question of who is party to the employment relationship will be considered. In Chapter 6, the contextual dimension will be discussed with reference to the societal challenges that impact upon the question.

2 *Introduction*

The contract of employment is, in the words of Merritt, a "tension-ridden hybrid" that contains both elements of contract and status.[5] According to Wedderburn, the employment contract therefore re-establishes status instead of destroying it.[6] Olivier states that because the basic nature of the employment relationship, that is the obligation of the employee, was based on status, the relationship was hence primarily

3 See Chapter 1 § 7.
4 Du Plessis "The (re-) systematization of the canons of and aids to statutory interpretation" 2005 *SALJ* 591 611.
5 Merritt "The historical role of law in the regulation of employment - abstentionist or interventionist?" 1982 *Australian Journal of Law and Society* 56 58.
6 Wedderburn "Labour law, corporate law and the worker" 1993 *ILJ* 517 523.

based on status.[7] Kahn-Freund nevertheless famously described the contract of employment as the "cornerstone of the edifice of labour law".[8]

Nowhere is this tension between contract and status more evident than in the question as to who should be protected by labour legislation and who are the parties to the employment relationship. This is because the existence and identification of a valid contract of employment has traditionally been the requirement for admittance into the circle of protection afforded by labour legislation.[9] Indeed, it was "[t]he entrenchment of the contractual model [that] introduced one of the great debates of modern employment, namely, how to determine whether a worker is an employee or an independent contractor".[10] In what follows it will be shown how, during the course of regulation in the world of work, the elements of contract and status have increased and (conversely) decreased in importance, and that the ratio in which these elements have stood *vis-à-vis* each other have been ever evolving.

Deakin has indicated that it is easier for us to understand the limitations of existing models of delivering labour protection to workers if we are knowledgeable of the historic conditions under which they arose, as this will "help to reveal whether their weaknesses are structural and deep-rooted, or merely contingent and temporary".[11] As such it is of vital importance that the judiciary, in its interpretive task, take into account the historic vicissitudes that underlie our understanding of who should be protected by labour laws.

In what follows the historical origins of the contract of employment as the preferred vehicle for the delivery of rights and entitlements in the employment relationship will

7 Olivier "Die belang van status en kontrak vir die diensverhouding" 1993 *Tydskrif vir die Suid-Afrikaanse Reg* 17 19. According to the author it would be wrong to say that because this matter is legally read into the contract that it therefore obtains a contractual nature. This would be a mere legal fiction that ignores reality and the true basis of the relationship.

8 Kahn-Freund "Legal framework" in Flanders and Clegg *The System of Industrial Relations in Great Britain* Basil Blackwell Oxford (1954) 44 45.

9 Grogan *Workplace Law* (2014) 4 and Le Roux "Independent contractors and employees: some recent distinctions made by the courts" 2015 *Contemporary Labour Law* 1 1.

10 Le Roux "Employment: a Dodo, or simply living dangerously?" 2014 *Industrial Law Journal* 30 31.

11 Deakin "The comparative evolution of the employment relationship" in Davidov and Langille (eds) *The Boundaries and Frontiers of Labour Law* (2006) 89 91.

be considered in Roman law, Roman Dutch law and English law.[12] It will also be considered how these systems of law deal with the matter of identifying the parties to the employment relationship. Thereafter the South African inception of the contract of employment will be considered, as well as pre-constitutional approaches to identifying the parties to the employment relationship. Finally, contemporary South African approaches to the problem will be considered. The impact of the adoption of South Africa's first justiciable Constitution will be considered. The approach of the judiciary in post-constitutional South Africa to identifying the parties to the employment relationship and the (demise of the) centrality of the preferred vehicle for the delivery of rights and entitlements in the employment relationship will be considered. Contemporary legislative responses to the problem of identifying the parties to the employment relationship will be described.

3 *Roman law*

In Roman law[13] two legal forms regulated the letting and hiring of labour: the *locatio conductio operarum* and *locatio conductio operis.*[14] The *locatio conductio operarum*, or the contract for letting and hiring of personal services or the employment contract, was a consensual contract whereby an employee undertook to place his personal services for a certain period of time at the disposal of an employer who in turn undertook to pay him the wages or salary agreed upon in consideration of his services.[15] As such, this legal form is described as the contract of service or the employment contract.

[12] Le Roux *The Regulation of Work: Whither the contract of Employment? An Analysis of the Suitability of the Contract of Employment to Regulate the Different Forms of Labour Market Participation by Individual Workers* (2008 thesis University of Cape Town) defends the focus on the development of the contract of employment in England and the Netherlands as follows: "First, South Africa has close historical ties with both countries and as a result the legal systems in both countries influenced the development of South African law. Second, these two countries represent a common-law and a civil-law system respectively and therefore provide useful benchmarks against which to consider aspects of the evolution of the contract of employment in South Africa and the claim that the contract of employment as a unitary concept is relatively new, shaped to a large extent by social welfare legislation." The historical development of the regulation of the contract of employment in England and the approach of the English courts in identifying the parties to the employment is also significantly important because, as Olivier (n 7) 21 and 22 shows, the development of the employment contract in our legal system has run the same course of development and because our courts have looked to the English courts for guidance in deciding who is party to the employment relationship.

[13] See Van Warmelo *An Introduction to the Principles of Roman Civil Law* (1976) s 478 ao.

[14] *Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 (A) 56D.

[15] 56E.

The *locatio conductio operis*, or the contract for letting and hiring of a particular piece of work or job to be done as a whole, was a consensual contract whereby the workman as employee or hirer undertook to perform or execute a particular piece of work or job as a whole for the employer as letter or lessor in consideration of a fixed money payment.[16] As such, the contract is described as the contract of work. It is this dichotomy that manifests itself in the distinction drawn between the employer-employee relationship and the independent contractor relationship.

As slaves performed most work during Roman times, the employment contract and the contract of work played a less significant role in Roman law than it did in subsequent history.[17] Since a slave was a mere thing, he himself was incapable of letting his labour or services, but if his owner did so then such a contract was construed as a letting of the slave as a thing and such a contract was known as the *locatio conductio rei*.[18] The *locatio conductio operarum* was therefore, in the words of Grogan

> "applied only to so-called *operae illiberales* or menial workers. In Roman times, "menial" work included painting and sculpture. Professional people could not enter into contracts of service and they were limited in the late Empire to claiming an honorarium for their services. Slavery explains why the contract of service was not utilised much in Roman times."[19]

The general principles of the employment contract were however incorporated into the Roman Dutch law and further developed there.[20] It should also be noted that, as will be shown later, the principles that regulated the common-law contract of employment were not exclusively rooted in Roman-Dutch law, but rather represent a complicated mixture of Roman-Dutch and English law.[21] Deakin has shown that the dichotomy between the employee and the independent contractor emerged, with the development of social welfare legislation in England.[22] This point is explored later.[23] It is however important to note from the outset that it would be an oversimplification to claim that the dichotomy between the employee and the independent contractor emerged solely in Roman law. There is also a scarcity of writings on the content of

16 57C.
17 Wallis *Labour and Employment Law* (1995) 2-3.
18 *Smit v Workmen's Compensation Commissioner* (n 14) 56D.
19 Grogan *Workplace Law* (2014) 3. See also Rycroft and Le Roux "Decolonising the labour law curriculum" 2017 *Industrial Law Journal* 1473.
20 Wallis (n 17) 2-4.
21 Le Roux (n 12) 48.
22 Deakin (n 11) 108.
23 See § 5.1. below.

these legal instruments in Roman law, and as such, it is understandable that our courts sought guidance from the English law.[24]

4 *Roman Dutch law*

Roman Dutch law saw the introduction of legislation or *placaaten* to make provision for criminal offences and penalties in those cases where, for instance, a domestic servant, an apprentice or a sailor deserted his service or was disobedient or insubordinate to his employer or failed to conduct himself decently.[25] This legislation did, however, not gain the force of law in South Africa.[26] It is the *locatio conductio operarum* of Roman law that became the *dienstcontract* or *huur en verhuur van diensten* during Roman Dutch times and still serves as the historical roots of the contemporary contract of employment.[27] In general, however, Roman-Dutch writers paid little attention to the *locatio conductio operarum*.[28] As such, Le Roux has contended that

> "the development of the employee/independent contractor dichotomy in South Africa is not necessarily explained by the Roman-Dutch dichotomy of *locatio conductio operis* and *locatio conductio operarum* and that the famous pronouncement of the AD in *Smit v Workmen's Compensation Commissioner* concerning the distinction between the two *locatios* was simply an attempt to shift a binary divide that was presenting itself in the South African labour market for different reasons onto common law nomenclature."[29]

24 Benjamin (n 39) 791.
25 *Smit v Workmen's Compensation Commissioner* (n 14) 59F-H.
26 Wallis (n 17) 2-4. This is due to the principle in *R v Harrison and Dryburgh* 1922 AD 320 333 and 336.
27 Above.
28 Grogan (n 19) 4.
29 Rycroft and Le Roux (n 19) 1480. The author has stated (Le Roux "The evolution of the contract of employment in South Africa" 2010 *Industrial Law Journal* (UK) 139 157-158) that "[t]he question can rightfully be asked whether the Roman-Dutch dichotomy, in the words of Freedland, was not in reality always "deeply embedded" in the South African common law, and simply waited for an opportunity to re-establish itself. Or were there other forces at work? If the Roman-Dutch dichotomy were such a major divisive force, would it not have shown itself long before *Smit*? Would the courts (or at least some of them) after *Colonial Mutual*, instead of making mere occasional references to it, not naturally have transplanted the dichotomy that gradually emerged under the influence of *Colonial Mutual* to the Roman Dutch model in a much more graphic "Smit-like" fashion? In fact, if the dichotomy was such a major presence, would the judges in *Colonial Mutual* not have made much more of the dichotomy instead of the brief obiter reference to it? While the Roman-Dutch dichotomy certainly existed, it is far more likely that *Smit* reflected the last remnants of the purist school, and that it was an attempt to shift the dichotomy that was emerging under the influence of *Colonial Mutual* (and subsequent judgments on predominantly social security and tax legislation) and the control test onto Roman-Dutch categorisations."

An important characteristic of the *dienstcontract* was the duty of the employee to obey the lawful commands, orders or instructions of his employer in regard to the performance of his services. The employer had a simultaneous right to supervise and control the manner in which the employee was to perform his services. As such an employer could decide what work was to be done by the employee, the manner in which it was to be done, the means to be employed in doing it and the time when and the place where it was to be done.[30] The employer could also inspect and direct the work being done by the employee.[31]

Key differences between the employment contract and the contract of work crystallised during this time. Firstly, the object of the employment contract is the rendering of personal services by the employee to the employer. The object of the contract of work is the performance of a certain specified work or the production of a certain specified result.[32] Secondly, the employee is at the beck and call of the employer to render personal services at the behest of the employer. Independent contractors stand in a more independent position and are not obliged to perform the work personally or to produce the result personally (unless otherwise agreed upon).[33] Thirdly, services to be rendered in terms of a employment contract are at the disposal of the employer who may in his own discretion decide whether or not he wants to have them rendered. The independent contractor is bound to perform a certain specified work or produce a certain specified result within the time fixed by the contract of work or within a reasonable time.[34]

Fourthly, the employee is subordinate to the employer and must obey lawful commands, orders or instructions of the employer who has the right to supervise and control employees by prescribing what work has to be done as well as the manner in which it has to be performed. The independent contractor, however, is bound by his contract of work, not by the orders of another, and does not work under the supervision or control of another and, furthermore, does not need to obey any orders

[30] *Smit v Workmen's Compensation Commissioner* (n 14) 59H.
[31] 61A.
[32] 61A-B.
[33] 61B-C.
[34] 61D.

in regard to the manner in which work is to be performed.[35] Fifthly, an employment contract is terminated by the death of the employee while the contract of work does not necessarily terminate in this event.[36] Sixthly, the contract of service terminates on expiration of the period of service entered into while a contract of work terminates on completion of the specified work or on production of the specified result.[37]

Although it is accepted that the Roman-Dutch dichotomy existed, it is also true that the Roman-Dutch law contained very little guidance to identify the parties to the employment relationship.[38] As our courts sought a singular touchstone to identify the parties to an employment relationship, it was the English law and the tests developed therein that guidance was sought from.[39]

5 *English law*[40]

5.1 The evolution of the contract of employment in England

The first labour statutes of England were as a result of the labour shortages caused by the Black Death of 1346.[41] Although these statutes did not introduce any contractual elements into the employment relationship, the Statute of Labourers of 1351 "helped to seed legal innovations which led to the promissory action of assumpsit, the forerunner of modern contract law".[42] The Statute of Artificers of 1562 and various poor laws statutes such as the Poor Law Act of 1601 provided the foundation for the setting of minimum wages and the activities of the urban guilds.[43] The laws provided for a compulsory seven year apprenticeship, reserved certain trades for the sons of the wealthy, imposed a duty for compulsory service in agriculture for those without property or means, empowered justices to require unemployed artificers to work in

35 61E-G.
36 61H.
37 Above.
38 Le Roux (n 29) 158.
39 Benjamin "An accident of history: who is (and who should be) an employee under South African labour law" 2004 *Industrial Law Journal* 787 791.
40 In this part historical developments that influenced the South African inception of English law rules and principles will be discussed. In Chapter 8, contemporary developments of English law that occurred after the South African inception thereof will be considered.
41 Deakin (n 11) 93.
42 Above.
43 Above.

agriculture, regulated the transfer of a workman from one employer to another, restricted the freedom of movement of the poor, allowed justices to fix wage rates for all classes of workmen, provided poverty relief and yearling contracts.[44]

The relationship within the guilds "resembled extended networks of independent contractors linked by merchant capitalists" and, as such, it is wrong to view the terms of the regulation of these guilds as a functional equivalent to the modern contract of employment.[45] The relationship was one of status and not contract.[46] However, the poor laws provided impetus for the emergence of the contract of employment as it contextualised the corporate system of the seventeenth and eighteenth centuries in a population that was increasingly dependent on wages and social protection.[47]

The advent of the First Industrial Revolutions saw a move from status (viewed as "distortions" or "interferences" with the labour market)[48] to contract. Uncertainty as to the application of the Statute of Artificers of 1562 led to the adoption of several Master and Servants Acts between 1747 and 1867.[49] Under these acts, the employment relationship was founded in contract and enforced in criminal law.[50] The inherent inequalities between the contracting parties meant that there was no real developed contractual theory of the employment relationship based on mutuality.[51]

The move towards contract from status was advocated for by the industrial bourgeoisie who wanted a more integrated and disciplined workforce than was provided by independent contractors.[52] They wanted workers to be subject to the same control as servants, whose position was regulated by virtue of their status, and because it was clear that the continuous (or open-ended) nature of the employment

44 Le Roux (n 12) 13.
45 Deakin (n 11) 93.
46 Kahn-Freund "Blackstone's neglected child: the contract of employment" 1977 *Law Quarterly Review* 508 513.
47 above
48 Deakin (n 11) 97.
49 Le Roux (n 12) 13.
50 above.
51 Deakin "Legal origins of wage labour; the evolution of the contract of employment from industrialisation to the welfare state" in Clarke, De Gijsel, and Janssen *The Dynamics of Wage Relations in the New Europe* (2000) 32 36.
52 Merrit (n 5) 57 and 58.

relationship could not be adequately regulated by contract alone.[53] This was done by utilizing the law of contract and thus the notion of "contract of employment" was created to allow the old master servant relationship to be "built into" a construct of contract as part of the *naturalia* thereof.[54]

For workers the law of contract ironically embodied values of freedom, equality, self-government and legal competence, and was seen as liberating. The employer's traditional duty to tend to the welfare of workers was, however, not included herein.[55] Victorian judges were content to reaffirm this "reality of subordination" as it was seen as necessary to the social structure of the late nineteenth century. This "reality was summed up in the so-called control-test for establishing if an employment relationship came into existence or not".[56] The contract of employment that emerged specified the rights of workers and the obligations of employers, while the rights of employers and the obligations of workers remained open and status-like.[57]

The last Master and Servant Act was repealed by the Conspiracy and Protection of Property Act of 1875. The Employers and Workmen Act of 1875 was passed.[58] For many, it was the passing of the Act that heralded an employment relationship that was founded on contract between equal contracting parties.[59] While there is evidence from the early twentieth century that the courts applied general contractual principles to lower status employees, the complete "contractualisation" of the employment relationship only occurred in the 1940s.[60]

It was the advent of social security legislation and rise of collective bargaining that achieved "a more complete 'contractualisation' of employment relations".[61] Due to the influence of these factors the binary divide between the independent contractor

53 Above.
54 Above.
55 Olivier (n 7) 19.
56 Clark and Wedderburn "Modern labour law: problems, functions and policies" in Wedderburn *et at* Labour *Law and Industrial Relations: Building on Kahn-Freund* (1983) 127 147.
57 Wedderburn "Laour law, corporate law and the worker" 1993 *ILJ*517 523.
58 Le Roux (n 12) 14.
59 Kahn-Freund (n 46) 525; Wedderburn *The Worker and the Law* (1965) 32 and Veneziani "The evolution of the contract of employment" in Hepple (ed) *The Making of Labour Law in Europe* (1986) 33.
60 Deakin, and Wilkenson *The Law of the Labour Market* (2005) 80-81.
61 Deakin (n 11) 98 and Deakin and Wilkinson *The Law of the Labour market: Industrialization, Employment and Legal Evolution* (2005) 86-100.

and the master and servant relationship were replaced with the independent contractor and employee relationship.[62] It was social security legislation (and specifically the National Insurance Act of 1946) that was first to employ the terminology of the "contract of service" and the "contract of employment".[63] As such "[t]he term 'employee' is truly a very recent innovation in British labour law".[64]

5.2 Identifying the parties to the employment relationship

As the Roman-Dutch common law contained very little guidance in distinguishing between employees and independent contractors, it was to the English law that our courts looked for guidance in solving this quandary.[65] The control test, developed within the context of vicarious liability of an employer for the delicts committed by an employee, focused on an employer's right of control of the work that is to be done by an employee, when it is to be done and the manner in which it has to be done, as the sole determining factor of the existence of an employment relationship.[66] In *Yewens v Noakes* it was stated that: "...a servant is a person who is subject to the command of his master as to the manner in which he shall do his work".[67] The test was further explained in *Honeywill and Stein Ltd v Larkin Brothers Ltd*:[68]

> "The determination whether [a person] is a servant or agent on the one hand or an independent contractor on the other depends on whether or not the employer not only determines what is to be done, but retains the control of the actual performance, in which case the doer is a servant or agent; but if the employer, while prescribing the work to be done, leaves the manner of doing it to the control of the doer, the latter is an independent contractor."[69]

Problems soon emerged with using this test in isolation as the advent of a new breed of skilled workers who worked under conditions of greater independence than their servant predecessors required a more critical and surgical test. Kahn-Freund[70] in 1951 observed that "[t]o say of a captain of a ship, the pilot of an aeroplane, the driver of a

62 Deakin (above).
63 Above.
64 Above.
65 Benjamin (n 39) 791.
66 Flannigan "Enterprise control: the servant-independent contractor distinction" 1987 *The University of Toronto Law Journal* 25 31.
67 *Yewens v Noakes* (1880) 6 QBD 530.
68 [1934] 1 KB 191.
69 196.
70 Kahn-Freund "Servants and independent contractors" 1951 *The Modern Law Review* 504.

railway engine, of a motor vehicle, or of a crane that the employer 'controls' the performance of his work is unrealistic and almost grotesque".[71] The author added:

> "Such common sense tests are sometimes the response of the Courts to situations in which 'harder' criteria have been overtaken by events. They have a way of collapsing in marginal cases and of leading to a maze of casuistry without much principle."[72]

In 1952 the English courts in *Bank voor Handel en Scheepvaarten v Slatford*,[73] being heavily influenced by the preceding work of Kahn-Fruend, rejected the control test and adopted the approach that an employee is someone who is part of the employer's business. This approach is referred to as the organization or integration test.[74] In *Stevenson, Jordan and Harrison Ltd v McDonald and Evans*[75] the test was described as follows:

> "One feature which seems to run through the instances is that under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business, whereas under a contract for services, his work, although done for the business is not integrated into it but is only accessory to it."[76]

The test was, however, rejected in *Ready Mix Concrete (South East) v Minister of Pensions and National Insurance*[77] on the basis that it begged more questions than it answered, failed to shed any light on the legal nature of the integration and as it was difficult to gauge one's degree of integration in an organisation.[78] In this case the Court instead adopted the so-called dominant impression test where no single factor is determinative of the employment relationship and all relevant circumstances must be considered to determine the existence thereof.[79]

Subsequent judicial developments in English law were not influential on the South African judiciary. So, Countouris has noted, "South African law is blissfully oblivious to our English law vagaries on 'mutuality of obligation'".[80] As such, further developments in English law will not be discussed here. Because of the shared

71 Above 506.
72 Above 507.
73 1952 2 ALL ER 956 (CA).
74 Benjamin (n 39) 791.
75 1952 1 TLR 101.
76 110.
77 1968 2 QB 497.
78 498.
79 Above.
80 Countouris "Uses and misuses of 'mutuality of obligation'" in Bogg, Costello, Davies and Prassl (eds) *The Autonomy of Labour Law* (2015) 169 183.

common law origin of our legal systems and the influence that English doctrine has had on the understanding of this problem and the development on our law in response thereto, contemporary developments will be discussed later in this study when the transnational (and specifically the foreign) dimension of the teleological enquiry is discussed.[81]

6 *South African inception*

6.1 The evolution of the contract of employment in South Africa

It is the common-law contract of employment (the *locatio conductio operarum* or the *dienstcontract*) that was transplanted into South African law.[82] The existence thereof was *condictio sine qua non* for the establishment of an employment relationship.[83] Administration of justice was however poor in the Cape and, by the time of the British occupation, in 1795 and 1806, no employment culture had developed during the Dutch control of the Cape.[84] This is so as the majority of work were performed by slaves and managed as *locattio re*,[85] although there were also free artisans.[86] The Dutch East India Company did, to a limited extent, make white labourers available to farmers on loan in a type of labour broking arrangement.[87]

The first forms of enacted law meant to regulate free labour in the Cape were introduced following the arrival of British settlers who represented the first introduction of artisans. Le Roux explains:

> "Since many of them absconded from their assigned masters to work for others, Proclamations were passed in 1803 and again in 1818, aimed at preventing the desertion of such white indentured servants and apprentices as well as preventing third parties from luring these servants away from their assigned masters: the former was punishable by imprisonment, the latter by a fine. These proclamations represent the earliest form of the regulation of 'free' labour at the Cape and introduced a pattern of disparities between the position of employees

[81] See Chapter 8.
[82] *Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 (A) 56A.
[83] Wallis (n 17) 2-17.
[84] Le Roux (n 12) 22-23.
[85] By the time of British occupation there were approximately 26 000 slaves in the Cape as opposed to 17 000 free civilians
[86] Le Roux (n 12) 23.
[87] Above. See also Visagie *Regspleging en Reg aan die Kaap van 1652-1806* (1969) 89-90.

> and employers that would dominate the South African labour market until at least the repeal of the Master and Servant Laws in 1974."[88]

In 1806 the slave trade was abolished in the Cape (although auctions took place until 1808). A shortage of labour followed and legislative interventions were sought to address the shortfall. A Proclamation of 1809 secured KhoiKhoi labour by means of a pass control system and the registration of contracts lasting a month or longer and assumed a master-servant relationship between the KhoiKhoi people and Europeans.[89] This proclamation was repealed by Ordinance 50 of 1828, the so-called "Hottentot" Ordinance of 1828, which endeavoured to introduce full civil rights for all KhoiKhoi; limited the powers of employers; abolished the obligation of the KhoiKhoi to carry passes; give the KhoiKhoi the same right as Europeans to buy and own land; limit oral contracts to one month; limit written contracts to one year; and ban child labour without the permission of their parents.[90]

A series of regulations were introduced to regulate the treatment of slaves until slavery was finally abolished with affect from 1 December 1834.[91] The Master and Servant Ordinance of 1841 removed the distinction between the KhoiKhoi and slaves.[92] The Master and Servant Act of 1856 and similar legislation were introduced in the other British territories, the Boer Republics and Natal.[93] The Master and Servant laws were only repealed in South Africa in 1974.[94] The principal objectives of these laws were to make the registration of contracts compulsory and to make a breach of contract criminally punishable. However, these laws also showed early traces of protective legislation. They provided, *inter alia*, for paid sick leave; notice periods; the provision of food and lodging; the protection of the wife and children of a servant against forced labour; the limitation of the age at which a child could be apprenticed; and for the limitation of the duration of contracts.[95]

88 Above 27.
89 Above. See also Clement Duly "A revisit with the Cape's Hottentot Ordinance of 1828" in Kooy (ed) *Studies in Economics and Economic History* (1972) 26 28.
90 Above 28.
91 Ordinance 1 of 1841.
92 Le Roux (n 12) 29.
93 Act 15 of 1856.
94 General Law Amendment Act 94 of 1974.
95 Le Roux (n 12) 30-31.

Although these laws were racially neutral, the laws in practice only applied to non-white workers employed in a limited amount of services (they were predominantly reserved for the agricultural and domestic sectors). In practice the exclusion of several black workers were achieved through pass and influx control laws.[96] Pass laws were designed to exercise control over the movement, employment and settlement of black workers.[97] Recall that the Master and Servant laws placed several duties upon workers, backed by criminal sanction. These laws were cumbersome to enforce as they required employers to appear before the magistrate, whilst pass laws prosecutions did not. As such "[t]he eventual demise of the Master and Servant laws is linked to pass law prosecutions" as it was easier to control the non-white workforce in this way.[98]

The general law of contract was reserved predominantly for the white workers.[99] As in the case of England,[100] there is no evidence in reality of a divide between employees and independent contractors and there was no unitary concept of employment.[101] Le Roux has shown that, as in the case of England, the binary divide between independent contractors and employees was first introduced only with the adoption of social welfare legislation.[102] This point can be illustrated with references to employee compensation legislation, although the point has also been made with reference to other social security legislation.[103] The Workmen's Compensation Acts of 1914[104] and 1934[105] defined the term "workman" in terms of a "contract of employment".[106] The Workmen's Compensation Act of 1941[107] defined the term workman in terms of a "contract of service".[108] This terminology was maintained in

[96] Above 32.
[97] Hindson *Pass Controls and the Urban African Proletariat* (1987) 11.
[98] Le Roux (n 12) 34 and Bundy "The abolition of the Masters and Servants Act" 1975 *SALB* 37 40.
[99] Above 36.
[100] See n 11 above.
[101] Le Roux (n 12) 33-36.
[102] Above 36-41.
[103] Above 39-40.
[104] Act 25 of 1914.
[105] Act 59 of 1934.
[106] S 2 of the Acts. These Acts excluded from its ambit of protection employees earning below or above a certain threshold, casual workers, outworkers, subcontractors, domestic and agricultural workers and persons of certain races. The control test further excluded predominantly higher status and professional workers from the application of these laws.
[107] Act 30 of 1941.
[108] S 3. Many categories of workers were excluded from the Act. In addition to those who earned above a certain threshold, the military, the police, casuals, outworkers, domestic servants, seamen, airmen, agricultural workers, persons who contracted for the carrying out of work and themselves

the Compensation for Occupational Injuries and Diseases Act of 1993,[109] although the term "workman" was replaced with "employee".[110] As Le Roux shows, it is the period following the adoption of the Workmen's Compensation Act of 1941 in which the binary divide between employees and independent contractors started to emerge.[111] It was not until 1993 that a semblance of the unitary concept of employee was achieved.[112]

6.2 Identifying the parties to the employment relationship

Perhaps because of the scarcity of writings on this legal instrument in Roman and Roman Dutch law, our courts however sought guidance from the English law.[113] The judiciary sought a single definitive criterion to identify the employment relationship.[114] When the problem of identifying the employee first came before South African courts in the period between 1915 and 1927, the courts considered control as the most important element in determining whether a person was an employee or an independent contractor.[115]

When the matter first came before the Appellate Division in 1931 in *Colonial Mutual Life Assurance Society Limited v Macdonald*,[116] a different approach was followed with the Court recognising a number of different factor including the nature of the task, the freedom of the individual, the extent of contractual reward, the existence of the power of dismissal, the circumstances in which payment may be withheld and control, supervision and subjection to orders to determine whether a person was an employee.[117] Although this judgment was clearly interpreted as not endorsing the

engaged others to perform the work, and blacks were excluded from the definition. These exclusions were amended various times.

109 Act 130 of 1993.

110 S 1. This Act only excludes the military, the police, a person who contracts for the carrying out of work and him or herself engages another person to perform such work, and domestic employees employed in a private household.

111 Le Roux (n 12) 39.

112 above 41.

113 Benjamin (n 39) 791.

114 Above.

115 *Phillips v Situpa* 1915 EDL 289; *De Beer v Thompson and Son* 1918 TPD 70 76; *Townsend v Honkey* Municipality 1920 EDL 226 228; *Dennis Edwards and Co v Lloyd* 1919 TPD 291 295; *Union Government v Lombard* 1926 CPD 150 154 and *Imperial Cold Storage v Yeo* 1927 CPD 432.

116 1931 AD 413.

117 *Colonial Mutual Life Assurance Society Limited v Macdonald* 1931 AD 413 434-435.

view[118] that control was the exclusive and ultimate element in identifying the contract of employment, the Court did hold that "the relation of master and servant cannot exist where there is a total absence of the right of supervising and controlling the workman under the contract".[119] The Court described the degree of control required as "a matter of extreme delicacy".[120]

Subsequently, the multifactorial approach of the Court was ignored and the judgment was treated as endorsing the control test to the exclusion of all other factors.[121] Because of the "delicacy" of the matter of control, it was also held that complete control relating to every aspect in which the work was to be performed was not necessary.[122] What was important, however, was that the employer has the right to control the employee.[123] Such control could be of a general nature and didn't have to be exercised daily.[124]

Kasuso lists the chief criticism against the control test as follows (the first point being that of Kahn-Freund):[125] Firstly, the test failed to cope with the emergence of skilled professionals who had significant latitude to determine how work was to be performed. Secondly, the test was developed within the context of vicarious liability under the law of delict and not employment law. Thirdly, it is pleonastic to prescribe a contract of employment on the basis of control alone, as it is a consequence of a contract of employment. Fourthly, it is difficult to measure the degree of control sufficient to qualify as an employee.[126]

The former Appellate Division in *Smit v Workmen's Compensation Commissioner*[127] held that the employer's right of supervision and control was not the sole test to

[118] *Cf Performing Rights Society v Mitchell and Booker* 1924 1 KB 672 766-767.
[119] 435.
[120] 434.
[121] Wallis (n 17) 2-11 n 11, *R v Caplin* 1931 OPD 172; *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 4 SA 446 (A) 450C; *Padayachee v Ideal Motor Transport* 1974 2 SA 565 (N); *Lichaba v Shield Versekeringsmaatskappy Beperk* 1977 4 SA 623 (O) 635F-G; *Oak Industries SA (Pty) Ltd v John* 1987 4 SA 702 (N) 702E-F.
[122] *R v Feun* 1954 1 SA 58 (T) 61.
[123] *R v AMCA Services Limited* 1959 4 SA 207 (A) 213.
[124] *Braamfontein Food Centre v Blake* 1982 3 SA 248 (T) 240-251.
[125] Kasuso *The Definition of an "Employee" under Labour Legislation: An Elusive Concept* (2015 thesis University of South Africa).
[126] Above 16.
[127] N 14 above.

identify an employment relationship.[128] The Court also held that the element of control was an important factor to determine the existence of an employment relationship, but that this element was not the only important factor and that it is possible for an employment relationship to be present even in the absence of any right of control.[129] The Court also rejected the organization test,[130] which at the time was recently adopted by the English Courts, as "vague and nebulous".[131] In the place of both of these tests the Court advanced the dominant impression test that had become the vogue in English law. According to this test there is no single factor decisively indicative of an employment relationship and the court must therefore evaluate all aspects on the basis of the dominant impression formed thereby. The existence of a right of supervision or control is an important consideration but not conclusive proof of the existence of an employment relationship.[132]

7 *The post-constitutional landscape*

7.1 Constitutionalisation

The most important development in recent times has been the constitutionalisation of labour law in South Africa. One of the primary objects of the LRA is to give effect to and regulate the fundamental rights guaranteed by the Constitution.[133] Additionally, section 3 (*a*) and (*b*) of the LRA require that its provisions be interpreted so as to give effect to its primary objects and in compliance with the Constitution. Constitutionalisation therefore requires that the law applicable to identifying the parties to the employment relationship must be reinterpreted to give effect to the Constitution. In *Wyeth SA Pty Ltd v Manqele*[134] the Labour Appeal Court therefore extended the literal construction of the definition of an employee to include persons who have concluded contracts of employment to commence at a future date because a literal interpretation would result in gross hardship, ambiguity and absurdity.[135]

[128] 63G.
[129] 61D.
[130] This test was applied by the Appellate Division in *R v AMCA Services Ltd* 1959 4 SA 207 (A) 214C and G-H.
[131] 54A-B.
[132] Benjamin (n 39) 791.
[133] S 1.
[134] 2005 26 ILJ 749 (LAC).
[135] Par 43.

Unfortunately, some orthodox reasoning (having the potential to circumvent the transformative vision of the Constitution) persisted and, according to Cheadle for example, the use of the term "everyone" in section 23(1) of the Constitution should not be interpreted to extend beyond the employment relationship, as the boundaries of the right are circumscribed by the reference to labour practices:[136]

> "Although the right to fair labour practices in subsection (1) appears to be accorded everyone, the boundaries of the right are circumscribed by the reference in subsection (1) to 'labour practices'. The focus of enquiry into ambit should not be on the use of "everyone" but on the reference to 'labour practices'. Labour practices are the practices that arise from the relationship between workers, employers and their respective organisations. Accordingly, the right to fair labour practices ought not to be read as extending the class of persons beyond those classes envisaged by the section as a whole."[137]

However, in *National Education Health and Allied Workers Union v University of Cape Town*[138] the Constitutional Court held that the term "everyone" extends to employers in addition to employees.[139] Additionally, in *South African National Defence Union v Minister of Defence*[140] the Court held that the term "worker" as used in section 23(2) of the Constitution is broader than the concept "employee".[141] On this basis the court was willing to include members of the armed forces within the ambit of the concept "worker", even though their relationship with the defence force may be unusual and not identical to the ordinary employment relationship.[142] The Court held:

> "Clearly, members of armed forces render service for which they receive a range of benefits. On the other hand, their enrolment in the permanent force imposes upon them an obligation to comply with the rules of the Military Disciplinary Code. A breach of that obligation of compliance constitutes a criminal offence. In many respects, therefore, the relationship between members of the permanent force and the defence force is akin to an employment relationship."[143]

The Court concluded that, though the relationship *in casu* was *sui generis*, that it was "akin to an employment relationship".[144]

[136] Cheadle "Labour relations" in Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* (2006) 18-3.
[137] Above.
[138] 2003 3 SA 1 (CC).
[139] Par 39.
[140] 1999 4 SA 469 (CC).
[141] Par 25.
[142] Par 27.
[143] Par 24.
[144] Above.

7.2 The judicial response

According to Benjamin it is the decision of the former Appellate Division of 1979 in *Smit v Workmen's Compensation Commissioner*[145] that continues to play a major role in determining which workers receive the protection of labour legislation.[146] Recall that the dominant impression test was adopted in this case.[147] The Code of Good Practice as to who is an employee has explicitly endorsed this test.[148] Additionally a jurisprudence has emerged in which there is a significant relationship between the dominant impression test and the factors listed in section 200A of the LRA, as the courts have used these factors to determine the existence of an employment relationship.[149] As Van Niekerk has noted, the presumption does not change the statutory definition of an employee but merely codifies the common law tests.[150]

The adoption of the dominant impression test has been subject to significant criticism.[151] Mureinik has stated that "to say that an employment contract is a contract which looks like one of employment sheds no light whatsoever on the 'legal nature' of the relationship".[152] Benjamin has noted that the test provided no guidelines on what weight should be attached to each individual factors.[153] Nevertheless, the South

[145] N 14 above.

[146] Benjamin (n 39) 787. Since the advent of constitutional democracy, the judiciary has again also rejected the control test. In *AVBOB Mutual Assurance Society v Commission for Conciliation, Mediation and Arbitration, Bloemfontein* 2003 24 ILJ 535 (LC) it was held that control was not decisive and of little value in determining the relationship where the contractual provisions regulating the relationship were inimical to an employment relationship. Note however that the factor of "control" is mentioned in section 200A(1)(*a*) of the LRA. The dominant impression test has also been implied in several instances. See *Schoeman v Longgrain CC* 2006 27 ILJ 2496 (CCMA); *Hunt v ICC CARE Importers Services Co (Pty) Ltd* 1999 20 ILJ 364 (LC); *Madlanya v Foster* 1999 20 ILJ 2188 (ARB); *Sanlam Life Insurance Ltd v Commission for Conciliation, Mediation and Arbitration* 2009 30 ILJ 2903 (LAC); *Connolly v Rand Water* 1997 18 ILJ 849 (CCMA); *St Clair v CFS Aviation CC t/a Corporate Flight Services* 2010 31 ILJ 486 (CCMA); and *Dempsey v Home & Property* 1995 16 ILJ 378 (LAC).

[147] 63G.

[148] *Code of Good Practice: Who is an Employee?* 2007 28 ILJ 96 r 32-43. Refer to Chapter 5 § 2 where the Code is discussed.

[149] See *Beya v General Public Service Sectoral Bargaining Council* 2015 36 ILJ 1553 (LC) and *Universal Church of the Kingdom of God v Myeni* 2015 36 ILJ 2832 (LAC).

[150] Van Niekerk "Employees, independent contractors and intermediaries: the definition of an 'employee' revisited" 2005 *CLL* 11 12.

[151] *Medical Association of South Africa v Minister of Health* 1997 18 ILJ 528 (LC); Mureinik "The contract of service: an easy test for hard cases" 1980 *SALJ* 246 258; Brassey "The nature of employment" 1990 *ILJ* 889 919 and Benjamin (n 39) 793.

[152] Mureinik (above) 258.

[153] Benjamin (n 39) 793.

African judiciary has adopted this test following the advent of constitutional democracy in South Africa.[154] This fact is remarkable in the light of the adoption of a justiciable Constitution. To date, the post-apartheid judiciary has squandered the opportunity to adopt a novel approach to the interpretive problem of who is an employee which is sourced from and based in the Constitution, even if this meant a profound break with the jurisprudential history of the legal doctrine of the past.

The Labour Appeal Court in *State Information Technology Agency v CCMA*[155] reworked the factors into a "reduced template which is more appropriate to meet the demands of the modern international and constitutional framework".[156] It is, however, unclear why the reformulation better serves our Constitution and its aims and purposes. In this case the Court identified the primary criteria of an employment relationship as: an employer's right to supervision and control; whether the employee forms an integral part of the organization with the employer; and the extent to which the employee was economically dependent upon the employer.[157]

The Court did not enquire into the existence of a contract of employment, but asked whether an employment relationship was established. The reformulation has therefore taken place within the context of the legal development that the existence of a valid contract of employment is not *sine qua non* for two parties to be deemed employer and employee,[158] although the existence of such a contract and the intentions of the parties thereto, although not determinative, may be relevant to determine the nature of the relationship.[159] Additionally, our courts have accepted that an employment

[154] *South African Broadcasting Corporation v McKenzie* 1999 20 ILJ 585 (LAC).
[155] 2008 7 BLLR 611 (LAC).
[156] Van Niekerk (ed) *Law@work* (2008) 60.
[157] Par 14. See also *Protect a Partner Pty Ltd v Machaba-Abiodun* 2013 34 ILJ 392 (LC). The Court held that the use of the word "assist" in the second part of the statutory definition was an endorsement of the organisation test: "the statutory definition of an employee requires a court to consider whether the employee is assisting the employer to conduct its business, an issue to which the 'organisation' test addresses itself" (par 65).
[158] See also *City of Tshwane Metropolitan Municipality v SA Local Government Bargaining Council* 2012 33 ILJ 191 (LC).
[159] *Phaka v Commissioner Ronnie Bracks* 2015 36 ILJ 1541 (LAC). In this case it found that the formulation of contract between the parties left no doubt that the intention of the parties was to establish a relationship between the company and the worker that was on a different footing to that of the employment relationship. In *National Education Health and Allied Workers Union v Ramodise* 2010 31 ILJ 695 (LC) it was held that the courts must go beyond what parties regard as the nature of their relationship to undercover the true nature of the relationship. Nevertheless, the contractual expression by the parties as contained in the agreement should not be ignored. See also *Hydraulic Engineering Repair Services v Ntshona* 2008 29 ILJ 163 (LC). See also *Pretorius and*

relationship may exists prior to assent to a contract of employment[160] and even after such an agreement had been terminated.[161]

The courts have therefore specifically dealt with the phenomenon of "disguised employment".[162] In *Buffalo Signs Co Ltd v De Castro*[163] the Labour Appeal Court held there is no such thing as a fictional employer and the true employer is the party that fits the definition of employer and that the real employer "may be plucked from his hiding place behind the corporate veil".[164] In *Denel Pty Ltd v Gerber*[165] the Labour Appeal Court held that a person was an employee "on the basis of the realities – on the basis of substance and not form or labels".[166] The Court held that, although there may be an agreement to the contrary, such an agreement does not alter the realities of the relationship that exists between the parties.[167]

The Labour Court in *Oosthuizen v CAN Mining and Engineering Supplies*[168] found that a person may also be both an employee and an independent contractor, although such a person will ostensibly be guilty of a breach of their duty of good faith.[169] Van Niekerk has however argued that parties should, for whichever perceived advantage, be entitled to decide for themselves whether they would prefer a different status than that which exists in reality.[170]

Prime Product Manufacturing (Pty) Ltd (2014) 35 ILJ 305 (CCMA). It has also been found that the exploration of extrinsic facts is mandatory to determine intended meaning. See *De Paauw and Living Gold (Pty) Ltd* 2006 27 ILJ 1077 (ARB).

160 *Maas v Commission for Conciliation, Mediation and Arbitration* 1999 20 ILJ 1276 (LC).

161 *Baudach v United Tobacco Co Ltd* 2000 21 ILJ 2241 (SCA) and *Transport Fleet Maintenance (Pty) Ltd v National Union of Metalworkers of South Africa* 2004 25 ILJ 104 (LAC).

162 A 4*(b)* of the ILO Employment Relationship Recommendation 198 of 2006 states that a "disguised employment relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee".

163 1999 20 ILJ 1501 (LAC).

164 1506.

165 2005 26 ILJ 1256 (LAC).

166 Par 22. See also *Rumbles v Kwa Bat Marketing (Pty) Ltd* 2003 24 ILJ 1587 (LC) where the court came to the same conclusion.

167 Par 21.

168 1999 20 ILJ 910 (LC).

169 Par 11.

170 Van Niekerk "Personal services companies and the definition of 'employee' some thoughts on *Denel Pty Ltd v Gerber* (2005) 26 ILJ 1256 (LAC)" 2005 *ILJ* 1904 1908. See also Van Niekerk (n 150) 19. This point is similar to that of the majority in *Barkhuizen v Napier* 2007 5 SA 323 (CC) at 700 where it was held that, in determining the matter of public policy, reference must be made to all constitutional values including the parties rights to freedom (the right to regulate one's own affairs) and dignity. In so doing the "extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity".

In *Bezer v Cruiser International CC*[171] an employee established a closed corporation at the suggestion of her employer. Despite the change of contract the day-to-day relationship did not change. The employer continued to set her hours of work and she was not entitled to work for other clients. The Labour Appeal Court accepted that the balance of factors indicated that the relationship remained one of employment.[172] The court did however find that the employee had lost her status as an employee because of her election to contract through the closed corporation.[173] In *CMS Support Services v Briggs*[174] the Labour Appeal Court found that, because there was no personal contract between the respondent and the employee, the respondent was not an employee.[175] In the recent case of *Vermooten v Department of Public Enterprises*[176] the Labour Appeal Court agreed with the sentiment expressed by Van Niekerk and held that, when parties in a relatively equal bargaining position choose to enter into an agreement that excludes the contract of employment and such an agreement was not for an illegal purpose, then in the absence of any overriding policy considerations, neither a tribunal nor a court may ignore its terms.[177] It has also been found that sophisticated contracts are unsuitable and inappropriate for relationships between employers and a semi-literate employee.[178]

In *Discovery Health Limited v CCMA*,[179] a case concerning the termination of a foreigner's employment when the company discovered that he had no work permit, the Labour Court confirmed that the definition of employee is not solely dependent on the conclusion of a contract recognised at common law as valid and enforceable:

> "[A] person who renders work on a basis other than that recognised as employment by the common law may be an 'employee' for the purposes of the definition. Because a contract of employment is not a sole ticket for admission into the golden circle reserved for 'employees', the fact that ... [a] contract was contractually invalid only because Discovery Health had employed him in breach of section 38(l) of the Immigration Act did not automatically disqualify him from that status."[180]

[171] 2003 24 ILJ 1372 (LAC).
[172] Par 55.
[173] Par 57.
[174] 1998 19 ILJ 271 (LAC).
[175] 277H.
[176] Case no JA91/2015 (LAC) (unreported).
[177] Par 26.
[178] *Madlanya v Foster* 1999 20 ILJ 2188 (ARB).
[179] 2008 29 ILJ 1480 (LC).
[180] Par 51. The Court at par 30 did however find that the contract *in casu* was not invalid, as it could not be assumed that the legislature intended, when drafting the Immigration Act 13 of 2002, to

In *"Kylie" v CCMA*[181] the Labour Appeal Court accepted that prostitutes working for brothels are employees within the statutory meaning of that term, although they may not be able to claim reinstatement under the LRA as this would be "manifestly against public policy".[182] The Court accepted that although illegal contracts are generally deemed void and that no consequences are attached to them, this rule may sometimes be relaxed in order "to prevent injustice or to satisfy the requirements of public policy".[183]

7.3 The legislative response

As described in the preceding part, our courts have devised creative responses to extend labour law's ambit of protection, but, as Benjamin points out, more often than not it falls to the legislature to reshape legislation to extend the ambit of protection.[184] Following the advent of constitutional democracy in South Africa, a range of legislative devices were adopted to establish core worker rights, facilitate South Africa's reintroduction into the world economy and address the high levels of inequality and unemployment caused by the apartheid system.[185] The new Acts were however premised on the foundation of the traditional employment relationship.[186] As such, the statutory definition of the term "employee" has also undergone little statutory modification. The 1956 LRA provided in section 1(1) that an employee is

> "any person who is employed by or working for any employer and receiving or entitled to receive any remuneration, and any other person whomsoever in any manner assists in carrying on or conducting the business of an employer".

See also the similar definition of employee in section 1(1) of the former BCEA 3 of 1983. In the latter definition, the phrase "or who works under the direction or supervision of an employer" was included into the definition directly after the word

accomplish more than to penalise persons who employ illegal immigrants. The Court at par 57 could therefore find no objection to extending protection to an illegal immigrant.

[181] 2010 31 ILJ 1600 (LAC).

[182] Par 32.

[183] Par 34.

[184] Benjamin "Beyond the boundaries: prospects for expanding labour market regulation in South Africa" in Davidov and Langille (eds) *The Boundaries and Frontiers of Labour Law* (2006) 181 181.

[185] Above 182

[186] Above.

"remuneration" contained in the definition of the 1956 LRA. One significant difference is that independent contractors were not specifically excluded from the definitions. Nevertheless the definition had in essence been maintained without any certainty as to its interpretation having been established. Several questions have been raised with regards to the use of the word "assist" in the second part of the definition.

In *Melomed Hospital Holdings Ltd v Commission for Conciliation, Mediation and Arbitration*[187] the Labour Court referred to Benjamin and stated:

> "Along that fault-line, he suggested, lies the true divide between employment and self-employment. And that is exactly the situation that pertained before the arbitrator in this case. The evidence before the arbitrator led to a reasonable conclusion that Burger assisted Melomed in carrying on its business; he did not conduct his own business. On the evidence before the arbitrator, this conclusion was not only reasonable but correct."[188]

In *Independent Institute of Education Pty Ltd v Mbileni*[189] the Court was however not convinced that a person was an employee as the person did not assist the business of an employer. The purpose of statutory provisions and their history is inseparably interlinked. This is because, in terms of the mischief rule, the purpose of any legislative provision is to provide a remedy for a mischief that existed in society.[190]

As Benjamin shows, the post-apartheid labour market has been categorised by two phenomena.[191] Casualisation is the process of shaping employment relations to deprive workers, particularly vulnerable workers, of their labour rights.[192] Externalization occurs when employers make use of employees of labour brokers,

[187] 2013 34 ILJ 920 (LC).
[188] Par 50.
[189] 2013 34 ILJ 1538 (LC).
[190] Benjamin (n 39) 780. See also Theron "Employment is not what it used to be" 2003 *ILJ* 1247 1271. The green paper that preceded the BCEA described the mischief of non-standard and atypical employment as follows: "The current labour market has many forms of employment relationships that differ from full-time employment. These include part-time employees, temporary employees, employees supplied by employment agencies, casual employees, home workers and workers engaged under a range of contracting relationships. They are usually described as non-standard or atypical. Most of these employees are particularly vulnerable to exploitation because they are unskilled or work in sectors with little or no trade union organization or little or no coverage by collective bargaining. A high proportion are [sic] women. Frequently, they have less favourable terms of employment than other employees performing the same work and have less security of employment. Often they do not receive 'social wage' benefits such as medical aid or pension or provident funds. These employees therefore depend upon statutory employment standards for basic working conditions. Most have, in theory, the protection of current legislation, but in practice the circumstances of their employment make the enforcement of rights extremely difficult."
[191] Above.
[192] Above.

employment agencies and sub-contractors to perform work formerly performed by employees of the employer.[193] It is within this historic context that the statutory provisions related to the definition of the term "employee" must be understood. The phenomena of casualisation and externalisation represent the mischief that these legislative provisions seek to address. The problem is not that these workers are not employees but rather that these employees are difficult to identify and that they find it difficult to enforce rights that accrue to them by virtue of them being party to the employment relationship.[194]

Further responses legislative responses to deal with the phenomena of casualisation and externalisation were adopted in 2002 and 2016. In 2002 Parliament adopted a rebuttable presumption of employment.[195] The 2002 amendments were justified on the basis that they would assist vulnerable employees to assert their rights as employees.[196] In terms of the presumption, the presence of any one of seven factors would be indicative of an employment relationship.[197] These factors includes those which have been traditionally used by the courts,[198] as well as some which have been previously rejected by the courts[199] and one additional factor which had never formed part of South African law.[200] The presumption applies irrespective of the form of employment and irrespective of the existence of a (valid) contract of employment. Even though the presumption formally only applies to workers who earn less than the applicable threshold, the Labour Appeal Court has held that the factors may be taken into consideration even in cases where a worker earns more that the applicable threshold.[201]

[193] Above.
[194] In *NUCCAWU v Transport Ltd t/a Portnet* 2000 21 ILJ 2288 (LC) and *Sibiya v Amalgamated Beverages Ltd* 2001 22 ILJ 961 (LC) it was found, for example, that although a person is employed for a short amount of time or without fixed employment, such a person is nevertheless an employee who is entitled to the protection of the LRA.
[195] S 200A of the LRA and s 83A of the BCEA.
[196] Benjamin (n 184) 190.
[197] These factors are: "(*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."
[198] Control and supervision.
[199] Being part of an employer's organisation.
[200] Economic dependence.
[201] *Denel Pty Ltd v Gerber* 2005 26 ILJ 1256 (LAC) 1298F.

In 2016 the LRA was again amended to address the dynamics of labour broking, outsourcing and short-term contracts. The express purpose of the Labour Relations Amendment Bill of 2012 was to ensure that "vulnerable categories of workers receive adequate protection and are employed in conditions of decent work".[202] *Inter alia*, the amendment Act[203] utilised the following legislative instruments towards this end: Firstly, the termination of employment is a dismissal, whether or not there is a formal or written contract of employment.[204] Secondly, employees engaged for a fixed term can claim dismissal on expiry of the term if they can show that they reasonably expected the employer to renew the fixed term, and if they can show that they reasonably expected to be retained in indefinite employment.[205] Thirdly, the employment of more vulnerable, lower-paid workers by a temporary employment service are restricted to situations of genuine and relevant temporary work, and various measures are intended to protect workers employed in this way.[206]

Fourthly, an employer is permitted to employ an employee on a fixed term contract or successive fixed term contract for up to six months.[207] An employee may be employed on a fixed term contract for longer if the nature of the work for which the employee is engaged is of a limited or definite duration or the employer can demonstrate any other justifiable reason for fixing the term of the contract.[208] If this is not done, employment will be deemed to be of indefinite duration.[209] The period of six months may be varied by a sectoral determination or a collective agreement concluded at a bargaining council.[210] The section sets out a non-exhaustive list of nine justifiable reasons for fixing the term of a contract.[211] An employee employed on

[202] Memorandum of Objects on Labour Relations Amendment Bill, 2012.
[203] Labour Relations Amendment Act 6 of 2014.
[204] S 186(1)(*a*) of the LRA.
[205] S 186(1)(*e*).
[206] Ss 189 and 189A.
[207] S 189B. In terms of s 189B(2)(*b*) he section does not apply to an employer that employs less than 10 employees or an employer that employs less than 50 employees and whose business has been in operation for less than two years. These exclusions do not apply if the employer conducts more than one business or the business was formed by the division or dissolution for any reason of an existing business.
[208] Ss 189(3)(*a*)-(*b*).
[209] S 189B(5).
[210] S 189B(2)(*c*).
[211] In terms of s 189B(4) "the conclusion of a fixed term contract will be justified if the employee (*a*) is replacing another employee who is temporarily absent from work; (*b*) is employed on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months; (*c*)

a fixed-term contract for more than six months must be treated on the whole not less favourably than an employee on an indefinite contract performing the same or similar work, unless there is a justifiable reason for treating the employee differently.[212]

Fifthly, an employer must treat a part-time employee[213] on the whole not less favourably than a comparable full-time employee doing the same or similar work, unless there is a justifiable reason for different treatment; and provide a part-time employee with access to training and skills development on the whole not less favourable than the access applicable to a comparable full-time employee.[214] Sixthly, section 200A was amended to extend the application of the presumption to other employment laws, and to a provision of the Insolvency Act dealing with rights of employees of insolvent employers.

Seventhly, the phenomenon of simulated arrangements or corporate structures that are intended to defeat the purposes of the LRA is combatted by providing for joint and several liability on the part of persons found to be employers or any failures to comply with an employer's obligations under the LRA or any employment law. This is important in the context of subcontracting and outsourcing arrangements if these arrangements are subterfuges to disguise the identity of an employer.[215]

As Cowen has shown, "the impact of such amendments will depend upon the effective implementation and enforcement of these protective provisions".[216] The author has averred that although the amendments "seek to provide a measure of regulated flexibility" in an attempt to reconcile the principles of equity and

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; (*d*) is employed to work exclusively on a specific project that has a limited or defined duration; (*e*) is a non-citizen who has been granted a work permit for a defined period; (*f*) is employed to perform seasonal work; (*g*) is employed for the purpose of an official public works scheme or similar public job creation scheme; (*h*) is employed in a position which is funded by an external source for a limited period; or (*i*) has reached the normal or agreed retirement age applicable in the employer's business.

212 S 189B(8)(*a*).

213 S 189C(1)(a) defines a part-time employee as "an employee who is remunerated wholly or partly by reference to the time that the employee works and who works less hours than a comparable full-time employee".

214 S 189C(3).

215 S 200B.

216 Cowen "The effect of the Labour Relations Amendment Bill 2012 on non-standard employment relationships" 2014 *ILJ* 2607 2622.

efficiency, that they are a far cry from the ILO's aspirations of decent and productive work".[217]

8 *Conclusion*

The historic developments traced above indicate a journey from status to contract and back again. This is not to say that the contract of employment has become, in the words of Le Roux, a "dodo".[218] The existence of the contract of employment is an important factor in determining the existence of the employment relationship.[219] We are, however, left in "a legislative and jurisprudential jungle, all part of the effort to extend the meaning of the terms 'employee' and 'employment' as far as possible".[220] The author has however also argued that, although this may help to bring more workers within the protective reach of labour legislation, that such a reprieve will be short-lived.[221] These efforts have the effect of driving yet another nail into the coffin of the contract of employment and inevitably leads to a double movement where unscrupulous employers adapt to new legislative and jurisprudential rules in order to move vulnerable workers beyond the ambit of labour protection.[222]

As Benjamin has shown, "[t]he remaking of labour law to adapt to ... changes will require debates with a broad focus that seeks to adjust the body of labour law to the changed reality that it must now regulate".[223] It has already been argued that the chief government response to the challenge of identifying the ambit of labour regulation protection will in all likelihood be the adoption of even more legislation.[224] The judiciary does however have the power, through its interpretive mandate, to significantly contribute to this project. From the historic account is clear that the tide has turned from using the dichotomy between employees and independent contractors to exclude workers from the ambit of labour protection, to a mode where the legislative and judicial response has been, powered by the constitutionalisation of

[217] Above.
[218] Le Roux (n 10)
[219] See n 159.
[220] Le Roux (n 10) 33.
[221] Above.
[222] Above.
[223] Benjamin (n 184) 204.
[224] See Chapter 2 above.

labour law, the expansion of labour protection. Labour law in South Africa has witnessed the abandonment of form for substance, the introduction of presumptions and deeming provisions, the desertion of common-law requirements of the contract of employment, and a shift in focus to the presence of an employment relationship. Additionally, the LRA has been amended to address problems of the dynamics of labour broking, outsourcing and short-term contracts.

It is within this context that the historic element of statutory interpretation is to be appreciated. Rather than be constrained by historic legal developments, it should be acknowledged that the historic account of who are party to the employment relationship, provides an opportunity for interpreters to appreciate that legal concepts have specific historic contexts which might not be appropriate for the contemporary globalised world.[225] As Rycroft and Le Roux have argued, "the explanation for the rise of the binary divide is rooted in a colonial and apartheid past".[226] As such the historic account of the regulation of the employment relationship inevitably draws interpreters into the decolonisation debate and the transformative constitutionalism project. A constitutionally appropriate reading of a legislative provision in general, and the definition of employee in particular, is therefore not possible without a critical account of the historical context in which the legislative provision appears.

[225] See n 1 above.
[226] Rycroft and Le Roux (n 19) 1480.

CHAPTER 5

The language dimension

"The reader may construct the text, but the text in turn controls the encounter."[1]

1 *Introduction*

The textual environment in which the laws that are relevant to determining the existence of the employment relationship is contained, is a "legislative jungle".[2] But, as was held in *Louw v Acting Chairman of the Board of Directors of the North West Housing Corporation*[3] "[i]f one distils the essence of the common law and the legislation relating to labour one observes that a thread of unity runs through them".[4] The legislative environment is, according to the Court, "explicatory, concerned with

1 Rosenau *Post-Modernism and the Social Sciences: Insights, Inroads, and Intrusions* (1992) 25.
2 Le Roux "Employment: a Dodo, or simply living dangerously?" 2014 *Industrial Law Journal* 30 33.
3 2000 21 ILJ 482 (NW).
4 492D.

the positive test of determining the relationship between the employer and employee and conditions in the workplace".[5]

It should be noted that the language dimension only "cautions the interpreter to take the meaning-generative functioning of language, and of the text as linguistic signifier, seriously".[6] It is not a throwback to literalism as it does not require that only the text must be considered. Instead the text is considered as the starting point when determining the purpose of legislation in the light of constitutional values. This is not to say that the textual element is unimportant. In fact, it acknowledges that textual consideration will control the range of possible meanings of a legislative provision.[7]

There is a limit to which the words of a statute may be disregarded in the process of an application of purposive interpretation.[8] The Constitutional Court has also held that "[a] contextual or purposive reading of a statute must of course remain faithful to the actual wording of the statute".[9] The Constitutional Court stated that "[w]hile we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument" and that if the language is "ignored in favour of a general resort to 'values' the result is not interpretation but divination".[10]

This Chapter will consider the textual environment within the teleological model of statutory interpretation to determine the existence of the employment relationship. The textual environment as contained in the Constitution, labour legislation, the presumption in favour of employment, the Code of Good Practice: Who is an Employee and other legislative provisions that impact upon identifying the parties to the employment relationship will be considered. Common-law canons of interpretation which are relevant to the textual environment will also be considered.

5 Above.
6 Du Plessis "Interpretation of statutes and the Constitution" in *LexisNexis* (ed) *Bill of Rights Compendium* (2012) 2C32.
7 See n 1 above.
8 *Xaba v Portnet Ltd* 2000 21 ILJ 1739 (LAC) par 3.22.
9 *Bertie Van Zyl Pty Ltd v Minister for Safety and Security* 2010 2 SA 181 (CC) par 21. The Court went on to say that "[i]t is indeed an important principle of the rule of law, which is a foundational value of our Constitution, that rules be articulated clearly and in a manner accessible to those governed by the rules. A contextual interpretation of a statute, therefore, must be sufficiently clear to accord with the rule of law."
10 *S v Zuma* 1995 4 BCLR 401 (CC) par 17-18.

2 *Text in context*

Contextual interpretation requires that a legislative provision must be understood in light of the intra-textual and extra-textual environment of which the provision forms part. In the case of ascertaining who is an employee and who is not, the entire intra-textual environment of which the definition of employee forms part must be considered. As such an interpreter must be cognisant of the preamble of the act, the long title, the definition clause, the objects of an act and interpretation provisions, headings above chapters and articles and annexures.[11] As such there is a great deal of overlap between textual and contextual interpretation.[12]

An interpreter, trying to ascertain if a person is an employee will therefore be required to look beyond the definition of employee contained in section 213 of the Labour Relations Act (hereafter the LRA) to the other intra-textual environment, of which the section forms part. Chief amongst these, the interpreter will *inter alia* have to consider the purpose[13] and interpretive provision of the LRA,[14] the presumption as to employment[15] and the Code of Good Practice as to who is an employee.[16] If this is not done section 213 of the LRA will become disintegrated from the rest of the textual environment (the LRA) of which it forms part.

Interpreters must also be mindful of the extra-textual environment of which a legislative provision forms part. "Extra-textual contextualization takes place with reference to meaning-generative signifiers (themselves texts) in the textual environment."[17] The "extra-textual environment" refers to the "wider network of enacted law and other normative law-texts such as precedents" as well as to "the political and constitutional order, society and its legally recognized interests and the international legal order".[18]

[11] Du Plessis "Interpretation of the Bill of Rights" in Woolman, Roux and Bishop (eds) *Constitutional Law of South Africa* (2014) 32-159.
[12] Above 166.
[13] S 1 of the LRA.
[14] S 2 of the LRA.
[15] S 200A of the LRA.
[16] N 11 above.
[17] Du Plessis (n 11) 32-166.
[18] Above.

An interpreter, trying to ascertain if a person is an employee for purposes of section 213 of the LRA, for example, will therefore be required to look beyond the intra-textual environment to considerations outside of the LRA.[19] This requires an interpreter to consider section 23 of the Constitution, impacting constitutional (or public) values, the provisions of other akin legislation,[20] precedents, the societal impact that a given interpretation of employee might display as well as the foreign law and international law context. If this is not done the provision will become disintegrated from the rest of the legal order of which it forms part.

3 *The text*

3.1 The definition of "employee"

3.1.1 The Constitution

As with all legal inquiry, the Constitution is the starting point to determine the meaning of "employee".[21] All legislation must be interpreted to give effect to fundamental constitutional rights.[22] It is striking that the text of the Constitution does not include the term "employee". The absence of this term within the constitutional

[19] In *Jaga v Dönges; Bhana v Dönge* 950 4 SA 653 (A) 662-663 the sentiment was expressed that "[c]ertainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background. The second point is that the approach to the work of interpreting may be along either of two lines. Either one may split the inquiry into two parts and concentrate, in the first instance, on finding out whether the language to be interpreted has or appears to have one clear ordinary meaning, confining a consideration of the context only to cases where the language appears to admit of more than one meaning. . . The second line of approach appears from what was said by Lord Greene, then Master of the Rolls in *Re Bidie* . . .'Few words in the English language have a natural or ordinary meaning in the sense that their meaning is entirely independent of their context.'" The Court went on to state at 664E-F that "[s]eldom indeed is language so clear that the possibility of differences of meaning is wholly excluded, but some language is much clearer than other language; the clearer the language the more it dominates over context, and *vice versa*, the less clear it is the greater the part that is likely to be played by the context". This sentiment was expressly endorsed by the Constitutional Court in *Du Toit v Minister for Safety and Security* 2009 12 BCLR 1171 (CC) par 37.

[20] Such as the Occupational Health and Safety Act and the Compensation for Occupational Injuries and Diseases Act.

[21] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd. In re: Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) par 21.

[22] S 39(2) of the Constitution.

text however sheds light upon the meaning of the term "employee" in particular and on the question as to who should be included within the employment relationship in general. Section 23 of the Constitution[23] extends the right to fair labour practices to "everyone",[24] the right to freedom of association for "workers" and "employers", the right to bargain collectively to trade unions and employers' organisations and the right of "workers" to strike.[25] The use of the term "worker" instead of "employee" is significant as the terms are not synonymous and "worker" has a meaning that is generally perceived as broader than the term "employee".[26]

The protection afforded by labour legislation generally applies only to those persons who are "employees",[27] whilst certain categories of employees are specifically excluded from various pieces of legislation.[28] The unqualified language contained in section 23 suggests that the section applies not only to employees but also to independent contractors and categories of persons excluded from the definition of "employee".[29] This is however not the case and it has been argued that not every work relationship, however, should attract constitutional protection.[30]

[23] "(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)."

[24] In *National Education Health and Allied Workers Union v University of Cape Town* 2003 3 SA 1 (CC) par 36 it was held that the term "everyone" applied to workers and employers.

[25] According to Cheadle "Constitutionalising the right to strike" in Hepple, Le Roux and Sciarra (eds) *Laws Against Strikes: The South African Experience in an International and Comparative Perspective* (2015) 71-72, the right to strike is a collective right that can only be exercised collectively with others in a collective action. As such, "the individual rights are dependent on the existence of the lawfulness of the collective action, which brings into play the collective facet of the right".

[26] Cooper "Labour relations" in Woolman, Roux and Bishop (eds) *Constitutional Law of South Africa* (2014) 3.

[27] Grogan *Workplace Law* (2014) 15 and Le Roux "Independent contractors and employees: some recent distinctions made by the courts" 2015 *Contemporary Labour Law* 1 1.

[28] S 2 of the LRA however provides that the LRA does not apply to members of the National Defence Force.

[29] Du Toit, Potgieter and Fouché "Labour and the Bill of Rights" in *LexisNexis* (ed) *Bill of Rights Compendium* (2012) 4B16.

[30] Cheadle "Labour relations" in Cheadle, Davis and Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2006) 367.

The Constitutional Court has found that the term "workers" can encompass persons who have not entered into a formal contract of employment but are in work relationships "akin" to the employment relationship governed by a contract of employment, such as atypical work relationships.[31] The Constitutional Court has also found that the section engages "broadly speaking, the relationship between the worker and employer".[32] Cooper has therefore indicated that the term "worker" "could encompass persons on the margins of the employment relationship, including those in the employee-like relationships".[33]

Cheadle has argued that the Constitutional Assembly used the concept "worker" instead of "employee" because "worker" would extend beyond those people who enter into common-law contracts of employment.[34] Thus, the author argues that the choice was made to emphasise that the legal form of the contract should not be determinative and that the term "worker" has a meaning wider than an employee under the common-law contract of employment.[35] Du Toit *et al* has also argued that the difference in terminology can be explained with reference to the difference in purpose between a justiciable Constitution and "ordinary" labour legislation. The use of the term "employee" in labour legislation acknowledges the "need to regulate access to the framework of the LRA and its various rights, duties and procedures designed specifically to regulate relations between employers and employees".[36] The authors however contend that there is no need for the same considerations to apply to the purposes of the Bill of Rights. As such they aver that "[t]here is no cogent reason why fairness should be reserved for 'employees' in the technical sense and denied to other persons in dependent employment relationships".[37] This is provided that such persons are involved in a relationship that is "akin" to an employment relationship.[38]

31 *South African National Defence Union v Minister of Defence* 1999 4 SA 469 (CC) par 24.
32 *National Education Health and Allied Workers Union v University of Cape Town* 2003 3 SA 1 (CC) par 40.
33 Cooper (n 26) 5.
34 Cheadle (n 30) 18-4(1).
35 Above 18-5.
36 Du Toit, Potgieter and Fouché (n 29) 4B16.
37 Above,
38 N 31 above.

3.1.2 Labour legislation

The purpose of the LRA "is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of [the] Act, which are to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of the Republic of South Africa, 1996".[39] Any person applying the LRA must also interpret its provisions so as to give effect to its primary objects and in compliance with the Constitution.[40]

"Ordinary" labour legislation however uses the term "employee". Section 213 of the LRA defines "employee" 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".[41]

This definition is practically identical to those used in section 1 of Employment Equity Act (hereafter the EEA),[42] section 1 of Basic Conditions Employment Act (hereafter the BCEA),[43] and section 1 of Skills Development Act (hereafter the SDA).[44] The BCEA also gives the Minister power to "deem" any category of persons to be employees for purposes of the Act by notice in the *Government Gazette*.[45] The definition itself provides very little guidance to assist interpreters in identifying employees. The definition merely excludes independent contractors and identifies an employee as a person who works for another person for remuneration or a person

[39] S 1 of the LRA.
[40] S 3 of the LRA. Similarly, the purpose of the BCEA is to "advance economic development and social justice by fulfilling the primary objects of this Act which are to give effect to and regulate the right to fair labour practices conferred by section 23(1) of the Constitution by establishing and enforcing basic conditions of employment; and by regulating the variation of basic conditions of employment" (s 2). The purpose of the EEA is to "achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational levels in the workforce" (s 1). The EEA must also be interpreted in compliance with the Constitution as to give effect to its purpose (s 3).
[41] Act 66 of 1995.
[42] Act 55 of 1998.
[43] Act 75 of 1997.
[44] Act 97 of 1998.
[45] S 83.

who in any manner assists in carrying on or conducting the business of an employer. Clearly absent from the definition is a reference to a contract of employment.

The exclusion of independent contractors from the definition of "employee" in these statutes is often regarded as unnecessary as the courts have always drawn the line at extending the statutory definitions to them.[46] As such, the definition does not do much to illuminate the difference between employees and independent contractors, is generally vague and does little to assist interpreters in identifying the parties to the employment relationship. Indeed, interpreter who has to decide if a person could be labelled as an "employee", has to deal extensively with the statutory definition of the concept to decide the question and has had to look beyond the language used to other elements of the provision and to the common law tests.[47] Paragraph (*b*) of the definition is seemingly very broad,[48] but the courts have limited the scope of application thereof by using its context and the common-law tests to determine the existence of an employment relationship.[49]

These definitions make no reference to the existence of a contract of employment between the parties, although the existence of such a contract has traditionally been regarded as *sine qua non* for two parties to be deemed employer and employee.[50] Conceivably partially fuelled by such an omission from the definition of "employee", our courts have on several occasions been moved to find that the existence of such a (valid) contract of employment is not needed in all cases[51] to establish the existence

46 Grogan (n 27) 23.

47 See *Bargaining Council for the Furniture Manufacturing Industry, KwaZulu Natal v UKD Marketing CC* 2013 34 ILJ 96 (LAC); *Denel Pty Ltd v Gerber* 2005 26 ILJ 1256 (LAC); *Kylie v Commission for Conciliation Mediation and Arbitration* 2010 31 ILJ 1600 (LAC); *National Union of Metalworkers of South Africa v Lee Electronics Pty Ltd* 2013 34 ILJ 569 (LAC); *Phaka v Bracks* 2015 36 ILJ 1541 (LAC); *Phera v Education Labour Relations Council* 2012 33 ILJ 2839 (LAC); *Shell SA Pty Ltd v National Bargaining Council for the Chemical Industry* 2013 34 ILJ 1490 (LAC); and *Universal Church of the Kingdom of God v Myeni* 2015 36 ILJ 2832 (LAC).

48 *Liberty Life Association of Africa Ltd v Niselow* 1996 17 ILJ 673 (LAC) 683A-B.

49 *Niselow v Liberty Life Association of Africa* 1998 4 SA 163 (SCA).

50 Above.

51 In certain cases the courts have been unwilling to accept the existence of an employment relationship in the absence of a valid contract of employment. See for example *CMS Support Services v Briggs* 1998 19 ILJ 271 (LAC) and *Vermooten v Department of Public Enterprises* case no JA91/2015 (LAC) (unreported). Refer to Chapter 4 § 7.2 for a discussion of these cases.

of an employment relationship.[52] The Labour Court has held that any person who works for another and receives remuneration falls within the definition.[53]

The judiciary has given the term an expansive interpretation on several occasions.[54] So, for example, the Labour Court has also stated that there is no distinction between full-time employees and employees employed for short time or without fixed employment.[55] The Labour Appeal Court has found that the definition of employee should not be interpreted to mean that a person only becomes an "employee" once he or she commenced duties, despite the fact that the term "works" is cast in the present tense in the definition of "employee".[56] The CCMA has also found that an employee will remain as such even though intentionally stays away from work and receives no pay until the relationship is properly terminated.[57]

3.1.3 Social security legislation

Section 27(1)(*c*) of the Constitution provides that everyone has the right to access to social security including, if they are unable to support themselves and their dependants, the right to appropriate social assistance.[58] The employment relationship is the main vehicle by means of which workers gain access to the rights and benefits of social security legislation.[59] In many cases the existence thereof is the condition that determines the application of social security law provisions addressed to

[52] See *Rumbles v KwaBat Marketing* 2003 24 ILJ 1587 (LC) and *Kylie v Commission for Conciliation Mediation and Arbitration* 2010 31 ILJ 1600 (LAC). Refer to Chapter 4 § 7.2 for a discussion of these cases.

[53] *Discovery Health Ltd v Commission for Conciliation, Mediation and Arbitration* 2008 29 ILJ 1480 (LC). In *White v Pan Palladium SA (Pty) Ltd* 2006 27 ILJ 2721 (LC) 2728A the Court also stated that "[s]omeone who works for another, assists that other in his business and receives remuneration may, under the statutory definition, qualify as an employee even if the parties *inter se* have not yet agreed on all the relevant terms of the agreement by which they wish to regulate their contractual relationship".

[54] See Chapter 4 § 7.2.

[55] *NUCCAWU v Transnet Ltd t/a Portnet* 2000 21 ILJ 2288 (LC) and *Sibiya v Amalgamated Beverages Ltd* 2001 22 ILJ 961 (LC).

[56] *Wyeth SA (Pty) Ltd v Manqele* 2005 26 ILJ 749 (LAC). See also *Van Deventer and Venture SA (Pty) Ltd* 2007 28 ILJ 268 (CCMA).

[57] *Seti and Nelson Mandela Metropolitan University* 2009 30 ILJ 1199 (CCMA).

[58] See *Khosa v Minister of Social Development; Mahlaule v Minister of Social* Development 2004 6 SA 505 (CC).

[59] ILO "Employment relationship" http://ilo.org/ifpdial/areas-of-work/labour-law/WCMS_CON_TXT_IFPDIAL_EMPREL_EN/lang--en/index.htm (12-10-2017).

employees.[60] In employment based social insurance schemes, workers with formal jobs tend to be better covered than those with similar characteristics but with informal jobs.[61] As such the interpretation of "employee" as contained in these statutes are of crucial importance to the extension of social security benefits.

The definitions of "employee" as contained in social security legislation differ from the definitions contained in other labour statutes. According to section 1 of the Unemployment Insurance Act (hereafter the UIA) "employee" means

> "any natural person who receives remuneration or to whom remuneration accrues in respect of services rendered or to be rendered by that person, but excludes any independent contractor".[62]

Section 1 of Occupational Health and Safety Act (hereafter the OHSA) defines "employee" as

> "any person who is employed by or works for an employer and who receives or is entitled to receive any remuneration or who works under the direction or supervision of an employer or any other person".[63]

Section 1 of Compensation for Occupational Injuries and Diseases Act (hereafter the COIDA) defines "employee" as

> "a person who has entered into or works under a contract of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or in kind, and includes (*a*) a casual employee employed for the purpose of the employer's business; (*b*) a director or member of a body corporate who has entered into a contract of service or of apprentice-ship or learnership with the body corporate, in so far as he acts within the scope of his employment in terms of such contract; (*c*) a person provided by a labour broker against payment to a client for the rendering of a service or the performance of work, and for which service or work such person is paid by the labour broker; and (*d*) in the case of a deceased employee, his dependants, and in the case of an employee who is a person under disability, a curator acting on behalf of that employee".[64]

[60] Above.

[61] Smit and Mpedi "Social protection for developing countries: can social insurance be more relevant for those working in the informal economy?" 2010 *Law Democracy and Development* 1 5. See also Olivier "Informality, employment contracts, and social insurance coverage: rights-based perspectives in a developing world context" 2011 *International Journal of Comparative Labour Law and Industrial Relations* 419.

[62] Act 63 of 2001.

[63] Act 85 of 1993.

[64] Act 130 of 1993. In *Mankayi v AngloGold Ashanti Ltd* 2011 3 SA 237 (CC) par 76 the Constitutional Court followed a practical and purposive approach to the interpretation of this section by asking who the intended beneficiaries of the legislation are.

The Supreme Court of Appeal[65] has held that the reference to remuneration "in kind" in the statutory provision means the provision of something that has an objectively ascertainable value that can serve as the basis for the assessment of an employer for the calculation of compensation".[66] Apart therefrom, the general vagueness of the statutory definitions means that the courts have relied, as in the case with other labour legislation, on considerations outside of the language to determine the existence of the employment relationship.

3.2 The presumption in favour of employment

In 2002 the legislature introduced a rebuttable presumption in favour of employment if any one of a list of factors is present. The introduction of the presumption was in response to the growth of atypical forms of employment is South Africa, driven by the global phenomenon of casualisation (which "entails a process of shaping employment relations to informalise working arrangements and thus deprives employees of their basic statutory rights") and externalisation (which "refers to a process in terms of which employers transform work formerly performed directly by permanent employees into triangular relationships between workers, clients and labour brokers").[67]

The presumption is contained in section 200A of the LRA and section 83A of the BCEA. The presumption is in line with article 11(*b*) of the Employment Relations Recommendation, 2006 which recommends that member states should provide for a statutory presumption that an employment relationship exists when one or more of the defined indicators of employment are present, although the South African presumption predated this international instrument. These factors are:

> "(*a*) the manner in which the person works is subject to the control or direction of another person;[68]

65 *ER24 Holdings v Smith* 2007 6 SA 147 (SCA).

66 Par 7.

67 Van Niekerk and Smit (eds) *Law@work* (2015) 63 and Theron "Employment is not what it used to be" 2003 *Industrial Law Journal* 1247 1271.

68 In *Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 (A) 62E it was held that the "right of supervision of control is one of the most important *indicia* that a particular contract is in all probability a contract of service". R 40 of the *Code of Good Practice: Who is an Employee?* 2007 28 ILJ 96 however states that, although the employer's right to control is likely to remain, in most cases, a significant indicator in the employment relationship, that a court may find that there

(*b*) the person's hours of work are subject to the control or direction of another person;[69]
(*c*) in the case of a person who works for an organisation, the person forms part of that organisation;[70]
(*d*) the person has worked for that other person for an average of at least 40 hours per month over the last three months;[71]
(*e*) the person is economically dependent on the other person for whom he or she works or renders services;[72]
(*f*) the person is provided with tools of trade or work equipment by the other person;[73] or
(*g*) the person only works for or renders services to one person."[74]

These factors bear more than just a passing resemblance to those found in article 13 of the Employment Relations Recommendation, 2006.[75] The factors are used as a guide to determine the true nature of the relationship.[76] The nature of relationship

is an employment relationship even if the employer exercises a relatively low degree of control over the employee. According to r 39 of the Code, "[t]he right of control by an employer includes the right to determine what work the employee will do and how the employee will perform that work".

69 Although r 18(*b*) of the Code states that "[t]his factor will be present if the person's hours of work are a term of the contract and the contract permits the employer or person providing the work to determine at what times work is to be performed", it also acknowledges that "the fact that the contract does not determine the exact times of commencing and ending work does not entail that it is not a contract of employment". Importantly, within the context of the phenomenon of atypical employment, the Code states that "[f]lexible working time arrangements are not incompatible with an employment relationship".

70 Although r 18(*c*) of the Code acknowledges that this factor will not apply to domestic workers, r 50 of the Code acknowledges that "[h]ome workers, working from their own premises or those of fellow employees, are employees because of factors such as the extent of control that the employer exercises over the manner in which they work".

71 It is unclear why the Code chose 40 hours per month as the determinative factor, especially since s 9 of the BCEA prescribes a maximum 45 hours work week and some of the chapters of the BCEA only apply if an employee works more than 24 hours per week. Van Niekerk and Smit (eds) (n 67) 65 aver that "[t]he 40-hour provision indicative of an ongoing relationship as opposed to a once off arrangement which is more typical of a situation where a person is contracted to complete a particular piece of work".

72 According to r 18(*e*) of the Code, "economic dependence will not be present if the applicant is genuinely self-employed or is running their own business. A self-employed person generally assumes the financial risk attached to performing work." Independent contractors are also free to contract with others to provide services.

73 According to r 18(*e*) of the Code the provision applies regardless of whether the tools or equipment are supplied free of cost. Tools of trade also includes items required for work such as books or computer equipment.

74 This factor will normally not be present in the event of a person being an independent contractor.

75 The Recommendation states that: "Members should consider the possibility of defining in their laws and regulations, or by other means, specific indicators of the existence of an employment relationship. Those indicators might include: (*a*) the fact that the work: is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or involves the provision of tools, materials and machinery by the party requesting the work; (*b*) periodic payment of remuneration to the worker; the fact that such remuneration constitutes the worker's sole or principal source of income; provision of payment in kind, such as food, lodging or transport; recognition of entitlements such as weekly rest and annual holidays; payment by the party requesting the work for travel undertaken by the worker in order to carry out the work; or absence of financial risk for the worker."

76 *Rodgers and Assist-U-Drive* 2006 27 ILJ 847 (CCMA).

must be considered in its entirety to assess whether parties in fact entered into an employment relationship for purposes of the presumption.[77] If the factors listed in the section are not present, the presumption will not become operative and the common-law tests applicable to determine the nature of the relationship will have to be used.[78] The factors listed in the statutory presumption does however to a large extent echo the various common-law tests which evolved in England and which was transplanted into South Africa,[79] to distinguish between employees and independent contractors.[80] The presumption is rebuttable, it is not included in other labour statutes (it only applies to the LRA and to the BCEA) and only employees who earn below a certain threshold can use the presumption.[81] The presumption will become operative if at least one factor mentioned in the section is present, resulting in the onus shifting from the employee to the employer to rebut the presumption.[82] If a persons' income exceeds the amount determined by minister in terms of s 6(3) of the BCEA, the presumption will not be applicable. The amount is currently set at R205 433.30.[83]

The presumption may also be useful in cases where they do not apply as a result of a person whose salary exceeds the statutory threshold or for purposes of an act other than the LRA or the BCEA. In *Denel Pty Ltd v Gerber*[84] the Labour Appeal Court held that a person was an employee "on the basis of the realities – on the basis of substance and not form or labels".[85] The Court adopted the so-called "reality approach" which takes account of all relevant factors to determine the parties of the employment relationship.[86] Importantly, the Court applied the factors in section 83A(1) of the BCEA simply as a guide for purposes identifying the employee even though the claimant exceeded the statutory threshold.[87] Regulation 20 of the Code of Good Practice: Who is an Employee[88] states:

77 *Van Zyl and WCPA (Department of Transport and Public Works)* 2004 25 ILJ 2066 (CCMA).
78 *Taljaard and Basil Real Estate* 2006 27 ILJ 861 (CCMA).
79 See Chapter 4 § 5.2 and 6.2.
80 Grogan (n 27) 17.
81 *Sanlam Life Insurance Ltd v Commission for Conciliation, Mediation and Arbitration* 2009 30 ILJ 2903 (LAC).
82 R 19 of the Code. *Saveia and Zami Nkululeko Building* 2014 35 ILJ 2313 (CCMA).
83 GN 531 in *GG* 37795 of 1 July 2014.
84 2005 26 ILJ 1256 (LAC).
85 Par 22. See also *Rumbles v Kwa Bat Marketing (Pty) Ltd* 2003 24 ILJ 1587 (LC) where the court came to the same conclusion.
86 Par 96.
87 Par 99.
88 N 68 above.

> "In cases in which the presumption is not applicable, because the person earns above the threshold amount, the factors listed in the presumption (and discussed above) may be used as a guide for the purpose of determining whether a person is in reality in an employment relationship or is self- employed."

It is submitted that, even though there is no indication that the Court reversed the onus of proof as the presumption would normally do, the Court was correct in utilising the factors listed in section 83A(1) of the BCEA to identify the parties to the employment relationship and to differentiate between employees and independent contractors. In *Pam Golding Properties (Pty) Ltd v Erasmus*[89] the Labour Court stated that this approach resonates with the International Labour Organisation's Employment Relationship Recommendation, 2006, which provides that member states should consider defining, in their laws and regulations, specific indicators of an employment relationship.[90] In any event, the factors listed echoes the common-law tests applied by our courts to distinguish between employees and independent contractors.[91]

The question has arisen if a person must be deemed an employee if any of the listed criteria are satisfied, even if there are other strong indications that the person is an independent contractor,[92] or if the relationship must still be considered in its entirety, in spite of the presence of one or more of the listed criteria.[93] The Labour Court has endorsed the latter view.[94] In *Universal Church of the Kingdom of God v Myeni*[95] the Labour Appeal Court found that the presumption could not be applied where no employment contract existed between the parties, even if the relationship has some of the features listed in section 200A.[96] It is submitted that the judgment is palpably erroneous.[97] In support for its findings, the Court relied on a 2001 Labour Court

89 2010 31 *ILJ* 1460 (LC).
90 Par 13.
91 Grogan (n 27) 17.
92 *Starke/Financial Expert Marketing CC* 2005 2 BALR 244 (CCMA).
93 *Van Zyl and WCPA (Department of Transport & Public Works)* 2004 25 ILJ 2066 (CCMA).
94 *Beyer v General Public Service Sectoral Bargaining Council* 2015 36 ILJ 1553 (LC) par 47.
95 2015 36 ILJ 2832 (LAC).
96 Par 54. *Cf Seate and SA Security Forces Union* 2011 32 ILJ 492 (CCMA) and *Schoeman and Longgrain CC* 2006 27 ILJ 2496 (CCMA).
97 It is submitted that the decision of the court *a quo* in U*niversal Church of the Kingdom of God v CCMA* 2014 35 ILJ 1678 (LC) that the nature of the relationship between must be determined with reference to the particular facts of case in light of presumption contained in s 200A and Code of Good Practice: Who is an Employee. This approach is also in line with the decision in *City of Tshwane Metropolitan Municipality v SA Local Government Bargaining Council* 2012 33 ILJ 191

judgment[98] in which it had been held that "a contract of employment is necessary for purposes of establishing an employment relationship".[99] The Court failed to consider emerging jurisprudence to the effect that a contract of employment is in fact not necessarily a requirement for the existence of an employment relationship.[100]

Theron has questioned the usefulness of a presumption of employment for those in disguised employment relationships.[101] For the author, the rebuttable nature of the presumption is problematic.[102] Moreover, because "the more powerful economic entity generally sets the terms for any such employment arrangements" the author is uncertain if economically weaker parties will approach the CCMA for an advisory award.[103]

3.3 The Code of Good Practice: Who is an Employee?

To assist in the interpretation of the concept, the National Economic Development and Labour Council (hereafter NEDLAC) issued a Code of Good Practice as to who is an employee.[104] The code was gazetted in 2006, less than a year after the ILO Employment Relationship Recommendation, 2006, was adopted. The Recommendation requires that member states should consider the possibility of adopting and defining specific indicators of the existence of an employment relationship.[105] The Code is important as its stated aim is, *inter alia*, "to set out the interpretive principles contained in the Constitution, labour legislation and binding international standards that apply to the interpretation of labour legislation, including the determination of who is an employee".[106]

(LC) the existence of a valid contract of employment is not *sine qua non* for two parties to be deemed employer and employee.

98 *Church of the Province of South Africa (Diocese of Cape Town) v CCMA* 2001 22 ILJ 2274 (LC).

99 Par 38.

100 *Discovery Health Limited v CCMA* 2008 29 ILJ 1480 (LC) and *"Kylie" v CCMA* 2010 31 ILJ 1600 (LAC).

101 Theron "The shift to services and triangular employment: implications for labour market reform" 2008 *Industrial Law Journal* 1.

102 Above 18.

103 Above.

104 See n 68 above. As they were authorized to do so in terms of ss 200A and 203 of the LRA, this Code can be seen as "subordinate legislation". See Chapter 2 § 2.

105 Refer to Chapter 8 § 2.5.

106 R 2(*b*).

Additionally, section 203(3) and (4) of the LRA directs the interpreter to take the Code into account for the purpose of determining whether a particular person is an employee.[107] Significantly, in addition to the array of substantive guidance to the interpretation of the term,[108] the Code contains substantial parameters relating to the interpretation of statutes.[109] Although the Code deals with the definition of "employee" contained in the LRA, the BCEA, the EEA and the SDA, the Code states that it should be taken into account in determining whether persons are employees in terms of the OHSA, COIDA and the UIA, even though the definition of "employee" in these statutes are different.[110]

The Code directs interpreters to be mindful of the proper approach to the interpretation of labour legislation,[111] and reminds interpreters that section 3 of the LRA requires that interpreters must give effect to its primary objects; in compliance with the Constitution; and in compliance with the public international law obligations of the Republic.[112] It requires that labour legislation must be interpreted broadly and purposively,[113] and to ensure the protection, promotion and fulfilment of constitutional rights, in particular the labour rights contained in section 23 of the Constitution.[114]

[107] R 3 and 4. See also *Universal Church of the Kingdom of God v Myeni* 2015 36 ILJ 2832 (LAC). *Cf* Van Jaarsveld "Gedagtes oor die arbeidsregtelike posisie van predikante, pastore en priesters as werknemers van die kerk" 2015 *HTS Teleologiese Studies* http://www.hts.org.za/index.php/HTS/article/view/2946/html#FN0076_2946 (17-10-2017) who states that the Code and Presumption should only be taken into consideration if there is a dispute as to the form of the contract. Van Jaarsveld's view is contradicted by s 203(3) and (4) of the LRA.

[108] Parts 3 and 4.

[109] Part 5.

[110] R 4.

[111] R 59: "Any person who is considering the application of either the presumption of employment or the definition of an employee in a particular statute is engaged in the interpretation of that statute. Accordingly, they must be mindful of the approach that must be adopted to the interpretation of labour legislation."

[112] R 60.

[113] R 61: "The Constitutional Court has stated that section 3 of the LRA is an express injunction to interpret the provisions of the LRA purposively. A 'purposive' approach to interpretation considers a statutory provision broadly so as to give effect to the Constitution and to the underlying purpose of the statute. This may result in a generous interpretation of the relevant provision."

[114] R 62: "In order to interpret labour legislation in compliance with the Constitution, a commissioner, arbitrator or judge must interpret its provisions in a way that ensures the protection, promotion and fulfilment of constitutional rights, in particular the labour rights contained in section 23 of the Constitution. If more than one interpretation can be given to a provision, the decision-maker must choose the interpretation that best gives effect to the Constitution, provided this does not unduly strain the language of the statute or infringe any protected right. The Labour Appeal Court extended the literal construction of the definition of an employee to include persons who have concluded contracts of employment to commence at a future date because a literal translation resulted in gross hardship, ambiguity and absurdity. The Constitutional Court has noted that

If more than one interpretation is possible the interpreter must choose the interpretation that best gives effect to the Constitution, provided this does not unduly strain the language of the statute or infringe any protected right.[115] Security of employment is a core value of the LRA.[116] The Code reiterates the constitutional injunction to develop the common law and to ensure that it is consistent with constitutional principles.[117] The Code requires interpreters to be mindful of section 23 of the Constitution that establishes the fundamental rights in respect of labour relations.[118] The Code also requires interpreters to be mindful of South Africa's public international law obligations.[119]

In addition thereto, the Code contains several substantive principles. It provides guidance on the application of the statutory presumption as to whether a person is an employee.[120] It is not a requirement that the person has commenced work in order to be classified as an employee in terms of labour legislation.[121] Strikingly, the code endorses the so-called "dominant impression" test.[122] In terms thereof, it is necessary to evaluate all aspects of the relationship before deciding the true nature of the relationship and no single factor is decisive.[123] The Code requires that courts must seek to discover the true relationship between the parties, irrespective of the wording of a contract.[124]

The Code endorses and informs the "characteristics" or "factors" first set out in *Smit v Workmen's Compensation Commissioner*[125] and again repeated in the presumption in favour of employment to determine if a person is an employee. In terms thereof the object of the employment relationship is to render personal services (as opposed to a

security of employment is a core value of the LRA and this should be taken into account in determining whether a person is an employee and therefore entitled to protection against unfair dismissal."

115 Above.
116 Above.
117 R 63 and s 29(2) of the Constitution.
118 R 64.
119 R 65-68.
120 Part 2.
121 R 26.
122 R 27.
123 R 27 and 52.
124 R 28-31.
125 1979 1 SA 51 (A).

specific result), employers may choose when to make use of the services of the employee, employees are obliged to perform lawful instructions, the contract will terminate on the death of the employee and the contract will terminate on expiry of a period agreed to therein.[126] The Code also acknowledges that the factors listed above is not a closed list and that the factors in section 200A of the LRA and section 83A of the BCEA that form part of the presumption of employment also serve as a useful guide.[127] The Code places a premium on the fact that a person receives remuneration and benefits,[128] is provided with training,[129] and the person's place of work to determine if that person is an employee.[130]

The Code has not, however, been unequivocally welcomed. Theron has, for example criticised the Code for it's allegiance to the "dominant impression" test to identifying the parties to the employment relationship:

> "Evidently this is a document drafted by lawyers for lawyers, that serves to confirm that, notwithstanding the new presumption, it is business as usual. For as already noted, it is a rebuttable presumption. Where rebutting evidence is led (and this is the critical point) it appears that the factors contained in the presumption are of no relevance whatsoever. Instead the 'dominant impression' test is revived."[131]

3.4 Other legislative provisions

In addition to the textual guidance contained in the LRA as to who is an employee, the Act also provides guidance on who is party to the employment relationship in relation to specific forms of atypical employment.[132] The purpose of section 198 of the LRA is to identify the employer of a placed worker under the LRA, because the conventional tests of employment, both common law and statutory, are inadequate in the circumstances of triangular employment. The section, *inter alia,* provides that:

> "(2) For 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. ...

[126] R 32-43.
[127] R 43.
[128] R 45-48.
[129] R 49.
[130] R 50. Although the Code advises some caution.
[131] Theron (n 101) 18-19.
[132] See Chapter 6 where the phenomenon of a typical employment is discussed as a contextual factor.

(4) The 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 sectoral determination made in terms of the Basic Conditions of Employment Act."

Section 198A of the LRA deals with the application of section 198 to employees earning below a certain earnings threshold and *inter alia* states:

"(3) For 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."[133]

The LRA provides that employees deemed to be an employee of the client "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".[134] The Minister of Labour may also, subject to certain procedural requirements, publish a notice of which categories of work should be deemed to be temporary service.[135]

Section 198B of the LRA deals with fixed-term contracts with employees earning below the earnings threshold and reads as follows:

"(3) An employer may employ an employee on a fixed-term contract or successive fixed-term contracts for longer than three months of employment only if-
(*a*) the nature of the work for which the employee is employed is of a limited or definite duration; or
(*b*) the employer can demonstrate any other justifiable reason for fixing the term of the contract."[136]

[133] Emphasis added.
[134] S 189A(5) of the LRA.
[135] S 189A(1)(*c*) of the LTA.
[136] The section further states at 189B(4) "the conclusion of a fixed-term contract will be justified if the employee (*a*) is replacing another employee who is temporarily absent from work; (*b*) is employed on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months; (*c*) 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; (*d*) is employed to work exclusively on a specific project that has a limited or defined duration; (*e*) is a non-citizen who has been granted a work permit for a defined period; (*f*) is employed to perform seasonal work; (*g*) is employed for the purpose of an official public works scheme or similar public job creation scheme;

The section further states that "[e]mployment in terms of a fixed-term contract concluded or renewed in contravention of subsection (3) is *deemed* to be of indefinite duration".[137] The section further provides that "[a]n employee employed in terms of a fixed-term contract for longer than three months must not be treated less favourably than an employee employed on a permanent basis performing the same or similar work, unless there is a justifiable reason for different treatment".[138]

Section 198C of the LRA deals with part-time employment of employees earning below the earnings threshold. Of specific significance are the definitions of part-time employee and full-time employee:

> "(1) For the purpose of this section-
> (*a*) a part-time employee is an employee who is remunerated wholly or partly by reference to the time that the employee works and who works less hours than a comparable full-time employee; and
> (*b*) a comparable full-time employee-
> (i) is an employee who is remunerated wholly or partly by reference to the time that the employee works and who is identifiable as a full-time employee in terms of the custom and practice of the employer of that employee; and
> (ii) does not include a full-time employee whose hours of work are temporarily reduced for operational requirements as a result of an agreement."

The Act requires that employers must "treat a part-time employee on the whole not less favourably than a comparable full-time employee doing the same or similar work, unless there is a justifiable reason for different treatment; and provide a part-time employee with access to training and skills development on the whole not less favourable than the access applicable to a comparable full-time employee".[139]

Section 186(1)(*a*) of the LRA also acknowledges that the termination of employment is a dismissal, whether or not there is a formal or written contract of employment. Prior to the 2015 amendments a dismissal was defined, *inter alia,* to mean, "an employer has terminated a contract of employment with or without notice". This paragraph now reads "'dismissal' means that an employer has terminated

(*h*) is employed in a position which is funded by an external source for a limited period; or (*i*) has reached the normal or agreed retirement age applicable in the employer's business".

[137] S 189B(5) of the LRA. Emphasis added.
[138] S 189A(8)(*a*) of the LRA.
[139] S 189C(3)(*a*)-(*b*) of the LRA.

employment with or without notice".[140] As such the LRA confirms the principle that the existence of a formal and legally valid contract of employment is not a prerequisite for legislative labour protection.

Section 200B(2) of the LRA also deals with the phenomenon of simulated arrangements or corporate structures that are intended to defeat the purposes of the LRA is combatted by providing for joint and several liability on the part of persons found to be employers or any failures to comply with an employer's obligations under the LRA or any employment law. This is important in the context of subcontracting and outsourcing arrangements if these arrangements are subterfuges to disguise the identity of an employer.[141]

Section 200B(1) of the LRA also introduced a definition of "employer":

> "For the purposes of this Act and any other employment law, 'employer' includes one or more persons who carry on associated or related activity or business by or through an employer if the intent or effect of their doing so is or has been to directly or indirectly defeat the purposes of this Act or any other employment law."

Although the introduction of this definition has drawn little scholarly attention, it is foreseen that the inclusion of a definition of "employer" that is meant to apply to all employment law is significant fodder for interpreters. Davies and Freedland has argued that many difficulties about the scope of labour law coverage can be resolved, or at least better understood, by shifting the focus of the debate from the question who an employee is to the question who is an employer.[142]

Put differently, the question of identifying the parties to the employment relationship may be better understood when asking who the employer is and not who the employee is. As such, the inclusion of a definition of employer serves as an important potential instrument in determining the scope and application of labour legislation. Although the definition of employer in section 200B(1) of the LRA is somewhat

[140] S 186(1)(*a*) of the LRA.
[141] "If more than one person is held to be the employer of an employee in terms of subsection (1), those persons are jointly and severally liable for any failure to comply with the obligations of an employer in terms of this Act or any other employment law."
[142] Davies and Freedland "The complexities in the employment enterprise" in Davidov and Langille (eds) *The Boundaries and Frontiers of Labour Law* (2006) 273.

limited as it is clearly only intended to deal with the phenomenon of disguised employment, the term is defined more comprehensively in other labour legislation.

Section 1 of the UIA defines "employer" as

> "any person, including a person acting in a fiduciary capacity, who pays or is liable to pay to any person any amount by way of remuneration, and any person responsible for the payment of any amount by way of remuneration to any person under the provisions of any law or out of public funds, excluding any person who is not acting as a principal."

Section 1 of the OHSA defined "employer" as "any person who employs or provides work for any person and remunerates that person or expressly or tacitly undertakes to remunerate him". Section 1 of the COIDA defines "employer" as

> **"**any person, including the State, who employs an employee, and includes (*a*) any person controlling the business of an employer; (*b*) if the services of an employee are lent or let or temporarily made available to some other person by his employer, such employer for such period as the employee works for that other person; (*c*) a labour broker who against payment provides a person to a client for the rendering of a service or the performance of work, and for which service or work such person is paid by the labour broker."

Important legislative provisions that do not directly purport to impact upon the determination of the parties to the employment relationship but nevertheless may significantly impact upon such a determination are the prohibition of discrimination contained in section 6(1) [143] of the EEA and the prohibition against wage discrimination in section 6(4) of the Act.[144] These provisions are important within the context of atypical or non-standard forms of employment where non-standard workers are often treated unequally (and often paid less) than their standard worker counterparts.[145] Although the principle of equal pay for equal work, and equal pay for

[143] "No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or any other arbitrary ground."

[144] "A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1), is unfair discrimination." See also the provisions of the Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value GN 448 *GG* 38837 of 1 June 2015. Refer to See Ebrahim "Equal pay for work of equal value in terms of the Employment Equity Act 55 of 1998: Lessons from the International Labour Organisation and the United Kingdom" 2016 *Potchefstroomse Elektroniese Regsblad* 1 and Laubscher "Equal pay for work of equal value: a South African perspective" 2016 *Industrial Law Journal* 804 for analysis of this provision.

[145] See Chapter 6 § 3.2.

work of equal value, has its roots in pay discrepancies between men and women and, within the South African context, between race groups (with Africans trailing their white, coloured and Indian counterparts),[146] the principle may be employed to also combat discrepancies between standard and non-standard workers.

4 *Canons of grammatical interpretation*

The common law imposes guidelines that are applicable to the text of the legislative provisions referred to above.[147] They do not function as, either conclusive or rebuttable, arbitrary conclusions that are attached to particular facts. They are rebuttable and have been described as "common-law *a priori* guidelines and principles of law, employed to assist the courts in the process of construing the law".[148] They are "essentially doctrinal 'shortcuts', rules of thumb that judges employ to quickly and assuredly reach the proper balance of interpretive and policy equities at play in statutory construction".[149] Canons of statutory interpretation are not mandatory or absolute, but merely guidelines which are not always necessarily conclusive.[150] Importantly, these canons also represent important public law values which are therefore of fundamental importance within a teleological model of statutory interpretation.

4.1 The ordinary-meaning rule

For literalists, the ordinary meaning of a legislative provision is equated with "clear and unambiguous language".[151] This study has however shown, firstly, that literalism is not a constitutionally appropriate theory of statutory interpretation (and, as such,

[146] Laubscher (n 144) 805.
[147] As these canons also represent public law values (see Chapter 4 § 2.2), they could also have been discussed in Chapter 7 of this study. Note however that it had been stated from the outset that there is a degree of overlap and interaction between the elements of statutory interpretation (see Chapter 1 § 7; Du Plessis "The (re-) systematization of the canons of and aids to statutory interpretation" 2005 *South African Law Journal* 591). As these canons of statutory interpretation represent values that apply generally to all law texts, they have been discussed herein as. Values directly related to the employment relationship will be discussed in Chapter 7.
[148] Devenish "The state is not presumed to be bound by statute: a constitutional and jurisprudential anachronism" 2009 *Obiter* 17 18.
[149] Anonymous "The Charming Betsy canon, separation of powers, and customary international law" 8 *Harvard Law Review* 1215 1216.
[150] *Chickasaw Nation v United States* 534 US 84 (2001) 93.
[151] Du Plessis (n 6) 2C33.

that it has been rejected by the Constitutional Court)[152] and, secondly, that the idea of "clear and unambiguous language" is a misnomer.[153] The ordinary-meaning rule or the plain-meaning rule is however not dependent on literalist modes of interpretation. It is ostensibly possible for an interpreter to consider what the ordinary textual meaning of a provision is before moving on to other elements and considerations of statutory interpretation. In its simplest guise the rule merely means that:

> "[s]ome laws are meant for all citizens (e.g., criminal statutes) and some are meant only for specialists (e.g., some sections of the tax code). A text that means one thing in a legal context, might mean something else if it were in a technical manual or a novel. So the plain meaning of a legal text is something like the meaning that would be understood by competent speakers of the natural language in which the text was written who are within the intended readership of the text and who understand that the text is a legal text of a certain type."[154]

In terms of the ordinary-meaning rule "[t]he language of a legislative instrument must be understood in its ordinary signification".[155] The interpreter must observe the usages and conventions of the natural language in which legislation has been drafted.[156] To this end, courts are entitled to consult dictionaries to determine the ordinary meaning of a legislative provision, as the Constitutional Court has done on several occasions.[157] Although dictionary definitions of the term "employee" may be useful,[158] it is submitted that the rule merely requires of interpreters to consider the meaning that competent speakers would ascribe to the term. Employment laws are meant to apply to all citizens, as formal and informal employment constitutes the predominant form of economic activity in all economies. In *President of the Methodist Conference v Preston* the United Kingdom Supreme Court determined that a claimant was an employee by finding that "everything in this relationship looks like an employment relationship. If it looks like a duck, walks like a duck and quacks

[152] See Chapter 3 § 3.2.
[153] See Chapter 3 § 4.2.
[154] Solum "Holism" in *Legal Theory Lexicon* https://web.archive.org/web/20051214130028/http://legaltheorylexicon.blogspot.com/2004_04_01_legaltheorylexicon_archive.html (13-06-2017). In *Bertie Van Zyl Pty Ltd v Minister for Safety and Security* 2010 2 SA 181 (CC) the Constitutional Court endorsed the ordinary meaning rule, but refused to apply it *in casu* as the broadness of the term under consideration would have led to an absurd result.
[155] Du Plessis (n 6) 2C33.
[156] Above.
[157] Three recent examples include: *Savoi v National Director of Public Prosecutions* 2014 5 SA 317 (CC) par 19; *Mansingh v General Council of the Bar* 2014 2 SA 26 (CC) par 18 and 19 and *Molaudzi v S* 2015 8 BCLR 904 (CC) par 14.
[158] So, for example, Merriam-Webster defines "employee" as "one employed by another usually for wages or salary and in a position below the executive level" https://www.merriam-webster.com/dictionary/employee (13-06-2017).

like a duck, it probably is one".[159] Similarly, the ordinary-meaning rule acknowledges that there is an ordinary meaning that citizens would ascribe to the term "employee" and that this ordinary meaning should be advanced wherever possible.

4.2 Technical words and expressions are generators of technical meaning

According to this rule, "[w]ords and phrases included in a definition clause acquire, for purposes of a specific statute, a 'technical' meaning that may deviate from their ordinary meaning".[160] The definition of "employee" as used in employment legislation therefore obtains a technical meaning that may differ from the public's ordinary understanding of the term. This canon does not necessarily negate the ordinary-meaning-rule.[161] The ordinary-meaning of the term will still serve as the starting point to determine the meaning of a statutory provision. As interpretation does not end with textual consideration (contrary to the literalist position), the provision will acquire technical meaning only after all applicable factors, such as context, *telos*, history and transnational comparisons, have been considered. The Constitutional Court has also warned against technical rigidity in interpretation.[162]

4.3 Language is not used unnecessarily

In its literalist manifestation, the rule that language is not used unnecessarily merely meant that each word of a statute must be given a meaning.[163] Du Plessis has however criticised the literalist formulation as "unduly narrow" and encouraging "excessive peering at the words".[164] Instead the author advocates that, within a teleological context, all language used, including phrases, sentences, paragraphs, sections and the instrument or text as a whole, must be taken seriously.

For purposes of identifying the parties to the employment relationship, the canon dictates that all signifiers contained within the legislation must be considered and that

[159] 2013 UKSC 29 (SC) par 49.
[160] Du Plessis (n 6) 2C34.
[161] *Cf* Du Plessis above.
[162] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) par 36.
[163] Above 2C37.
[164] Above.

"excessive peering" at any specific part of the legislative environment (and especially the definition of "employee") should be avoided. As such, this reimagined canon resonates with the emerging trend in labour law to focus upon the parties to the employment relationship instead of merely trying to identify "employees". The canon dictates that no part of the definition of "employee" is superfluous. If we were to consider the definition in section 213 of the LRA it is clear that all words included therein, including "any person", "excluding", "independent contractor", "works" and so on – including articles, adjectives and nouns, are of significance when interpreting the term.

4.4 Statutory multilingualism

South African courts are entitled to refer to the unsigned text of a statute to elucidate an ambiguity in the signed text.[165] Labour legislation in South Africa is available in both Afrikaans and English (although it is only the English version that has been assented to by the President). The Afrikaans version of the LRA, the *Wet op Arbeidsverhoudinge,*[166] defines "*werknemer*" ("employer") as

> "(*a*) *iemand, behalwe 'n onafhanklike kontrakteur, wat vir iemand anders of die Staat werk en wat besoldiging ontvang of geregtig is om besoldiging te ontvang; en* (*b*) *iemand anders wat op enige wyse help om die besigheid van 'n werkgewer voort te sit of te bedryf.*"

This definition is repeated in the Afrikaans versions of the BCEA (the *Wet op Basiese Diensvoorwaardes*).[167] The Afrikaans version of the OHSA (the *Wet op Beroeps-gesondheid en Veiligheid*) reads as follows:[168]

> "*'n Persoon wat in diens is by of werk vir 'n werkgewer en 'n beloning ontvang of geregtig is om dit te ontvang of wat onder die aanwysing of toesig van 'n werkgewer of enige ander persoon werk*".

The Afrikaans version of COIDA (the *Wet op Vergoeding vir Beroepsbeserings en – siektes*[169] reads as follows:

[165] *Commissioner for Inland Revenue v Witwatersrand Association of Racing Clubs* 1960 3 SA 291 (A) 302A-B and *Bonitas Medical Fund v The Council for Medical Schemes* 2016 4 All SA 684 (SCA) par 16-18.
[166] 66 *van* 1995.
[167] 75 *van* 1997.
[168] 85 *van* 1993.
[169] 130 *van* 1993.

> "*'n Persoon wat met 'n werkgewer 'n diens- of vakleerlingskap- of leerlingskapkontrak aangegaan het of daarvolgens werk, hetsy die kontrak uitdruklik of stilswyend, mondeling of skriftelik is, en hetsy die besoldiging volgens tyd of gedane werk bereken word, of in kontant of in natura is.*"

Section 82 of the Constitution provides that the signed copy of an Act of Parliament is conclusive evidence of the provisions of that Act and, after publication, must be entrusted to the Constitutional Court for safekeeping. This does not mean to say, however, that the unsigned version becomes irrelevant.[170] Statutory bilingualism provides opportunities for comparison of various versions of legislation, and thereby aids their construction.[171] Botha,[172] supported by Du Plessis,[173] has put forward the idea that section 39(2) of the Constitution should be taken into account when different versions of a statute are in conflict, and that the version that best reflects the spirit, purport and objects of the Bill of Rights be preferred.

Section 240 of the Constitution states that "[i]n [174]the event of an inconsistency between different texts of the Constitution, the English text prevails". This provision however only becomes operative where there is an inconsistency between the versions. As such the Constitutional Court *Du Plessis v De Klerk*[175] accepted that

> "if one text is ambiguous, and if the ambiguity can be resolved by the reference to unambiguous words in the other text, the latter unambiguous meaning should be adopted. There is no reason why this common-sense rule should not be applied to the interpretation of the Constitution. Both texts must be taken to represent the intention of Parliament."[176]

As there are 11 versions of section 23 of the Constitution available to interpreters, these versions can provide ample fodder to construct this provision in a manner that promote the values that underlie an open and democratic society based on human dignity, equality and freedom.[177]

[170] *Cf* De Ville *Constitutional and Statutory Interpretation* (2000) 115 who argues that s 82 has done away with equality between two or more versions and that only the text that is signed will prevail.
[171] Above 2C38.
[172] Botha *Statutory Interpretation: An Introduction for Students* (2005) 78.
[173] Du Plessis (n 6) 2C38.
[174] Reported cases such as *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 4 SA 446 (A) dealt with repealed provisions of now repealed legislation such as the Workmen's Compensation Act 30 of 1941.
[175] 1996 3 SA 850 (CC).
[176] Par 44.
[177] S 39 of the Constitution. The Constitution is translated into Afrikaans, isiNdebele, isiXhosa, isiZulu, Sepedi, Sesotho, Setswana, SiSwati, Tshivenda and Xitsonga.

There are no reported cases in which the Afrikaans versions of labour legislation and the definition of "employee" have been interpreted. It is possible that the Afrikaans definitions of the term "employee" but also of other indicators in the legislative environment such as the Afrikaans version of the presumption of employment could be useful in shedding light on the English provision. It may for example be interesting to consider why the Afrikaans texts have used the terms "*besoldiging*" and "*beloning*" as translations for "remuneration". Such an investigation could shed light on the conceptual differentiation, if any, between the concepts of "wages", "compensation", "payment", "stipend" and "remuneration".[178] Our courts have held, for example, that the term "remuneration" is a wider concept than "wage".[179]

4.5 Legislation does not contain a *casus omissus*

An interpretation that does not lead to a *casus omissus* must be preferred.[180] A *casus omissus* is "a contingency not provided for by the legislature or, put differently, a gap in the statute that has not been filled".[181] It should therefore be presumed that what a text does not provide for is simply not provided. Courts should not be entitled to "fill in the gaps" in the *ipsissima verba* of the provision, except to the extent that it might be necessary to give effect to the purpose of the statute and to the constitutional goals of the society.[182]

This canon seeks to protect the constitutional value of the separation of powers. Therefore, prior to the adoption of the Constitution, courts refused to fill the gap in an *ipsissima verba*.[183] As Du Plessis points out "[t]he interpreter judge is no legislator and must constantly remind him- or herself of that … [i]nterpretation is meant to make sense of the legislature's law as it stands and not to substitute the judge's law

[178] Cases where such an investigation would have been ostensibly helpful include: *Maartens v Van Leer SA (Pty) Ltd* 1998 19 ILJ 182 (CCMA); and *ER24 Holdings v Smith* 2007 28 ILJ 2497 (SCA).
[179] *Shenker v Levy* 1997 18 ILJ 93 (W) 97E.
[180] Van Staden "A comparative analysis of common-law presumptions of statutory interpretation" 2015 *Stellenbosch Law Review* 550 562.
[181] *Director of Public Prosecutions, Western Cape v Prins* 2012 3 All SA 138 (WCC) par 51.
[182] *Mercedes Benz Financial Services (South Africa) (Pty) Ltd v Dunga* 2011 1 SA 374 (WCC) par 22.
[183] See eg *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 562 and *Sleutelfontein (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk* 1994 3 SA 407 (A) 422C.

for it".[184] The canon should, however, be seen within the context of the judiciary's duty to advance constitutional protection by interpreting in a way that promotes the core values of the Constitution.[185]

It should also be acknowledged that very little guidance is contained within the definition of "employee" and that the courts would therefore be necessitated to deal with matters that cannot simply be resolved by a simple application of the text to the set of facts it is presented with. The definition itself, other than providing for the distinction between employees and independent contractors and certain other textual limits does little to contribute to the interpretation that a court will ascribe to the concept. As such it is foreseen that the courts will have to do much to fill the gap in the *ipsissima verba*.

The courts may therefore extend the definition of "employee" if it is argued, that a certain category of worker is omitted from the legislative protection afforded by admittance to the category of "employee" so as to give effect to the purpose of the statute, to remedy unconstitutionality or to extend constitutional protection. It may be argued that this canon may be a useful tool to strike a balance between the doctrine of separation of powers and constitutional obligations. Such an approach acknowledges that although courts are empowered to extend the scope of the definition of "employee", it must first attempt to interpret the provision to avoid the omission.

4.6 Words and phrases bear the same meaning throughout

When the same words and phrases are repeated in the same legislative text it is assumed that the words or phrases will bear the same meaning throughout.[186] This will apply with greater force when the same word is repeated in the same sentence.[187] Similarly, it can be presumed that a change in expression within a legislative text is taken to import a change of intention.[188] This canon assumes that legislatures use

[184] Du Plessis *Re-Interpretation of Statutes* LexisNexis Durban (2002) 229.
[185] S 39(2).
[186] *Principal Immigration Officer v Hawabu* 1936 AD 26 33; *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 7 BCLR 771 (CC) par 47 and *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) par 52.
[187] *Minister of the Interior v Machadodorp Investments (Pty) Ltd* 1957 2 SA 395 (A) 404.
[188] *Snyders v S* 1997 4 All SA 80 (C).

words and phrases in a consistent manner. The canon will not apply if the words or phrases are used in a different context and as such the presumption has limited application. [189] The presumption seeks to promote legal certainty, a central requirement for the rule of law.[190]

Although the canon would apply over the entirety of an act, it may not be said that the canon would apply over the entire *corpus juris*,[191] although words in statutes that are closely related may well be susceptible to the canon. As section 213 of the LRA, section 1 of the EEA, section 1 of the BCEA, and section 1 of the SDA contain practically identical definitions of the term "employee", it is therefore unlikely that the courts will diverge from a previous interpretation, even if it was in relation to a different act. Similarly, it may be argued that the courts, compelled by the value of legal certainty, will not easily deviate from a previous interpretation of the term "employee" for purposes of social security legislation unless compelled thereto by other the text, context, *telos*, history or transnational elements. The same can however not be said of, for example, tax legislation where the term may be employed. Our courts have, as such, used the same jurisprudential tests to determine who is an employee for various pieces of labour legislation.[192]

5 *Conclusion*

The importance of the textual environment should not be overvalued or undervalued. On the one hand it should be noted that it is not only the text of the legislative provision that must be considered to ascertain the meaning thereof. The contextual environment of the legislative provision, the values it advances, the history of the statutory regulation and transnational elements will ultimately all contribute to the meaning that is to be afforded the statutory provision. On the other hand it should also be noted that the textual environment would control the range of possibilities of meaning that can be given a statutory provision.

[189] Van Staden (n 180) 581.
[190] Maxeiner "Some realism about legal certainty in the globalization of the rule of law" 2008 *Houston Journal of International Law* 27 30.
[191] Scalia and Gardner *Reading Law: The Interpretation of Legal Texts* (2012) 172-173.
[192] *National Education, Health and Allied Workers Union v Ramodise* 2010 31 ILJ 695 (LC) par 20.

When determining who the parties to the employment relationship are, the entire textual environment must be considered. Interpreting a statute therefore means "the finding of a single, sensible, consistent meaning for the whole".[193] As such, it would be wrong to focus solely on the definition(s) of "employee". Instead, the interpreter must consider the relevant text of the Constitution as well as other provisions that impact upon the question as to who is party to the employment relationship such as the presumption in favour of employment, the Code of Good Practice: Who is an Employee, legislative provisions that regulate specific forms of atypical work and the definition of "employer". It is suggested that the definition of employer, perhaps more than any other indicator, has significant potential to contribute to our understanding of who is party to the employment relationship.

A consideration of the textual environment must proceed within the context of public law values that elucidate our understanding of the textual environment. Chief amongst these the interpreter will have to be mindful of the ordinary-meaning rule, the rule that technical words and expressions are generators of technical meaning, the rule that language is not used unnecessarily, rules relating to statutory multilingualism, the rule that legislation does not contain a *casus omissus* and the rule that words and phrases bear the same meaning throughout a legislative text.

[193] De Sloovere "Contextual interpretation of statutes" 1936 *Fordham Law Review* 219 222.

CHAPTER 6

The contextual dimension

"And the law may be resembled to a nut, which has a shell and a kernel within; the letter of the law represents the shell, and the sense of it the kernel, and as you will be no better for the nut if you make use only of the shell, so you will receive no benefit by the law, if you rely only upon the letter, and as the fruit and profit of the nut lies in the kernel, and not in the shell, so the fruit and profit of the law consists in the sense more than in the letter."[1]

1 *Introduction*

Interpretation starts with the ordinary grammatical meaning of words but should not end there.[2] Gadamer stated that "the anticipated meaning of the whole is understood through the parts, but it is in the light of the whole that the parts take on their illuminating function".[3] In *Matatiele Municipality v President of the Republic of South Africa* [4] the Constitutional Court explained the need for contextual interpretation. Legislation has an inner unity and the meaning of any one part thereof is therefore linked to that of other provisions. Individual parts cannot therefore be construed in isolation. Interpretation must be context-sensitive. It is not sufficient to

1 *Eyston v Studd* 1574 2 Plowden 450 465-467.
2 Devenish "*Department of Land Affairs v Goedgelegen Tropical Fruits* - a triumph for teleological interpretation, an unqualified contextual methodology and the jurisprudence of *ubuntu*" 2008 *South African Law Journal* 231 237.
3 Gadamer "The problem of historical consciousness" in Rabinow and Sullivan (eds) *Interpretive Social Science: A Reader* (1979) 103 146.
4 2007 1 BCLR 47 (CC).

focus only on the textual meaning of the phrase. The proper approach to interpretation requires a structural approach.[5] For our purposes this means that the question as to who should be party to the employment relationship must be determined with reference to the entire textual environment described in Chapter 5 of this study and that the term "employ" should not be constructed in isolation.

Interpreters must have regard to the "extra-textual environment" of which a legislative provision forms part. They must consider the wider network of enacted law and other normative law-texts such as precedents as well as "the political and constitutional order, society and its legally recognised interests and the international legal order".[6] An interpreter, trying to ascertain if a person is an employee for purposes of section 213 of the Labour Relations Act[7] (hereafter the LRA) must look beyond the intra-textual environment to considerations outside of the LRA.[8]

Even when words can be said to be clear and unambiguous they must be read in their complete context, this includes their linguistic, normative, historical and comparative context.[9] It has already been stated that there exists no clear dividing lines between

5 Par 36-37.

6 Du Plessis "Interpretation of the Bill of Rights" in Woolman, Roux and Bishop (eds) *Constitutional Law of South Africa* (2014) 32-159 and 32-166.

7 66 of 1995.

8 In *Jaga v Dönges; Bhana v Dönge* 950 4 SA 653 (A) 662-663 the sentiment was expressed that "[c]ertainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background. The second point is that the approach to the work of interpreting may be along either of two lines. Either one may split the inquiry into two parts and concentrate, in the first instance, on finding out whether the language to be interpreted has or appears to have one clear ordinary meaning, confining a consideration of the context only to cases where the language appears to admit of more than one meaning. . . The second line of approach appears from what was said by Lord Greene, then Master of the Rolls in *Re Bidie* . . .'Few words in the English language have a natural or ordinary meaning in the sense that their meaning is entirely independent of their context.'" The Court webt on tio state at 664E-F that "[s]eldom indeed is language so clear that the possibility of differences of meaning is wholly excluded, but some language is much clearer than other language; the clearer the language the more it dominates over context, and *vice versa*, the less clear it is the greater the part that is likely to be played by the context". This sentiment was expressly endorsed by the Constitutional Court in *Du Toit v Minister for Safety and Security* 2009 12 BCLR 1171 (CC) par 37.

9 *Bato Star Fishing (Pty) v Minister of Environmental Affairs* 2004 4 SA 490 (CC) par 90; Devenish (n 2) 236 and Devenish *The Interpretation of Statutes* (1992) 116–17.

the elements of statutory interpretation.[10] As such, the expositions contained in chapters 4, 5, 7 and 8 could easily have been incorporated here. In what follows, however, important socio-political factors as well as the emergence of non-standard forms of employment will be considered. In Chapter 4 the legislative and jurisprudential responses to the question of who is party to the employment relationship was considered. In this chapter, the contextual dimension will be discussed with reference to the societal challenges that impact upon the question.

2 *Mischiefs in employment*

Contextual factors are significant in discovering the purpose of a provision. In *Heydon's Case*,[11] decided as far back as 1584, the Court pronounced that the prime purpose of enacted law is to suppress mischief.[12] The historic racial exclusion of workers from the employment relationship in South Africa and the global rise in non-standard forms of employment are the "mischief" that our legislative scheme is designed to remedy. The mischief rule draws our attention to the fact that the *ratio legis* of a provision is causally linked to a remedy for a societal malice. Contextual interpretation and purposive interpretation is therefore interlinked.[13] According to Du Plessis, the "coalescence of systematic and purposive/teleological interpretation furthermore highlights the essential unity of interpretation and application".[14] Legislative provisions must be interpreted to find a solution to real world problems.[15]

[10] Du Plessis "The (re-) systematization of the canons of and aids to statutory interpretation" 2005 *SALJ* 591 611 and Le Roux "Directory provisions, section 39(2) of the Constitution and the ontology of statutory law *African Christian Democratic Party v Electoral Commission*" 2006 S*APR/PL* 382 398.

[11] (1584) 3 Co Rep 7a.

[12] 7b: "For the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered: First, what was the common law before the making of the Act; Second, what was the mischief and defect for which the common law did not provide; Third, what remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth; and, fourth, the true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*."

[13] *Executive Council of the Western Cape v Minister for Provincial Affairs and Constitutional Development of the RSA; Executive Council of KwaZulu-Natal v President of the RSA* 2000 1 SA 661 (CC) par 52 and *Matatiele Municipality v President of the Republic of South Africa* 2007 1 BCLR 47 (CC) par 36-37.

[14] Du Plessis (n 6) 32-170.

[15] In *Sefalana Employee Benefits Organisation v Haslam* 2000 2 SA 415 (SCA) par 6 the Supreme Court of Appeal held that "[w]hen interpreting a statute one is not obliged, of course, to conjure up

Identification of the parties to the employment relationship in context of the rise of atypical or non-standard forms of employment has also become axiomatic as a modern mischief which legislation must respond to.[16] As the winds of globalisation grow ever stronger, it becomes incumbent upon interpreters to have a thorough understanding of the problems that legislation is designed to respond to. De Vos warns that a court's choice of narrative must avoid shallowness and exclusivity that would result in an overly narrow reading of a legislative provision. Reliance on various accounts of history will counter the inference that only certain interpretive choices are historically inevitable.[17] The sentiment is echoed by Du Plessis who states that "[t]he spirit of this history is more significant than the 'historical facts' (in other words, the events connected with the genesis of such law)".[18]

3 *Political change*

3.1 A history of exclusion

The Constitution in general and section 23 in particular, including those legislative provisions designed and enacted to give effect to it, is the remedy designed to cure the fundamental mischief of apartheid.[19] In Chapter 5 the historic roots and approach to the question of determining the existence of the employment relationship is considered from a legal historic perspective. It is, however, also important to consider

all manner of fanciful and remote hypotheses in order to test the implications of a construction which one is considering placing upon it. However, where readily conceivable and potentially realistic situations spring immediately to mind it is a salutary practice to test the proposed construction by applying it to such situations. If the exercise produces startling (as opposed to merely anomalous) results, it may become clear that the proposed construction is not correct. This, in my view, is just such a case."

16 See § 4 below.

17 De Vos "A bridge too far? History as context in the interpretation of the South African Constitution" 2001 *South African Journal of Human Rights* 1 1. Although this was said of constitutional interpretation, it is submitted that this sentiment should apply to all interpretation for the same reasons.

18 In *Mahlangu v Amplats Development Centre* (2002) 23 ILJ 910 (LC) par 20 the Court however noted that "[p]erceptions of racial discrimination in the employment environment, endemic in the aftermath of the apartheid era, are not uncommon and are frequently justified. Those are cases which, if proved and established upon application of the relevant legal principles, will justify the award of the maximum relief which the Labour Relations Act 1995, recognizing the absolute unacceptability of that form of conduct on the part of employers, prescribes. What is however a phenomenon also of not infrequent occurrence, although perhaps equally understandable in the historical context, is a hyper-sensitivity to a perceived state of affairs in which, upon objective analysis, the true facts are distorted."[18]

19 *Qozoleni v Minister of Law and Order* 1994 3 SA 625 (E) 634I-635C.

the socio-political context in which legislative provisions are adopted.[20] The history of labour law (and labour exploitation) has run lockstep with the history of Apartheid.[21] As the Congress of South African Trade Unions (hereafter COSATU) have pointed out, "apartheid's labour laws, pass laws, forced removals and cheap labour system were all to the benefit of the business community".[22] Without the system of apartheid, many businesses would not have been as financially successful.

All labour legislation prior to 1971 had the distinguishing feature of excluding black workers from its ambit.[23] To do this, two mechanisms were employed; either black workers were excluded directly from the provisions of the Act (as was the case with the 1937 Industrial Conciliation Act[24] and the 1925 Wage Act)[25] or workers were indirectly excluded from the provisions of an act due to their inability to comply with the statutory definition of the term "employee" (as was the case with the 1924 Industrial Conciliation Act).[26] One system of industrial relations emerged for white, coloured and Indian workers and another for black workers. Black workers were subject to a different legislative regime than white, coloured and Indian workers.[27]

[20] See De Clercq "Apartheid and the organised labour movement 1979 *Review of African Political Economy* 69; Gould "The emergence of black unions in South Africa" 1987 *Journal of Law and Religion* 495-500; Jones "The emergence of shop-floor trade union power in South Africa" 1985 *Managerial and Decision Economics* 160; Jones "The changing structure of industrial relations in South Africa" 1985 *Managerial and Decision Economics* 217; Marsh "Labour reform and security repression in South Africa: Botha's strategy for stabilizing racial domination in the 1980s" 1982 *Issue: A Journal of Opinion* 49; Maree "The emergence, struggles and achievements of black trade unions in South Africa from 1973 to 1984" 1985 *Labour, Capital and Society* 278; Maree and Budlender "Overview: state policy and labour legislation" in Maree (ed) *The Independent Trade Unions 1974 – 1984* (1987) 116-123; Morris "Unions and the Industrial Councils – why do union's policies change?" in Nattrass and Ardington (eds) *The Political Economy of South Africa* (1990) 148-162; and Terreblanche and Nattrass "A periodisation of the political economy From 1910" in Webster, Alfred, Bethlehem, Joffe, and Selikow (eds) *Work and Industrialisation in South Africa: An Introductory Reader* (1994) 190-204.

[21] Smith "The right of revolution: black trade unions, workplace forums, and the struggle for democracy in South Africa" 2000 *Georgia Journal of International and Comparative Law* 595 595.

[22] Balint *Genocide, State Crime and the Law: In the Name of the State* (2012) 158.

[23] Grogan *Collective Labour Law* (2007) 4.

[24] 36 of 1937.

[25] 27 of 1925.

[26] 11 of 1924. See Wiehahn Commission *The Complete Wiehahn Report with Notes by Prof NE Wiehahn* (1982) xx – xxii.

[27] For example the Native Labour (Settlement of Disputes) Act 48 of 1953 which was renamed in 1964 to the Bantu Labour (Settlement of Disputes) Act, in 1973 to the Bantu Labour Relations Regulation Act, and in 1978 to the Black Labour Relations Regulation Act.

In practice, although some laws were on the face thereof racially neutral, they only applied to non-white workers employed in a limited amount of services (such as the agricultural and domestic sectors).[28] The exclusion of numerous black workers was achieved through pass and influx control laws, designed to control the movement of black workers.[29] Legislation (such as the 1911 Mines and Works Act which established quotas for black and white workers and reserved better paying jobs for white workers)[30] worked to the detriment of black workers.[31] The 1950 Suppression of Communism Act also led to the large-scale repression of union-activists.[32]

Even though much blame should be laid at the feet of the (democratically illegitimate) legislature, it should be noted that much blame could also be contributed to the judiciary in general and the way in which they interpreted such draconian *apartheid* legislation.[33] Of the interpretation of exclusionary statutes, and in echoing the now defunct "golden rule" of interpretation,[34] it was said in *S v De Wet*:[35]

> "Racial discrimination of this kind is permitted only if the Act authorises such discrimination either by express words or by necessary implication. The Act does not authorise racial discrimination by merely giving the Minister wide powers. Unless the contrary appears it is to be presumed that the Legislature intended such powers to be exercised impartially and without racial discrimination."[36]

The effect hereof was to deprive African workers of opportunities for training, employment and promotion.[37] Labour legislation created a system of racially based barriers that subjected African workers to lower wages and poor working conditions, deprived them of job security, excluded them from collective bargaining, refused to recognise trade unions of African workers, and prohibited strike action.[38] As a result

[28] Le Roux *The Regulation of Work: Whither the contract of Employment? An Analysis of the Suitability of the Contract of Employment to Regulate the Different Forms of Labour Market Participation by Individual Workers* (2008 thesis University of Cape Town) 32.
[29] Above
[30] 12 of 1911.
[31] Smith (n 21) 595.
[32] 44 of 1950.
[33] In *R v Abdurahman* 1950 3 SA 136 (A) 145 it was held that "it is the duty of the Courts to hold the scales evenly between the different classes of the community and to declare invalid any practice which, in the absence of the authority of an Act of Parliament, results in partial and unequal treatment to a substantial degree between different sections of the community".
[34] See Chapter 1 fn 91.
[35] 1978 (2) SA 515 (T).
[36] 517-518.
[37] Valticos and Von Potobsky *International Labour Law* (1995) 111.
[38] Above.

the International Labour Organisation (hereafter the ILO) adopted the Declaration concerning the Policy of "Apartheid" of the Republic of South Africa, 1964.[39]

The Declaration condemned Apartheid as contrary to the Declaration of Philadelphia, 1944. The objective of this Declaration is, *inter alia*, that all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity full employment and the raising of standards of living, the employment of workers in the occupations in which they can have the satisfaction of giving the fullest measure of their skill and attainments and make their greatest contribution to the common well-being.[40]

The Declaration noted that the *apartheid* government "persistently and flagrantly violates this principle with the means of legislative, administrative and other measures incompatible with the fundamental rights of man, including freedom from forced labour". Drawing upon the Discrimination (Employment and Occupation) Convention, 1958, the ILO instituted various punitive measures against the *apartheid* government (including excluding South Africa from some of its trade committees and tasking the Director-General of the ILO to submit a yearly report to the Conference on the application of the Declaration) and the South African government, having been a founding member, shortly thereafter withdrew from the ILO.[41]

In 1979, due to the work of Wiehann Commission, the Industrial Conciliation Act was amended to remove the exclusion of black workers. The use of the term "unfair labour practices", intended to protect white workers from unfair displacements

[39] Although conventions and recommendations are the instruments most commonly used by the International Labour Conference to formulate standards, the conference does, on occasion, make use of other types of texts, including declarations. Declarations are generally used to make a formal statement and reaffirm the importance that the constituents attach to certain principles and values. Although declarations are not subject to ratification, they are intended to have a wide application and contain symbolic and political undertakings by the member states. The ILO regarded *apartheid* as such an affront to labour everywhere that the Declaration concerning the Policy of "Apartheid" of the Republic of South Africa, 1964 is one of only seven declaration adopted by the organisation, the others being Part XIII of the Treaty of Versailles, 1919, the Declaration of Philadelphia, 1944, the Declaration on Fundamental Principles and Rights at Work, 1998, the Declaration on Social Justice for a Fair Globalisation, 2008, the Declaration on Equality of Opportunity and Treatment for Women Workers, 1975, and the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration), 2006.

[40] A I to III.

[41] Valticos and Von Potobsky (n 37) 111.

because of the newly afforded protection of black workers, was to become the most significant principle for the development of South African labour law. The former Industrial Court in *George v Liberty Life of Africa*,[42] emboldened by its power to decide what amounted to unfair labour practices, allowed for discrimination against a white person with regard to promotion to enforce the normalisation of the South African workforce.[43] The ILO noted that "the most consequential recommendation made by the Commission was the extension of freedom of association to cover all persons, irrespective of race or sex".[44] Trade unions representing Black workers were able to make use of the machinery of the 1956 LRA.[45]

The contribution of black trade unions to secure the end of apartheid in South Africa is trite. Just as the segregation of South African society and South African workplaces were interrelated (or because thereof), the end of the segregation of workers contributed to the fall of apartheid. As a consequence of the discriminatory practices of the past South Africa was one of the most unequal societies in the world at the time of the adoption of our first justiciable constitution.[46] To this day "[i]nequalities in South Africa are deep and pervasive, scarring every aspect of society".[47] In *Fraser v Children's Court, Pretoria North*[48] the Constitutional Court explained the importance of achieving a more equal society:

> "There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised. In the very first paragraph of the preamble it is declared that there is a ... need to create a new order ... in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms."[49]

42 1996 17 ILJ 571 (IC).
43 See Le Roux en Van Niekerk *The South African Law of Unfair Dismissal* (1994) 1-2; Landman "Fair labour practices: the Wiehahn legacy" 2004 *ILJ* 805 806.
44 ILO "National Labour Law Profile: South Africa" http://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158919/lang--en/index.htm (04-07-2017).
45 The Industrial Conciliation Act 28 of 1956, subsequently renamed the Labour Relations Act 28 of 1956.
46 Albertyn and Goldblatt "Equality" in Woolman, Roux and Bishop (eds) *Constitutional Law of South Africa* Juta (2014) 2.
47 Above.
48 1997 2 BCLR 153 (CC).
49 Par 20.

2.2 Remedial policies

Even though the current definitions of "employee" in labour law is racially neutral,[50] this fact would not in its own prevent the racial exclusion of certain category of workers on racial (or any other prohibited) grounds. The concept "unfair discrimination", as opposed to "discrimination", first made its way into South African labour law jurisprudence in the codification of the "unfair labour practice" jurisprudence of the former Industrial Court, introduced by the Labour Relations Amendment Act of 1988.[51] The Act provided that the concept "unfair labour practice" included "the unfair discrimination by any employer against any employee solely on the grounds of race, sex or creed".[52]

The definition was problematic on many fronts.[53] It ostensibly confined the concept of "unfair discrimination" to conduct by an employer vis-à-vis an employee.[54] Some found the introduction of the word "unfair" concerning, as they feared that it would be a narrowing criterion.[55] It was feared that definition would be interpreted to extend only to the three prohibited grounds listed in the definition.[56] None of these concerns came to fruition.[57] There was, however, little time for the statutory definition to be developed as the codification of the former Industrial Court's jurisdiction was repealed in 1991 and the pre-1988 position restored.[58]

The former Industrial Court, however, continued to exercise its unfair labour practice jurisdiction,[59] and was boosted in their task by the introduction of section 8 of the

[50] Refer to Chapter 5 §3.1.
[51] 83 of 1988.
[52] S 1 of the Labour Relations Amendment Act of 1988.
[53] Du Toit "The evolution of the concept of 'unfair discrimination' in South African labour law" 2006 *ILJ* 1311.
[54] *Cf Chamber of Mines v Council of Mining Unions* 1990 11 ILJ 52 (IC) 70 where it was found that where it was found that, "it is not a requirement that an unfair labour practice which is directed at an employee or employees must be committed by their employer but it can also be committed by a third party outside this relationship provided that the labour practice has the effect envisaged by the unfair labour practice definition".
[55] Du Toit (n 53) 1320. *Cf FAWU v National Co-Operative Dairies Ltd (1)* 1989 10 ILJ 483 (IC) 486.
[56] Above 1322. *Cf Mthembu v Claude Neon Light* 1992 13 ILJ 422 (IC) 423.
[57] Du Toit (n 53) 1323.
[58] Labour Relations Amendment Act 9 of 1991.
[59] Du Toit (n 53) 1324.

Interim Constitution (the equality clause).[60] Section 8 added a number of prohibited grounds (such as colour, sexual orientation, age, disability, religion, conscience, belief, culture and language), and the Court regarded them as unfair labour practices. The section provided a prohibition against direct[61] or indirect[62] discrimination. In addition to the prohibition of unfair discrimination, the section allowed for substantive measures (such as affirmative action) designed to achieve equality. The section introduced a rebuttable presumption of unfair discrimination if the alleged discrimination was on a prohibited ground.[63] Section 8 was ultimately replaced by section 9 of the Constitution of the Republic of South Africa, 1996.[64] Section 9 substantially repeats the provisions of its' predecessor, but required that Parliament adopt national legislation to prevent unfair discrimination.[65]

The prohibition of unfair discrimination was first provided in item 2(1)(*a*) of schedule 7 to the LRA.[66] It was replaced with the Employment Equity Act (hereafter the

[60] Constitution of the Republic of South Africa Act 200 of 1993. The section read as follows: "(1) Every person shall have the right to equality before the law and to equal protection of the law. (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language. (3)(*a)* This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms. ... (4) *Prima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established."

[61] Du Toit (n 53) 1311 n 2 defined direct discrimination as "discrimination premised expressly on a prohibited ground of discrimination".

[62] The concept was explained in *Lagadien v University of Cape Town* 2000 21 ILJ 2469 (LC) par 14: "An employer may be guilty of indirect discrimination if the use of an apparently neutral criterion has a significant adverse impact on a particular group and the criterion is not sufficiently relevant to workplace needs to justify that impact. Examples of such criteria are educational qualifications and physical characteristics (such as height) in situations where the employer is unable to justify the required standard."

[63] Above.

[64] The provision reads as follows: "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons disadvantaged by unfair discrimination may be taken. (3) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[65] Above.

[66] 66 of 1995.

EEA).[67] Section 6(1) prohibits unfair discrimination, directly or indirectly, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth. Section 6(2) creates the defences of affirmative action and inherent requirement of a job against a charge of unfair discrimination. It also restricts medical and psychometric testing[68] and provides that "'employee' includes an applicant for employment".[69]

In 2014 the EEA was amended[70] and section 6(1) now includes "any other arbitrary ground" in addition to the grounds listed therein. The EEA was amended to introduce the concept that differences in terms and conditions of employment between employees of the same employer performing the same work is unfair discrimination.[71] The introduction of the principle in section 6 of the EEA was rather uncontroversial as it was accepted prior to the amendment that the principle was already part of South African law. The EEA was also amended to state that the difference in terms and conditions between employers had to be directly or indirectly related to a ground listed in section 6(1). As such, it is trite that section 6(4) adds no new protection than that which was already provided by section 6(1).[72] In addition, the amendments[73] introduced a new burden of proof provision.[74]

The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)[75] is also an important legislative intervention designed to give effect to

67 55 of 1998.
68 Ss 7 and 8 of the EEA.
69 S 9 of the EEA.
70 S 3(*a*)-(*b*) of the Employment Equity Amendment Act 47 of 2013.
71 S 6(4) of the EEA. S 6(5) of the Act now provides that "[t]he Minister, after consultation with the Commission, may prescribe the criteria and prescribe the methodology for assessing work of equal value contemplated in subsection (4)."
72 See Le Roux "The Employment Equity Act: new amendments set problems and posers" 2014 *Contemporary Labour Law* 1 and Le Roux "The Employment Equity Act amendments tested in practice" 2015 *Contemporary Labour Law* 13.
73 S 11 of the Employment Equity Amendment Act.
74 "(1) If unfair discrimination is alleged on a ground listed in section 6(1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination (*a*) did not take place as alleged; or (*b*) is rational and not unfair, or is otherwise justifiable. (2) If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that (*a*) the conduct complained of is not rational; (*b*) the conduct complained of amounts to discrimination; and (*c*) the discrimination is unfair."
75 4 of 2001.

section 9 of the Constitution. The Act deals with measures to prevent unfair discrimination[76] and with measures to promote equality.[77] Although the Act is not meant to deal with labour related matters, it is submitted that the Act could provide significant protection to workers who do not fall within the definition of "employee" as used in the EEA to provide protection to these vulnerable groups.[78]

3.3 Approaches adopted by the judiciary

The judicial response to racial exclusion of workers predates the legislative response. The first two reported cases where reference was made to discriminatory practices occurred in the decade preceding the advent of constitutionalism in South Africa. In *Raad van Mynvakbonde v Minister van Mannekrag*[79] it was held that less favourable conditions of service enjoyed by union members amounted to discrimination and that it therefore constituted an unfair labour practice.[80]

In *AMAWU v Fodens SA Pty Ltd*[81] it was held that it was an unfair labour practice for an employer to refuse to bargain with a representative trade union. In coming to its' conclusion the former Industrial Court relied on the prohibition of anti-union discrimination contained in the International Labour Organization's Right to Organize and Collective Bargaining Convention.[82] These decisions laid the foundation for the approach to discrimination to be followed by our courts: firstly, discrimination was understood as "denoting adverse treatment of an individual or group of employees in comparison with others"; and secondly, discrimination was only prohibited if it took place on a prohibited ground.[83]

In the period that followed the former Industrial Court developed the discrimination jurisprudence on an *ad hoc* basis based on its' mandate to determine and define for

[76] Chapters 2 and 3 of PEPUDA.
[77] Chapter 5 of PEPUDA.
[78] Fourie "Non-standard workers: the South African context, international law and regulation by the European Union" 2008 *Potchefstroomse Elektroniese Regsblad* 110 par 3.4.
[79] 1983 4 ILJ 202 (T).
[80] 208.
[81] 1983 4 ILJ 212 (IC).
[82] 227.
[83] Du Toit (n 53) 1317.

itself what amounted to an unfair labour practice.[84] The following important characteristics may be discerned from the jurisprudence of the Court.[85] Firstly, the Court was consistently guided by the meaning given to "discrimination" in international and foreign law. Chief amongst these, the Court held that the ILO's Discrimination (Employment and Occupation) Convention of 1958 was to be considered in defining discriminatory actions.[86] Secondly, the court drew a distinction between the terms "discrimination" and "differentiation".[87] Thirdly, the Court had, in the course of the 1980's found that adverse treatment of persons on grounds of, *inter alia,* race[88] and sex[89] were found to constitute unfair labour practices.

The former Industrial Court was strengthened in its unfair labour practice mandate by the introduction of constitutionalism in South Africa and section 8 of the Interim Constitution.[90] So, the Court held that constructive dismissal of a pregnant employee who was denied maternity leave in terms of a collective agreement amounted to unfair indirect discrimination, and therefore to an unfair labour practice.[91] The Court continued to rely on the ILO's Discrimination (Employment and Occupation) Convention of 1958 to determine unfair discrimination.[92]

The Court also had significant interpretive difficulty with the new constitutional provision and struggled to formulate a test to determine if unfair discrimination took place which effectively dealt with the elements of differentiation, discrimination,

[84] *Biyela v Sneller Enterprises (Pty) Ltd* 1985 6 ILJ 33 (IC); *MAWU v Siemens Ltd* 1986 7 ILJ 547 (IC); *MAWU v Transvaal Pressed Nuts, Bolts and Rivets (Pty) Ltd* 1986 7 ILJ 703 (IC); *Mtshamba v Boland Houtnywerhede* 1986 7 ILJ 563 (IC); *MAWU v Bonar Long NPC (SA) (Pty) Ltd* 1987 8 ILJ 108 (IC); *Mkize v Tembisa Town Council* 1987 8 ILJ 256 (W); *SA Iron, Steel and Allied Industries Union v Chief Inspector, Department of Manpower* 1987 8 ILJ 303 (IC); *Kebeni v Cementile Products (Ciskei) (Pty) Ltd* 1987 8 ILJ 442 (IC); *MWASA v The Minister of Manpower; NUM v The Minister of Manpower* 1987 8 ILJ 614 (IC); *G v K* 1988 9 ILJ 314 (IC); *Chetty v Raydee (Pty) Ltd* 1988 9 ILJ 318 (IC); *SACWU v Sentrachem Ltd* 1988 9 ILJ 410 (IC); *SACWU v Sentrachem Ltd* 1989 10 ILJ 249 (W); *NUM v Gold Fields of SA Ltd* 1989 10 ILJ 86 (IC); *Chamber of Mines v MWU* 1989 10 ILJ 133 (IC); *ERGO v NUM* 1989 10 ILJ 683 (LAC); *J v M Ltd* 1989 10 ILJ 755 (IC); *Administrator of the Transvaal v Traub* 1989 10 ILJ 823 (A); and *Mazibuko v Mooi River Textiles Ltd* 1989 10 ILJ 875 (IC).

[85] Du Toit (n 83) 1317.

[86] *SACWU v Sentrachem Ltd* 1988 9 ILJ 410 (IC) 429.

[87] *SA Iron, Steel and Allied Industries Union v Chief Inspector, Department of Manpower* 1987 8 ILJ 303 (IC) 307 and 311.

[88] *Chamber of Mines v MWU* 1989 10 ILJ 133 (IC).

[89] *J v M Ltd* 1989 10 ILJ 755 (IC).

[90] See n 60 above.

[91] *Collins v Volkskas Bank* 1994 15 ILJ 1398 (IC) 1411.

[92] Above. See also *SACWU v Sentrachem* 1988 9 ILJ 410 (IC) 429.

prohibited ground and unfair discrimination inherent in the new provision.[93] The dominant approach of the Court was however formulated as follows:

> "Not all forms of differentiation or classification would constitute an unfair labour practice. The word 'unfair' suggests that more than a mere differentiation or classification is required. ... In differential treatment, the deciding factor should therefore not be a person's colour or sex, but a person's ability to do the job. Put differently, unless the inherent requirements of the job require differentiation on the grounds of colour or sex, direct differentiation based on such inherent human characteristics should not be condoned."[94]

Following the adoption of the Constitution of the Republic of South Africa, 1996, the Constitutional Court started to formulate an approach to discrimination law that put human dignity at the centre of its jurisprudence. In *Hoffmann v South African Airways*[95] the Constitutional Court articulated this point as follows:

> "At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against. The determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against. Relevant considerations in this regard include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interests of the victim of the discrimination have been affected, and whether the discrimination has impaired the human dignity of the victim."[96]

In *Harksen v Lane*[97] the Constitutional Court formulated a much-cited[98] and much-criticised[99] test to determine if unfair discrimination occurred:

> "Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not

93 Du Toit (n 83) 1326-1327.

94 *Association of Professional Teachers v Minister of Education* 1995 16 ILJ 1048 (IC) 1085.

95 2001 1 SA 1 (CC).

96 Par 27.

97 1998 1 SA 300 (CC).

98 *Louw v Golden Arrow Bus Services (Pty) Ltd* 2000 21 ILJ 188 (LC) par 26; *Hoffmann v SA Airways* 2000 21 ILJ 2357 (CC) par 24; *NUMSA v Gabriels (Pty) Ltd* 2002 23 ILJ 2088 (LC) par 9; *Food and Allied Workers Union v Pets Products (Pty) Ltd* 2000 21 ILJ 1100 (LC) par 13; *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) par 70; *Independent Municipal and Allied Trade Union v City of Cape Town* 2005 26 ILJ 1404 (LC) par 80; *Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC) par 110; and *Biggar v City of Johannesburg (Emergency Management Services)* 2017 38 ILJ 1806 (LC) par 32.

99 Du Toit (n 53) 1313. The chief point of criticism the author offers is that the utilisation of the test contravenes the subsidiarity principle due to the fact that the test was formulated in dealing with the constitutional equality provision and not in dealing with national legislation. The author also argues (1327) that the use of the test is inappropriate because the ILO's Discrimination (Employment and Occupation) Convention of 1958 defines discrimination and the EEA requires that it should be interpreted in order to give effect to international obligations. See also Van Niekerk and Smit (eds) *Law@Work* (2015) 131. *Cf SAA (Pty) Ltd v GJVV* 2014 8 BLLR 748 (LAC) par 29. In *Mbana v Shepstone Wylie* 2015 6 BCLR 693 (CC) par 25 the Constitutional Court however held that "the test for unfair discrimination in the context of labour law is comparable to that laid down by this court in *Harksen*".

> there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner."[100]

Recent amendments to the Employment Equity Act has raised many questions.[101] The addition of the phrase "or any other arbitrary ground" in section 6 of the Act has been particularly problematic, especially since the word "including" in the section means that the list of grounds expressly referred to in section 6 was not a closed list.[102] The Labour Court[103] has endorsed the opinion of Du Toit[104] that the inclusion of an "arbitrary" ground is meant to widen the scope of discrimination:

> "[T]he reintroduction of the prohibition of discrimination on 'arbitrary' grounds cannot be understood as merely reiterating the existence of unlisted grounds, which would render it redundant. To avoid redundancy, 'arbitrary' must add something to the meaning of 'unfair discrimination'. Giving it the meaning ascribed to it by Landman J in *Kadiaka*[105] – that is, 'capricious' or for no good reason – would broaden the scope of the prohibition of discrimination from grounds that undermine human dignity to include grounds that are merely irrational without confining it to the latter."[106]

The Labour Court[107] has also endorsed the view of Rautenbach and Fourie[108] who aver that "[t]he only sensible meaning that can be ascribed to it is that it refers to grounds not listed in section 6(1); as such, the amendment was not necessary". The Court held:

> "The distinction between differentiation which does not involve unfair discrimination and differentiation which does involve unfair discrimination is not a distinction between two completely separate things. It simply is a distinction between a component of a general category of differentiation and the rest of the general category. Differentiation that does not amount to unfair discrimination constitutes a residual and not a distinctive category."[109]

In rejecting the argument that the words "or any other arbitrary ground" created a third category of grounds, the Court relied on interpretations given to the constitutional equality clauses to decide that "[t]he crux of the test for unfair

[100] Par 53.
[101] De Villiers "Arbitrêre gronde vir onbillike diskriminasie en die bewyslas in arbeidsgeskille" 2014 *Litnet* 169-187; Du Toit "Protection against unfair discrimination: cleaning up the Act" 2014 *ILJ* 2623; Le Roux (n 72) 1; Le Roux (n 72) 13-24; and Rautenbach and Fourie "The Constitution and recent amendments to the definition of unfair discrimination and the burden of proof in unfair discrimination disputes in the Employment Equity Act" 2016 *TSAR* 110.
[102] Rautenbach and Fourie (above) 117.
[103] *Pioneeer Foods (Pty) Ltd v Workers Against Regression* 2016 37 ILJ 2872 (LC) par 60.
[104] Du Toit *et al Labour Relations Law: A Comprehensive Guide* (2015).
[105] *Kadiaka v Amalgamated Beverage Industries* 1999 20 ILJ 373 (LC) par 43.
[106] 683.
[107] *Ndudula s v Metrorail PRASA (Western Cape)* 2017 7 BLLR 706 (LC).
[108] Rautenbach and Fourie (n 101) 122.
[109] Par 66.

discrimination is the impairment of human dignity or an adverse effect in a comparably similar manner".[110]

It is submitted that the interpretation of Rautenbach and Fourie is most appropriate. Their interpretation accords with the interpretation of "arbitrary" that has been given to similar constitutional provisions.[111] It is also in line with Memorandum on the Objects of Employment Equity Amendment Bill, 2012 which states that the object of the amendment is merely to "*clarify* that discrimination is not only permitted on a ground listed in that section but also on any other arbitrary ground",[112] and to merely create consistency with the terminology used in other legislation.

Section 9(2) of the Constitution (and section 6(2)(*a*) of the EEA) encapsulates the right to substantive equality.[113] The Constitutional Court has accepted that "[r]emedial measures are not a derogation from, but [are] a substantive and composite part of, the equality protection envisaged by the provisions of section 9 and of the Constitution as a whole. Their primary object is to promote the achievement of equality".[114] Dignity has also been place at the centre of the substantive equality jurisprudence adopted by the Constitutional Court.

The Court has held that "[m]easures that are directed at remedying past discrimination must be formulated with due care not to invade unduly the dignity of all concerned".[115] The Constitutional Court has held that to pass constitutional muster in terms of section 9(2) of the Constitution a measure in terms thereof must "target a particular class of people who have been susceptible to unfair discrimination; be designed to protect or advance those classes of persons; and promote the achievement of equality".[116]

[110] Par 73-75.
[111] Refer to the cases listed in Rautenbach and Fourie (n 101) 115 and the discussion thereof. In *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) par 25 the Constitutional Court established that distinctions will only contravene the equality right if they are irrational.
[112] Emphasis added.
[113] Albertyn and Goldblatt (n 46) 33.
[114] *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) par 32.
[115] *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) par 30.
[116] *Minister of Finance v Van Heerden* (n 114) par 37 and *South African Police Service v Solidarity obo Barnard* (above) par 36.

3 *Evolution of employment*

3.1 The rise of non-standard forms of work

It is essential when considering the proper interpretation of the term "employee" and who should be included in the employment relationship, that interpreters should be mindful of the challenges and global pressures that strain traditional conceptions of "employee" and which serve to move workers from typical to atypical forms of employment.[117] These conditions serve as the mischief that labour law must respond to. As such, it is important to accept on-going changes to the world of work, the existence of a heterogeneous mix of employment situations and facts regarding decent work deficits so that creative solutions may be found on how the situation of these workers may be improved.[118]

Although no real definition of non-standard employment[119] is possible,[120] the term broadly encompasses "work that falls out of the realm of the 'standard employment

[117] See Fourie (n 78) 110.

[118] ILO "Conclusions of the Meeting of Experts on Non-Standard Forms of Employment" GB 323/POL/3 http://www.ilo.org/gb/GBSessions/GB323/pol/WCMS_354090/lang--en/index.htm (22-06-2017) par 19.

[119] The South African judiciary has generally dealt with this matter under the label of "atypical employment" instead of "non-standard (forms of) employment" as the ILO has done. In this part the two terms are used interchangeably. See *Kelly Industrial Ltd v Commission for Conciliation, Mediation and Arbitration Commissioner Edwards* 2015 36 ILJ 1877 (LC) par 1; *Daniels v Standard Bank of South Africa* case no JS246/2011 (LC) par 24; *Lumka and Associates v Mancotywa* case no JR 944/07 (LC) (unreported) par 4; and *NUMSA v Assign Services* case no JA 96/15 (LAC) (unreported) par 43 where the term atypical employment is used. See *Protect a Partner v Machaba-Abiodun* 2013 34 ILJ 392 (LC) par 50 where both terms are employed interchangeably.

[120] ILO *Non-standard employment Around the World: Understanding Challenges, Shaping Prospects* (2016) 7. The ILO has noted at 15-18 that the terminology of formal and informal economy is often used in developing countries but has warned that, even though there are overlaps between the terminology of formal/informal economy and standard/non-standard employment, that there are important distinctions between the concepts that warrant separate consideration. Similarly, the ILO has noted at 18-19 that non-standard employment is sometimes referred to as "precarious work": "'precariousness' has its own varying definitions, it is typically understood as work that is low paid, especially if associated with earnings that are at or below the poverty level and variable; insecure, meaning that there is uncertainty regarding the continuity of employment and the risk of job loss is high; with minimal worker control, such that the worker, either individually or collectively, has no say about their working conditions, wages or the pace of work; and unprotected, meaning that the work is not protected by law or collective agreements with respect to occupational safety and health, social protection, discrimination or other rights normally provided to workers in an employment relationship. A defining characteristic of precariousness is that the worker bears the risks associated with the job, rather than the business that is hiring the worker." As such it is evident that the two terms should not be conflated even though there may be

relationship', understood as work that is full time, indefinite, as well as part of a subordinate and bilateral employment relationship".[121] Non-standard employment is therefore an umbrella term that groups together distinct forms of work arrangements that deviate from the standard employment relationship.[122] There is no singularly excepted legal definition of "standard employment".[123] The concept and our understanding of the employment relationship have evolved in reaction to changing economic forces.[124] Our understanding of the concept is still evolving and will continue to evolve in response to these forces.

The situation is also further complicated by the fact that workers are often misclassified under a non-standard work arrangement to avoid paying taxes, benefits, and social protection contributions.[125] There is also the possibility that there may be overlap between two or more forms of non-standard employment.[126] In *Dyokhwe v De Kock*[127] the Labour Court, for example, had to deal with a disguised employment relationship involving a labour broker.[128] Forms of non-standard employment include, but are not limited to; temporary employment that is characterised by a predefined or predictable term; part-time and on-call work; multi-party employment relationship where workers are not directly employed by the company to which they provide their services;[129] disguised employment or dependent self-employment where an appearance is created that is different from reality meant to nullify the protection afforded by labour law; and home work.[130] It has been noted that South African employers have similarly camouflaged employment conditions in order to avoid stringent labour laws.[131]

similarities between them. Precariousness can be found within both standard and non-standard forms of employment.

[121] Above.

[122] Above 9.

[123] Above 10.

[124] Deakin and Wilkinson *The Law of the Labour market: Industrialization, Employment and Legal Evolution* (2005) 86-100.

[125] ILO (n 118) par 18.

[126] ILO (n 120) 20. See also Mandl "Overview of new forms of employment" in Blanpain, Hendrickx and Waas (eds) *New Forms of Employment in Europe* (2016) 7 8.

[127] 2012 33 ILJ 2401 (LC).

[128] Par 1-3.

[129] *Kelly Industrial Ltd v Commission for Conciliation, Mediation and Arbitration Commissioner Edwards* 2015 36 ILJ 1877 (LC) par 1.

[130] ILO (n 120) 8 and Benjamin "An accident of history*: who is (and who should be) an employee under South African labour law"* 2004 *ILJ* 787 789-790.

[131] Benjamin (above) 789.

There are many drivers of non-standard employment. They are multifaceted and vary substantially across countries. Some overarching and interrelated tendencies can be discerned, such as: economic hardship and the growth of the informal and "gig"[132] economy; [133] transformation of economic structures away from agriculture to manufacturing and then to services; the development of new production activities; the proliferation of global supply chains and the internationalisation of the world's production system; the evolving demographic structure of the labour force; the advent of new technologies;[134] political instability and strife (as they produced economic migrants who would accept any form of work);[135] poor law enforcement;[136] cost-saving strategies used by the enterprises; the erosion of principles of decent work; the inability to produce innovative and dynamic policy responses;[137] and the inability of collective bargaining to sufficiently extend protection to non-standard employees.[138]

The European Foundation for the Improvement of Living and Working Conditions (Eurofound) has identified nine broad new forms of employment.[139] They are: employee sharing; job sharing; interim management; casual work; ICT-based mobile work; voucher-based work; portfolio work, crowd employment; and collaborative employment. These new form of employment are not all necessarily non-standard, as they represent new models of the employment between employers and employees (or clients and workers); and new work patterns.[140]

[132] Such as crowdwork and "work-on-demand via apps" such as with the Uber application. See *Uber South Africa Technological Services (Pty) Ltd and NUPSAW and SATAWU* case no WECT12537-16 (CCMA) (unreported) where the CCMA classified uber drivers as employees. See also *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers* case no c449/17 (LC) (unreported) where the Labour Court decided on jurisdictional grounds that Uber drivers are not employees. See in general Mokoena "Are uber drivers employees? A look at emerging business models and whether they can be accomodated by South African labour law" 2016 *ILJ* 1574.

[133] ILO (n 118) par 65.

[134] ILO (n 120) 47.

[135] ILO (n 118) par 30.

[136] Above par 65.

[137] Above par 43.

[138] Above par 65. This is not to say that collective bargaining cannot provide protection to non-standard employees. Indeed more collective bargaining may be needed in certain sectors to prevent the increase of non-standard employment.

[139] Mandl (n 126) 8.

[140] Above.

Employee sharing occurs where many employers jointly hire a worker.[141] Job sharing occurs when a single employer hires two or more workers to both do a specific job. Voucher-based work occurs when the employment relationship is based on a voucher instead on a contract of employment. Interim management refers to a situation where a usually high-skilled worker is hired for a specific period to solve a specific problem or to see to a specific task. Casual work relationships refer to a situation where employers are not obliged to regularly provide workers with work, but can call on them as and when they are needed.[142] ICT-based mobile work refers to work situations where workers work outside of the premises of the employer at various possible locations, using modern technologies. Crowd employment transpires when virtual platforms matches large numbers of buyers and sellers of services or products. Portfolio work refers to independent contractors who provide small amounts of work to a large number of clients. Collaborative employment refers to patterns such as where umbrella organisations provides certain administrative services to self-employed persons; co-working, which involves the sharing of work space and support tasks; and cooperatives, jointly owned enterprises typified by intensive cooperation among its members in the field of production, marketing and management.[143]

In South Africa, as of quarter one of 2017, 11 337 000 are employed in the formal sector (non-agricultural) with 2 681 000 employed in the informal sector (non-agricultural). 6 214 000 persons are unemployed and a further 14 634 000 (including 2 277 000 discouraged work seekers) are not economically active. The unemployment rate stands at 27,7 percent, the employment/population absorption rate at 43,7 percent and the labour force participation rate at 60,5 percent.[144] 32,4 per cent of youth aged 15–24 years were not in employment, education or training.[145] 8 493 000 persons were employed on a permanent contract of employment, 3 408 000 on an unspecified contract and 1 857 000 on a contract of fixed duration.[146]

[141] Above. Two types of this relationship have been identified. Firstly, strategic employee sharing allows many employers to form a network that hires workers who are then sent to individual employees to perform specific tasks. Secondly, *ad hoc* employee sharing occurs when an employee can no longer afford to pay a worker and sends her to work at another company.
[142] Above 9.
[143] Above 10.
[144] Statistics South Africa *Quarterly Labour Force Survey Quarter 1: 2017* (2017) 1.
[145] Above 11.
[146] Above 8.

These statistics indicate that the primary economic drivers of non-standard-employment are present in South African. Courts must be cognisant of this economic reality when deciding who should be party to the employment relationship and who should be not. The interpretation afforded to the term "employee" by the judiciary must be sensitive to the fact that such an interpretation would constitute a form of regulation of the labour market that would have economic consequences.[147]

Non-standard employment has multiple consequences for the working conditions of individual workers, employers, the labour market, the economy and society.[148] Non-standard employment can be both beneficial and undesirable. Non-standard employment can allow workers to enter the labour market, gain work experience and to develop professional skills. Non-standard employment presents an opportunity for those who have left the labour market to re-enter it. Hiring a worker in a temporary capacity can allow employers the opportunity to assess the suitability of the worker for a full-time position. Temporary employment agencies can also have a beneficial effect on the labour market as they attract a wider pool of potential employees and screen workers using more standardized methods, often hire workers who would otherwise have difficulty entering the labour market and provide services such as transportation of workers to the job location.[149]

Workers may also favour temporary employment as it may allow workers the necessary flexibility to balance family or study responsibilities. The ILO has therefore concluded that non-standard employment can, under certain circumstances "contribute to improved employment outcomes and to a better work–life balance, increase overall job performance and life satisfaction, provided that this type of employment is the result of the worker's choice and the job is of good quality."[150] The ILO has also noted, however, that, in most countries, temporary employment is

[147] Van Staden "The role of the judiciary in balancing flexibility and security" 2013 *De Jure* 470 473. Courts should however not be hesitant to attach an interpretation to the concept as, uncertainty in the way the courts interpret labour legislation, will cause government to opt for more regulation (483).
[148] ILO (n 120) 186.
[149] Above.
[150] Above.

generally not a voluntary choice. This is especially true in countries where unemployment is high, as in South Africa.[151]

There are also those who argue that temporary jobs, instead of being stepping-stones into full-time employment, are dead-end jobs in which many workers remain indefinitely or from where they slip into unemployment.[152] They point out that it is not easy to transit from non-standard to regular employment. Part time workers are also generally in a less favourable position than their full-time counterparts when it comes to job security and accompanying payment of severance pay.

The most a fixed-term employee in South Africa can hope for is to show that a dismissal occurred because she reasonably expected the employer to renew a fixed-term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it.[153] If the above circumstances are not met, no dismissal would have taken place and the employee will not be entitled to claim severance pay for a dismissal based on operational requirements.[154]

The ILO has concluded that non-standard jobs are often accompanied by three key outcomes with respect to working hours: "(a) longer hours and overtime, increased work intensity and presenteeism at the current job; (b) having to hold multiple jobs, which may or may not result in overall longer hours; and (c) irregular, unpredictable and atypical hours or work schedules".[155] As such, non-standard employment "can result in clashes of schedules, raised stress levels, higher risk of injury, both at work and outside work, and have a substantial negative impact on an individual's work–life balance".[156] This phenomenon has been observed in the South African nursing profession.[157]

[151] Above.
[152] Above 187.
[153] S 186(1)(*b*) of the LRA. See Gericke "The regulation of successive fixed-term contracts: lessons to be gleamed from foreign and international law" 2016 *TSAR* 94.
[154] S 41 of the BCEA.
[155] Above 196.
[156] Above 199.
[157] Rispel and Blaauw "The health system consequences of agency nursing and moonlighting in South Africa" 2015 *Global Health Action* 1 1–14.

Workers in non-standard employment also have a higher risk of their health being negatively affected by work-related conditions.[158] They are more prone to injury-related risks and accidents, mental health and harassment risks, exposure to poorer working conditions and hazards and fatigue issues.[159] This is so as non-standard workers are often employed for short periods and are therefore inexperienced; and poorly trained and supervised. There are often ineffective procedures and communication between the organisation and the workers and ineffective occupational health and safety management systems in place. Non-standard workers are often ill informed about their legal rights and the obligations of the employer and that there are often non-compliance with the obligations imposed upon the employer as well as poor regulatory enforcement.[160]

Non-standard workers are often insufficiently protected by social security coverage.[161] This may be as certain categories of non-standard workers are explicitly excluded;[162] they are excluded per implication[163] or because of poor regulatory enforcement and unawareness of social security rights of workers. In South Africa, the employers of non-standard workers are also less likely to contribute to a pension fund and a medical aid.[164] Non-standard workers generally benefit less from training opportunities, as they are perceived to be less career-orientated.[165]

As to the fundamental principles and rights at work,[166] the ILO has noted that non-standard workers are generally at a more disadvantaged position than their standard

[158] ILO (n 120) 199.
[159] Above 200.
[160] Above 203.
[161] Above 204.
[162] This was the case in South Africa, for purposes of unemployment benefits, for migrant workers who were required to repatriate after their contract of employment, apprentice or learnership had terminated. The legislature removed this requirement of s 3 of the Unemployment Insurance Act 63 of 2001 in s 1 of the Unemployment Insurance Amendment Act 10 of 2016. Certain civil servants are however still excluded from the ambit of protection.
[163] As in the case of minimum threshold requirements in terms of hours worked or earnings such as those applicable to unemployment benefits in South Africa (less than 24 hours a month) – s 3 of the Unemployment Insurance Act 63 of 2001.
[164] See Bhorat, Mayet, Tian and Tseng *The Determinants of Wage Inequality in South Africa, Country Case Studies on Inequality* (2013).
[165] ILO (n 120) 208.
[166] Refer to Chapter 8 n 18 for a detailed explanation of this principle. They are: 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 and occupation.

worker counterparts.[167] Although the eight core conventions[168] which give effect to these fundamental or core rights are meant to apply to workers in the widest possible sense,[169] it is commonplace that workers employed in non-standard forms of employment are often more vulnerable than their standard worker counterparts.

The ILO has noted that "the key challenge in promoting collective bargaining among non-standard workers is that ... they may not be able to exercise their fundamental rights, even if in theory they should be able to do so".[170] This is so as these workers "often have a limited attachment to the same employer and to the employees of the same enterprise" (and may have divergent interests), or are reluctant to organise because they fear retribution from their employers.[171]

Some legal restrictions also disproportionately affect non-standard workers. In *Consolidated Workers' Union of South Africa v Commission for Conciliation Mediation and Arbitration,*[172] for example, employees employed by a temporary employment service working at Mogalakwena Mine staged a protected strike. The CCMA ruled that the striking employees were permitted to stage pickets at the premises of the temporary employment agency, 30 kilometres from the mine, but not at the mine.[173] The Labour Court set aside the ruling because the Commissioner had failed to consider the proper place for picketing.[174]

The link between forced labour and non-standard forms of employment (especially in regard to temporary workers and their recruitment) has also been established, chiefly in the case of migrant workers.[175] These workers are often required to work only for a specific employer. As the visas of these workers are often imprinted with these details, migrant workers are effectively disallowed from resigning at pain of being

[167] ILO (n 120) 208 ao.
[168] The Freedom of Association and Protection of the Right to Organize Convention, 1948, the Right to Organise and Collective Bargaining Convention, 1949, the Forced Labour Convention, 1930 and the Abolition of Forced Labour Convention, 1957, the Minimum Age Convention, 1973, the Worst Forms of Child Labour Convention, 1999, the Equal Remuneration Convention, 1951 and the Discrimination (Employment and Occupation) Convention, 1958.
[169] Refer to Chapter 9 §2.
[170] Above 212.
[171] Above.
[172] 2013 34 ILJ 1966 (LC).
[173] Par 5.
[174] Par 31.
[175] ILO (n 120) 215.

deported. As a result, the rights of these workers are often abused. In addition, forced labour and child labour practices, including human trafficking, are often concealed through the use of work arrangements involving multiple parties.[176]

The ILO has noted that non-standard employees are particularly vulnerable to discriminatory practices. The EEA[177] prohibits unfair discrimination in terms and conditions of employment between employees performing the same or substantially the same work or work of equal value. Despite this, the ILO has noted that available evidence from other countries with similar legislative prohibitions suggest that the earnings of workers in non-standard employment differs from those of comparable standard workers.[178] As such, the question if non-standard employees are paid differently to standard employees should be considered empirically and not legally.

What is important for our purposes is not to determine if non-standard employees may be paid less in terms of the law, but rather if they are, in practice, paid less. Workers employed by temporary employment agencies are generally paid less than their counterparts who are paid directly by the client.[179] In South Africa, wage premiums for part-time female workers amount to about 40 per cent.[180] There are also instances where part-time employment are used as a tool to circumvent the statutory obligations and objectives of the Employment Equity Act[181] as workers employed on a fixed term contract of employment are often not counted by organisations for purposes of employment equity targets.[182]

Non-standard employment has consequences for the employers of those workers. As businesses are subject to fluctuations in demand for their goods and services, they would prefer flexibility in their workforce so that they do not have to employ more staff than necessary when demand falls. They also need sufficient numbers of

[176] Above.
[177] S 6(4) of the EEA. See Ebrahim "Equal pay for work of equal value in terms of the Employment Equity Act 55 of 1998: Lessons from the International Labour Organisation and the United Kingdom" 2016 *PER* 1 and Laubscher "Equal pay for work of equal value: a South African perspective" 2016 *ILJ* 804.
[178] ILO (n 120) 189.
[179] Above 192.
[180] Above 193.
[181] A5 of 1998.
[182] *Auf Der Heyde v University of Cape Town* case no C603/98 (LC) (unreported) par 70.

permanent staff so as to ensure longevity. As such businesses seek a balance between flexibility and security.[183]

There is also a cost advantage to employing non-standard workers as they are often paid less than standard employees and as it is often not necessary to pay non-standard workers severance pay or to make social security contributions for them.[184] The simplification of tasks brought about by technological changes has also meant that tasks can be performed by less skilled non-standard workers.[185] Non-standard work arrangements can have an effect on the recruiting, training and managing workers;[186] the attitude of the non-standard employees towards the enterprise;[187] and on organizational performance, productivity and innovation.[188]

Non-standard employment has consequences on the macroeconomic level.[189] The ILO has noted, for example, that reforms liberalizing the use of full time contracts with the aim of raising employment levels can lead to the reduction of unemployment in a good macroeconomic climate. These gains are almost always short-lived as, "[i]n economic downturns, temporary contracts are not renewed, which means that the employment gains from relaxing the rules of using fixed-term contracts are transitory, and can even lead to higher volatility in labour markets". Because of the lower costs associated with hiring non-standard employees, employers will inevitably start to hire temporary workers for permanent tasks. Full time contract liberalization therefore leads to marginal and short-lived gains in employment, but also to an exchange of permanent employment for temporary employment.[190]

The coexistence of standard and non-standard workers in a single economy will lead to labour marker segmentation where one segment enjoys greater protection, greater wages and working conditions than the other segment, which could ultimately lead to unstable labour markets.[191] The proliferation of non-standard forms of employment

[183] ILO (n 120) 158.
[184] Above 161.
[185] Above 164.
[186] Above 171.
[187] Above 174.
[188] Above 178.
[189] Above 217.
[190] Above 218.
[191] Above 219.

can also have negative effects on the adoption of new technology, efficiency of labour relocation, labour productivity and economic growth.[192]

Ultimately, non-standard employment will also have broad social consequences such as the inability to get access to credit and housing,[193] a propensity towards delaying marriage and starting a family and lower fertility rates.[194] Non-standard migrant workers are often housed in dormitories and therefore experience a loss of connection with their social networks; loved-ones and hometowns as well as finding it difficult to (re)integrate into mainstream society.[195]

4.2 Remedial policies

As globalisation pressures forces ever-higher numbers of persons into non-standard forms of employment, the legislative response has primarily been threefold. First, the legislature has sough to provide more guidance of who should be regarded as employees and who should not. To this end the legislature has adopted a definition of employment, introduced a presumption of employment and a code of good practice as to who is an employee. Additionally, section 23(1) of the Constitution provides protection to non-standard employees who do not fit the definition of employee as provided for in labour legislation, because section 23(1) grants the right to "everyone". Sections 198 and 198A of the LRA is also designed to identify the employer of a placed worker under the LRA. These interventions have already been discussed in Chapter 5 of this study.

Second, the legislature has prohibited or imposed strict conditions on certain employment relationships. So, the employment of more vulnerable, lower-paid workers by a temporary employment service are restricted to situations of genuine and relevant temporary work, and various measures are intended to protect workers employed in this way.[196] An employer is permitted to employ an employee on a fixed

[192] Above 221.
[193] Above.
[194] Above 222.
[195] Above 223.
[196] Ss 189 and 189A. See Aletter and Van Eck "Employment agencies: are South Africa's recent legislative amendments compliant with the International Labour Organisation's standards?" 2016

term contract or successive fixed term contract for up to six months.[197] An employee may be employed on a fixed term contract for longer if the nature of the work for which the employee is engaged is of limited or definite duration or the employer can demonstrate any other justifiable reason for fixing the term of the contract.[198] If this is not done, employment will be deemed to be of indefinite duration.[199] An employer must treat a part-time employee[200] on the whole not less favourably than a comparable full-time employee doing the same or similar work.[201]

Third, in term of section 83 of the Basic Conditions of Employment Act,[202] the Minister may, on advice of the Employment Conditions Commission and by notice in the Government Gazette, deem any category of persons specified in the notice to be employees for the purposes of the whole or any part of the BCEA or any other employment law or sectoral determination.[203]

It is foreseen that as more persons are forced into or choose to work in non-standard forms of employment, that the legislature would be compelled to adopt more legislative interventions.[204] Le Roux has argued that there will inevitably be pushback against these interventions by unscrupulous employers, "pushing more and more

South African Mercantile Law Journal 285 287 for a historic exposition of the legislative responses in respect of private employment agencies.

197 S 189B. In terms of s 189B(2)(*b*) he section does not apply to an employer that employs less than 10 employees or an employer that employs less than 50 employees and whose business has been in operation for less than two years. These exclusions do not apply if the employer conducts more than one business or the business was formed by the division or dissolution for any reason of an existing business.

198 S 189(3)(*a*)-(*b*).

199 S 189B(5).

200 S 189C(1)(a) defines a part-time employee as "an employee who is remunerated wholly or partly by reference to the time that the employee works and who works less hours than a comparable full-time employee".

201 Refer to Van Eck "Employment agencies: international norms and developments in South Africa" 2012 *The International Journal of Comparative Labour Law and Industrial Relations* 29 for an exposition of how international norms have contributed to the South African approach of regulating certain forms of precarious work (such as agency work), instead of banning it outright. In *Africa Personnel Services Pty Ltd v Government of Republic of Namibia* 2011 32 ILJ 205 (Nms) (Namibia) the Supreme Court of Appeal of Namibia held that a blanket prohibition on labour broking is unconstitutional under their legal framework. See Van Eck "Temporary employment services (labour brokers) in South Africa and Namibia" 2010 *Potchefstroomse Elektroniese Regsblad* 107.

202 75 of 1997.

203 Fourie (n 1) 125 has asked "why the act does not regulate the position of non-standard workers directly, and whether or not it is wise to leave a matter of such importance up to the discretion of the Minister to adopt measures when he/she deems it appropriate".

204 Refer to Chapter 2 where it is argued that the employment relationship will, in future, become primarily regulated by legislation, if this is not already the case.

workers beyond the reach of protective labour legislation".[205] Although the express purpose of recent legislative amendments have been to ensure that "vulnerable categories of workers receive adequate protection and are employed in conditions of decent work",[206] it is foreseen that legislative amendments will soon be required again to deal with non-standards forms of employment new models of employment between employers and employees (or clients and workers); and new work patterns.

4.3 Approaches adopted by the judiciary

The chief jurisprudential response has been to interpret the concept "employee" extensively.[207] To this end, the courts have also accepted that in most cases[208] the existence of a valid contract of employment is not a prerequisite for the existence of an employment relationship.[209] The courts have similarly also interpreted legislative provisions designed to extend adequate protection to vulnerable categories of workers liberally. This point can be made with reference to the interpretation given to section 197 and section 198A of the LRA.

The purpose of section 197 of the LRA is to protect the employment of workers and to facilitate the sale of businesses as going concerns by enabling the new employer to take over the workers.[210] This section has caused challenging interpretative difficulties for South African courts.[211] Section 197(1)(*b*) of the LRA defines "transfer" as follows: "the transfer of a business *by* one employer ('the old employer') to another employer ('the new employer') as a going concern."[212] In

[205] Le Roux "Employment: a Dodo, or simply living dangerously?" 2014 *ILJ* 30 33.
[206] Memorandum of Objects on Labour Relations Amendment Bill, 2012.
[207] See Chapter 4 § 7.2.
[208] In *Vermooten v Department of Public Enterprises* Case no JA91/2015 (LAC) (unreported) par 26 it was found that held that, when parties in a relatively equal bargaining position choose to enter into an agreement that excludes the contract of employment and such an agreement was not for an illegal purpose, then in the absence of any overriding policy considerations, neither a tribunal nor a court may ignore its terms.
[209] *Discovery Health Limited v CCMA* 2008 29 ILJ 1480 (LC) and *"Kylie" v CCMA* 2010 31 ILJ 1600 (LAC).
[210] *National Education Health and Allied Workers Union v University of Cape Town* 2003 2 BCLR 154 (CC) par 54.
[211] Refer to *South African Municipal Workers' Union v Rand Airport Management Co Ltd* 2005 3 BLLR 241 (LAC); *Crossroads Distributions (Pty) Ltd t/a Jowells Transport v Clover SA (Pty) Ltd* 2008 6 BLLR 565 (LC); *Chemical Energy Paper Printing Wood and Allied Workers Union v Print Tech (Pty) Ltd* 2010 31 ILJ 1850 (LC); and *Zikhethele Trade (Pty) Ltd v COSAWU* 2008 2 BLLR 163 (LAC).
[212] Own emphasis.

NEHAWU v UCT[213] the Constitutional Court held that the interpretation of section 197 of the LRA in particular and labour matters in general was to proceed as follows:

> "The proper approach to the construction of section 197 is to construe the section as a whole and in the light of its purpose and the context in which it appears in the LRA. In addition, regard must be had to the declared purpose of the LRA to promote economic development, social justice and labour peace. The purpose of protecting workers against loss of employment must be met in substance as well as in form. And, as pointed out earlier, it also serves to facilitate the transfer of businesses."[214]

It is generally accepted that section 197 applies to most cases of outsourcing, but the application of the section to second-generation outsourcing has been more problematic precisely because of the definition of transfer as contained in section 197(1)(b) of the LRA and the use of "by" therein. This problem was perhaps best explained in *COSAWU v Zikhethele Trade (Pty) Ltd*:[215]

> "A mechanical application of the literal meaning of the word 'by' in section 197(1)(*b*) would lead to the anomaly that workers transferred as part of first generation contracting-out would be protected whereas those in second generation scheme [sic] would not be, when both are equally needful and deserving of the protection. The possibility for abuse and circumvention of the statutory protections by unscrupulous employers is easy to imagine. … I am in agreement ... that section 197(1)(*b*) might be better interpreted to apply to transfers 'from' one employer to another, as opposed to only those effected 'by' the old employer."[216]

In *South African Airways Pty Ltd v Aviation Union of South Africa*[217] the Supreme Court of Appeal was unwilling to accept that such "abuse" (as the Court termed it) of the plain meaning of the section was warranted.[218] The approach of the Supreme Court of Appeal was decidedly reminiscent of outdated modes of statutory interpretation that has been debunked in South Africa. The following dictum serves as a textbook example of the old "golden rule" of statutory interpretation with its roots in both literalism and intentionalism. The Court stated that:

> "The choice of language in section 197 is plain and unambiguous. By the deliberate use of the word 'by', the legislature showed that it intended section 197 to apply to a situation where there are at least two positive actors in the process. The ordinary meaning of the word 'by' requires positive action from the old employer who transfers the business to the new employer."[219]

[213] N 210 above.
[214] Par 62.
[215] N 211 above.
[216] Par 29.
[217] 2011 3 SA 148 (SCA).
[218] Par 32.
[219] Par 31.

The Supreme Court of Appeal did not only show contempt for contemporary developments in statutory interpretation in South Africa, but also for established law on how this very section of the LRA was to be interpreted as enunciated in *NEHAWU v UCT*. Two further points of criticism can also be noted against the approach of the Supreme Court of Appeal.[220] Firstly, it may be said that the SCA commits the error of "disintegration" where the Court "turns a blind eye to the systematic interconnectedness of text-components and tries to understand them in splendid isolation from one another". Additionally the SCA may be criticised for its excessive peering at an individual word or words.[221]

The Constitutional Court[222] however held that it is "unnecessary to equate the word 'by' with 'from'".[223] But even though the Court could not read "by" to mean "from" it would be wrong to categorise its mode of interpretation as literalist. In fact the Court held that section 197 of the LRA does apply to second-generation outsourcing. What the Court does is to read the provision purposively as they are obligated to do in terms of *NEHAWU* but also within the context of the whole provision:

> "Determining the operation of the section with reference to a single word is not the correct approach to its interpretation. The whole section must be read in its proper context. Reading section 197 as a whole in the context of where it is located in the LRA and paying sufficient attention to its purpose and the objects of the LRA, reveal that it applies to any transaction that transfers a business as a going concern."[224]

The Court attached a meaning to the provision that may not have been the first meaning that springs to mind when reading the provision, but the words are still reasonably capable of bearing that meaning.

The meaning of "deemed" in section 189A of the LRA has given rise to interpretive difficulty.[225] The LRA provides that employees deemed to be an employee of the client "must be treated on the whole not less favourably than an employee of the

[220] Van Staden (n 147) 479 n 66.
[221] Du Plessis "Interpretation of Statutes and the Constitution" in *LexisNexis* (ed) *Bill of Rights Compendium* (2012) par 2C37 and 2C40.
[222] *Aviation Union of South Africa v South African Airways (Pty) Ltd* 2012 1 SA 321 (CC).
[223] Par 81.
[224] Par 55.
[225] Benjamin "Restructuring triangular employment: The interpretation of section 198A of the Labour Relations Act" 2016 *ILJ* 28 28 and Aletter *Protection of Agency Workers in South Africa: An Appraisal of Compliance with ILO and EU Norms* (2016 thesis University of Pretoria) 155.

client performing the same or similar work, unless there is a justifiable reason for different treatment".[226] In *Assign Services Pty Ltd v Krost Shelving and Racking Pty Ltd*[227] trade union National Union of Metalworkers of South Africa (NUMSA) and a temporary employment service, Assign Services, submitted a test case to the Commission for Conciliation, Mediation and Arbitration (hereafter the CCMA) to gain interpretive clarity on the meaning of "deemed". The question arose if the client becomes the sole employer of the workers – the "sole employment approach" (contended by NUMSA) or if the TES continues to be the employer for all purposes and may, for instance, terminate the employee's services on behalf of the client – the "dual employment approach" (averred by Assign).[228]

In support of the "dual employment approach" it was argued that the word "deemed" has no technical or ordinary meaning and that it's meaning must be determined from its context and according to the ordinary canons of construction.[229] Two contextual factors were relied on to support the argument that dual employment would establish more protection for workers: Firstly, it was pointed out that subsequent to the three-month period the deeming provision does not end the agreements between the employment agency and the client nor the employment agency and the workers.[230] Secondly, it was pointed out that employment agencies and clients are jointly liable for breaches of the LRA and the BCEA,[231] and that such liability was only possible in circumstances of dual employment.[232]

In support of the "sole employment approach" it was submitted that the word "deem" is often used in a loose sense, and that it could easily be substituted with "is". The dictionary meaning of "deem" was considered and it was argued that it means "regard as being". It was argued that "deemed" creates a legal fiction that "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".[233] In response to the

[226] S 189A(5) of the LRA.
[227] 2015 36 ILJ 2408 (CCMA).
[228] Benjamin (n 225) 28.
[229] Par 4.1.
[230] Par 4.4.
[231] S 198(4A) of the LRA.
[232] Par 4.5.
[233] Par 4.2.

argument that employment agencies and clients are jointly liable for breaches of the LRA and the BCEA, and that such liability was only possible in circumstances of dual employment, it was argued that "the section merely provides for an opportunity for an employee to institute proceedings against a party that is liable". [234]

The CCMA held that the correct interpretation is the one that will provide greater protection for the vulnerable class of employees.[235] This approach is clearly in line with the purposes and values advanced by the legislative provision. The Memorandum of Objects on Labour Relations Amendment Bill, 2012 states that the main thrust of the amendments is to restrict the employment of more vulnerable, lower-paid workers by a temporary employment service to situations of genuine and relevant temporary work and to protect workers employed in this way. As such the CCMA interpreted "deemed" to mean, "that the client becomes the sole employer of the placed workers for purposes of the LRA, provided that they earn below the threshold and that the three-month period has lapsed".[236]

The Labour Court[237] found that "[t]he issue that arises is whether the [temporary employment service] continues to have a relationship with the worker and, if so, whether the relationship remains one of employment".[238] The Court criticised the characterisation of the dispute in terms of either the label "sole employment" or "dual employment". The label "sole employment", said the Court, was misleading as the contractual relationship between the workers and the temporary employment service, and the ensuing rights and obligations embodies therein, remained in force.[239] The label "dual employment" was found to be misleading and "a fertile source of confusion".[240] This is because the client does not become privy to the contract between the employment service and the worker nor does it become invested with the rights and obligations that are contained in that contract.[241]

[234] Par 4.7.
[235] Par 5.8.
[236] Par 6.1.
[237] *Assign Services Pty Ltd v CCMA* 2015 36 ILJ 2853 (LC).
[238] Par 1.
[239] Par 3.
[240] Par 4 and 26.
[241] Par 5.

The Court found that the only issue was if the agency continues to be an employer, together with the adjoining rights and responsibilities, for purposes of the LRA and not for the rights and responsibilities flowing from the contractual relationship:[242]

> "There seems no reason, in principle or practice, why the TES should be relieved of its statutory rights and obligations towards the worker because the client has acquired a parallel set of such rights and obligations. The worker, in contracting with the TES, became entitled to the statutory protections that automatically resulted from his or her engagement and there seem to be no public policy considerations, such as pertain under the LRA's transfer of business provisions (s 197), why he or she should be expected to sacrifice them on the fact that the TES has found a placement with a client, especially when (as is normally so) the designation of the client is within the sole discretion of the TES."

Because there was no factual dispute before the Court, the Court refused to substitute the CCMA award whilst setting aside the CCMA decision.[243] As such, interpretation of the "deemed" provision remained fundamentally unclear.[244] In light hereof Aletter proposed that the purpose of the "deemed" provision is to create one employment relationship and one contract of employment.[245] Firstly, the author argues that, if two relationships were intended, the legislator would have differentiated between the duties of the employment agency and the client.[246] Benjamin has argued that a single employer should be identified so as to avoid irresolvable conflicts when it comes to matters of control over an employee.[247] Secondly, it is essential to note that the "deemed" provision was introduced into the LRA so as to provide increased protection for vulnerable groups of employees. Thirdly, the worker will still be entitled to institute proceedings against either the employment agency or the client or both in terms of section 189(4A)(*a*) of the LRA, even though not dually employed.[248]

The Labour Appeal Court,[249] had no problem in dealing with the labels rejected by the Labour Court and endorsed the "sole employment approach",[250] whilst rejecting the "dual employment approach" as "not consonant with the context of section 198A and the purpose [thereof]". The Court held that the purpose of the measure is to

[242] Par 12.
[243] Par 18.
[244] Aletter (n 225) 161 and 163. For a detailed critique of the decision see Benjamin (n 225) 28.
[245] See Aletter and Van Eck "Employment agencies: are South Africa's recent legislative amendments compliant with the International Labour Organisation's standards?" 2016 *South African Mercantile Law Journal* 285.
[246] Aletter (n 225) 163.
[247] Benjamin (n 225) 36.
[248] Aletter (n 225) 164.
[249] *NUMSA v Assign Services* 2017 38 ILJ 1978 (LAC).
[250] Par 38.

ensure that employees "are not treated differently from the employees employed directly by the client" and that the provision "should not be interpreted to support the contention that the deemed employees are employed by both the [temporary employment service] and the client".[251]

The purpose is not, said the Court, to transfer the contract of employment from the temporary employment service to the client.[252] The Court rejected the submission that because employment agencies and clients are jointly liable for breaches of the LRA and the BCEA, that such liability was only possible in circumstances of dual employment. The Court found that this was only a measure to reinforce the protection of vulnerable workers, and consequently that these provisions served the same legislative purpose.[253] The Court emphasised that the employment relationship between the placed worker and the client arose by legal operation, irrespective of any contract that may exist between the placed worker and the employment service.[254]

5 *Conclusion*

A fundamental insight to the teleological model of statutory interpretation is that it is empty without a contextual methodology. Without contextual considerations, speak of teleological interpretation is nothing but lip service where the text or (narrow) purpose of a statutory provision is allowed to dominate. The problems with literalism has been pointed out elsewhere,[255] but it should also be pointed out that merely giving effect to the narrow purpose of a provision without contextualising the purpose thereof can be counterproductive to the Constitution's ethos of transformation. Importantly, interpreters will have to have regard to the political and constitutional order, society and its legally recognised interests and the international legal order.[256] The historic exclusion of certain races from the employment relationship in South Africa and the global rise in non-standard forms of employment are the "mischief" that our legislative scheme is designed to remedy.

[251] Par 40.
[252] Par 43.
[253] Par 41.
[254] Par 45.
[255] Chapter 3 § 3.3 and 4.2.
[256] Du Plessis (n 6) 32-159 and 32-166.

In the first instance, interpreters will have to have regard to the history of racial exclusion of the majority of South Africa's population prior to the adoption of South Africa's first justiciable Constitution. Although definitions of "employee" in labour law are racially neutral,[257] this fact would not in its own prevent the racial exclusion of certain category of workers on racial (or any other prohibited) grounds. It is therefore imperative for interpreters to be cognisant of the history of racial exclusion as well as the judicial and legislative responses that have been adopted to cure this societal mischief. Interpreters must also be cognisant of the interrelationship between the law relevant to determining the parties to the employment relationship and discrimination law.

Similarly, interpreters are mandated to have an effective knowledge of the global drivers of change affecting the employment relationship. Chief amongst these, interpreters must understand the phenomenon of non-standard forms of employment and new models of the employment between employers and employees (or clients and workers); and new work patterns. As these phenomena serve to further complicate the identifications of parties to the employment relationship and push workers outside of the protection afforded thereby, further legislative interventions will inevitably be required. Interpreters will be necessitated to also have cognisance of the current judicial and legislative responses in order to respond effectively to the changing nature of work.

[257] Refer to Chapter 5 §3.1.

CHAPTER 7

The values dimension

"Constitutional principles ... are broad constitutional strokes on the canvas of constitution making in the future."[1]

1 *Introduction*

The fourth element of teleological interpretation requires the interpreter to have regard to the societal values that are to be advanced in giving meaning to a statutory provision. Within the teleological model, such values or *telos* are arguably the most important considerations.[2] This approach was illustrated by the Commission for Conciliation, Mediation and Arbitration (hereafter the CCMA) in *Lumka v Premier: Eastern Cape Province*[3] where the CCMA had to determine if members of the Eastern Cape Youth Commission were employees of the Premier of the Eastern Cape for purposes of the Labour Relations Act (the LRA).[4] The Commissioner considered the purpose of the LRA as well as constitutional rights to rule that an employment

1 *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the*

2 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors Pty Ltd. In re: Hyundai Motor Distributors Pty Ltd v Smit* 2001 1 SA 545 (CC); *National Education Health and Allied Workers Union v University of Cape Town* 2003 3 SA 1 (CC); *Bato Star Fishing Pty v Minister of Environmental Affairs* 2004 4 SA 490 (CC); *African Christian Democratic Party v Electoral Commission* 2006 3 SA 305 (CC); *Department of Land Affairs v Goedgelegen Tropical Fruits Pty Ltd* 2007 6 SA 199 (CC); *Aviation Union of South Africa v South African Airways Pty Ltd* 2012 1 SA 321 (CC); *Dengetenge Holdings Pty Ltd v Southern Sphere Mining and Development Company Ltd* 2014 5 SA 138 (CC); and *Cool Ideas 1186 CC v Hubbard* 2014 4 SA 474 (CC).

3 2008 29 ILJ 783 (CCMA).

4 66 of 1995.

relationship in terms of the LRA had been established.[5] This approach is undoubtedly correct, the values and purposes which should inform our understanding of who should be entitled to the protection afforded by labour law, stem from the relevant act(s) (such as the LRA), the Constitution of the Republic of South Africa, 1996 and indeed from other public law values that form part of the constitutional order as a whole. The purpose of the LRA is to "advance economic development, social justice, labour peace and the democratisation of the workplace".[6] The objects of the LRA are: "to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution".[7]

Courts must prefer interpretations of the term "employee" which advance the key societal aims of human dignity, equality, the advancement of human rights and freedoms, non-racialism and non-sexism, supremacy of the Constitution and the rule of law.[8] The denial of labour protection, due to a person not being deemed an employee, will impact upon a person's dignity, will lead to differential treatment and will impact upon the person's freedom. Under these conditions, the achievement of social justice is not possible. The Constitutional Court has therefore held that "[the] Constitution commands us to strive for a society built on the democratic values of human dignity, the achievement of equality and freedom".[9] The Constitution expresses itself on the ideals that our society deem worthy of aspiring to.[10]

This chapter will consider public law values[11] that are to be advanced when interpreting the term "employee" and identifying the parties to the employment

5 Par 88. So too, in *National Union of Metalworkers of South Africa v Bader Bop Pty Ltd* 2003 3 SA 513 (CC) the Constitutional Court had to decide between two interpretations of the LRA – one limiting the right to strike and one which did not. Because there was no justification for the limitation on the right, the Court interpreted the LRA in a manner that accorded with the right. In *Rustenberg Platinum Mines v CCMA* 2007 1 SA 576 (SCA) it was argued that the interpretation given by the SCA to the LRA endorsing the reasonable employer test in determining the fairness of dismissals did not accord with s 23(1) of the Constitution because that right requires a balancing of both employer and employee interests and not just a preference for the interests of one party over the other.

6 S 1 of the LRA.

7 Above.

8 S 1 of the Constitution.

9 Minister of Finance v Van Heerden 2004 6 SA 121 (CC) par 22.

10 De Vos and Freedman (eds) South African Constitutional Law in Context (2014) 59.

11 The term values or telos are better understood in terms of Dworkin's distinction between principles (public law values) and rules, rather than the distinction between rights and values. Recall that in terms of Dworkin's thesis, rules either apply or do not apply, whereas principles can be relevant to a given case without being decisive – principles will always carry some weight but not conclusive

relationship. They are: dignity, equality, social justice, fair labour practices, security of employment (including dismissal protection and social protection), labour market flexibility, and freedom of contract. This is not to say that other values may not impact upon identifying the parties to the employment relationship, as there are many public law values that are potentially applicable. Teleological interpretation requires that statutes must be understood in light of their (broad) purpose. It is irrevocably presumed that the purpose of all legislation is to advance broader societal purposes. Teleological interpretation endeavours to advance the values of the legal order.[12]

2 *Dignity*

Human dignity is a key constitutional tenet. In *S v Makwanyane*[13] dignity was described as *the* public law value upon which our constitutional order was founded.[14] Dignity is the first mentioned value in the founding provisions of the Constitution,[15] which contains seven references to this key societal value.[16] Section 10 states that "[e]veryone has inherent dignity and the right to have their dignity respected and protected". Dignity is also one of just two rights in the Constitution (the other being the right to life) which is entirely non-derogable, albeit in the context of a state of emergency.[17] The Constitution itself makes no provision to clarify the meaning of "human dignity" and, as such, it has been left to the courts and their powers of interpretation to give life to this central concept.

The value of dignity is important to the question as to who should be regarded as party to the employment relationship because a person's work is part of one's identity and is also constitutive of one's dignity. The label of "employee" is a badge of dignity and personhood for all workers. In *Affordable Medicines Trust v Minister of*

weight, and judges will have to decide how much weight a principle should carry (taking into consideration other competing principles) when applied to the circumstances of a given case. In Dworkin's view it is possible for constitutional rights to constitute "principles" or "public law values". Recall that in terms of s 36 of the Constitution all rights may be limited and s 36 provides mechanisms to assist in discerning the correct balance between various constitutional principles.

12 See Chapter 4 above.

13 1995 3 SA 391 (CC).

14 Par 58 and 328.

15 S 1(*a*) of the Constitution.

16 Ss 7(1), 10, 35(2)(e), 36(1), 37 and 39(1)(a) of the Constitution.

17 S 37 of the Constitution.

Health[18] the Constitutional Court commented on the importance of the relationship between work and the human personality. For the Court, a person's work is part and parcel of a person's dignity. The Court stated that "there is a relationship between work and the human personality as a whole".[19] As a consequence, loss of employment, insufficient social protection in circumstances of unemployment and the inability to be admitted to the employment relationship in the first place can have severe consequences for the dignity of such a person, their family and society at large.[20]

There are at least five primary definitions of dignity in the jurisprudence of the Constitutional Court.[21] They are: the individual as an end in herself, equal concern and equal respect, self-actualisation, self-governance and collective responsibility for the material conditions for individual agency.[22] The first conception of dignity requires the interpreter to have regard to the history of racial exclusion[23] of the vast majority of South Africans prior to the advent of constitutional democracy.[24] This conception of dignity makes it clear that dignity is umbilically linked to, not only Immanuel Kant's second formulation of the categorical imperative ("act in such a way that you always treat humanity, whether in your own person or in the person of

18 2006 3 SA 247 (CC).

19 Par 59.

20 In *Khosa v Minister of Social Development; Mahlaule v Minister of Social* Development 2004 6 SA 505 (CC) par 76 the Constitutional Court held that the exclusion of permanent residents from the class of persons entitled to a variety of social security grants was unconstitutional: "The exclusion of permanent residents in need of social-security programmes forces them into relationships of dependency upon families, friends and the community in which they live, none of whom may have agreed to sponsor the immigration of such persons to South Africa. Apart from the undue burden that this places on those who take on this responsibility, it is likely to have a serious impact on the dignity of the permanent residents concerned who are cast in the role of supplicants."

21 Woolman "Dignity" in Woolman, Roux and Bishop (eds) *Constitutional Law of South Africa* (2014) par 36.2.

22 Above.

23 For an account of the racial exclusion of workers, see Chapter 6 § 3.1.

24 Ackermann "The legal nature of the South African constitutional revolution" 2004 *New Zealand Law Review* 650 650 explains this concept as follows: "it is permissible and indeed necessary to look at the ills of the past which [the Constitution] seeks to rectify and in this way try to establish what equality and dignity mean? What lay at the heart of the apartheid pathology was the extensive and sustained attempt to deny to the majority of the South African population the right of self-identification and self-determination. Who you were, where you could live, what schools and universities you could attend, what you could do and aspire to, and with whom you could form intimate personal relationship was determined for you by the state. That state did its best to deny to blacks that which is definitional to being human, namely the ability to understand or at least define oneself through ones own powers and to act freely as a moral agent pursuant to such understanding of self-definition. Blacks were treated as means to an end and hardly ever as an end in themselves; an almost complete reversal of the Kantian imperative and concept of priceless inner worth and dignity".

another, never simply as a means, but always at the same time as an end"),[25] but also to South Africa's history of racial exclusion.[26] The other four conceptions of dignity are all reformulations of Kant's categorical imperative.

The second conception of dignity (equal concern and equal respect) is also based on Kantian moral law. Kant stated that "[a]ny action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law".[27] This negative obligation means that others should not merely be treated as a means to an end and to recognise that others have the ability to act as autonomous moral agents.[28] It has been argued that human dignity requires society to respect the equal worth of the poor by marshalling its resources to redress the conditions that perpetuate their marginalisation.[29] Ackermann has affirmed that the purpose of our constitutional order is "the establishment of a society in which all human beings will be accorded equal dignity and respect".[30] The Constitutional Court has confirmed in *Hoffmann v South African Airways*[31] that "under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity".[32]

The third conception of dignity requires that dignity secure the space for self-actualisation for all. The Constitutional Court in *Ferreira v Levin NO; Vryenhoek v Powell*[33] held that "[h]uman dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their 'humanness' to the full extent of

25 Kant *Groundwork of the Metaphysics of Morals* (1785) (trans and ed Wood 2002) 46–47. Refer to Hill "Humanity as an end in itself" 1980 *Ethics* 84 for a detailed exploration of the principle. According to the author humanity is not a relative end but rater an objective end or an end in itself. An end, in turn, means that which serves the will as the "(subjective) ground of its self-determination". Humanity is also regarded as a self-existent and objective end (88). Objective ends are "a supreme condition limiting the use of every means", "a condition limiting all merely relative and arbitrary ends", and "a limit on all arbitrary treatment".

26 See Chapter 6 § 4.1.

27 Kant *Metaphysics of Morals* (1797) (trans Gregor 1991).

28 Woolman (n 21) 36-10.

29 Liebenberg "The value of human dignity in interpreting socio-Economic rights" 2005 *South African Journal on Human Rights* 1.

30 Ackermann "Equality under the 1996 South African Constitution" in Wolfrum (eds) *Gleichheit und Nichtdiskriminierung im nationalen und internationalen Menschenrechtsschutz (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht)* (2003) 105.

31 2001 1 SA 1 (CC).

32 Par 27. See also *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) par 41.

33 1996 1 SA 984 (CC).

its potential".[34] Human dignity requires an enabling environment where every person can achieve his or her own maximum potential and possibilities. Since a person's work is a key component of their humanness and dignity,[35] this conception of dignity requires that the workplace should be an enabling environment for persons to develop their humanity to the full extent of its possibility.

The fourth conception of dignity is the recognition of the ability of all persons to set ends for themselves through their capacity to reason. It is our capacity to set goals for ourselves that make democracy the only acceptable secular form of political organisation.[36] This conception of dignity can therefore, by the same reasoning, also be applied to advocate for forms of workplace democracy, collective bargaining and social dialogue, all of which may to a greater or lesser extent be dependent upon admittance as a party to the employment relationship.

The final conception of dignity acknowledges that dignity should also focus on broader societal ends.[37] On this view, "[d]ignity is that which binds us together as a community, and it occurs only under conditions of mutual recognition".[38] The Constitutional Court held in *Port Elizabeth Municipality v Various Occupiers*[39] that it is not only the dignity of the poor that is assailed when homeless people are inadequately treated, but also our society as a whole is demeaned when state action intensifies their marginalisation.[40] In *Khumalo v Holomisa*[41] the Constitutional Court found dignity is not only concerned with an individual's sense of self-worth, but also with the worth of all human beings in our society.[42] In *South African Police Service v Solidarity obo Barnard*[43] the Constitutional Court again emphasised that "we are not islands unto ourselves", that the individual, as the bearer of the right to dignity,

[34] Par 49. See also *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) par 173 where the Court stated that "[t]he value of the individual is safeguarded in our jurisprudence. Every person should be treated as an end in herself and not as a means to an end only. This is what blunt utilitarianism would allow. The concept of dignity also concerns an individual's sense of self-esteem, and encompasses the idea that one is permitted to develop one's talents optimally".
[35] N 18 above.
[36] Woolman (n 21) 36-12–36-13.
[37] Above 36-15.
[38] Above.
[39] 2005 1 SA 217 (CC).
[40] Par 18. See also *MEC for Education: KwaZulu Natal v Pillay* 2008 1 SA 474 (CC) par 150.
[41] 2002 5 SA 401 (CC).
[42] Par 27.
[43] 2014 6 SA 123 (CC).

"should not be understood as an isolated and unencumbered being", and that dignity "contains individualistic as well as collective impulses".[44] As such, it is clear that the point of criticism used by some[45] against the centrality of the value of dignity in the jurisprudence of the Constitutional Court, "that because dignity is individualistic, it is not well-equipped to meet the goals of equality", is not sustainable.[46]

A further point of criticism against the use of dignity to interpret legislative provisions is that it is "fuzzy – often rife with ambiguity, and hence difficult to give a concrete meaning or effect as a realisable right".[47] The potential benefit of utilising vague concepts have been described elsewhere in the study,[48] but Cameron has answered that "dignity has enabled the Court to secure a significant break from the past. As a value and as a right, dignity has affirmed and de-stigmatised those previously excluded".[49]

Our courts have already used human dignity to answer difficult interpretive questions within a labour context. The Labour Appeal Court in *ARB Electrical Wholesalers v Hibbert*[50] has held that compensatory relief in terms of the LRA is payment for the impairment of an employee's dignity and that it constitutes solace to provide satisfaction to an employee whose constitutionally protected right to fair labour practice has been violated.[51] The Labour Court in *Department of Health: Gauteng Provincial Government v National Education Health and Allied Workers Union*[52] also highlighted the interrelationship between the right to fair labour practices and the constitutional right to dignity and has held that the right to dignity must be extended to deceased persons.[53] The Court held that the right to human dignity arises from our very existence as human beings, and from our concept of *Ubuntu*, which Archbishop Desmond Tutu who defined as: "the essence of being human. It speaks of the fact that my humanity is caught up and is inextricably bound up in yours. I am human because

44 Par 174.
45 See Cowen "Can 'dignity' guide South Africa's equality jurisprudence?" 2001 *SAJHR* 34.
46 Above 51.
47 Cameron "Dignity and disgrace – moral citizenship and constitutional protection" in Corder, Federico and Orrù (eds) *The Quest for Constitutionalism: South Africa since 1994* (2016) 95 104.
48 Chapter 3 § 4.2.
49 Cameron (n 47) 106.
50 2015 36 ILJ 2989 (LAC).
51 Par 23.
52 Case no J2864/16 (LC) (unreported).
53 Par 1.

I belong. It speaks about wholeness, it speaks about compassion".[54] It is therefore incumbent on interpreters, tasked with deciding who should be party to the employment relationship, to advance not only the purposes of the legislative provisions in which key concepts such as "employee" are contained, but also the broader and key societal value of human dignity as well as the various conceptions of the value.

3 *Equality*

Inequalities in South Africa are deep rooted and persistent, scarring every aspect of society, including the workplace. According to Albertyn and Goldblatt "[t]he meaning of equality in any jurisdiction is influenced by the historical, socio-political and legal conditions of the society concerned".[55] In South Africa, equality must therefore be understood within the extensive and systematic exclusion and subordination of black people in all aspects of political, social and economic life and the employment relationship. Under colonialism and apartheid, the colour of a person's skin and the person's gender determined the nature and availability of economic opportunities.[56] Prior to 1971, all labour legislation had the distinguishing feature of excluding black workers from its ambit.[57] The exclusion of black workers was also achieved through pass and influx control laws and, although some laws were on the face thereof racially neutral, they only applied to non-white workers employed in a limited number of services.[58]

Equality is also a central value of the Constitution,[59] and the Bill of Rights contains seven references to it.[60] The Constitution endorses both formal ("[e]veryone is equal before the law and has the right to equal protection and benefit of the law")[61] and substantive equality[62] ("[e]quality includes the full and equal enjoyment of all rights

54 Par 9.
55 Albertyn and Goldblatt "Equality" in Woolman, Roux and Bishop (eds) *Constitutional Law of South Africa* (2014) 35-3.
56 Above.
57 Grogan *Collective Labour Law* (2007) 4.
58 See Chapter 6 4.1.1.
59 S 1(*a*) of the Constitution.
60 Ss 7(1), 9 35(2)(*e*), 36(1), 37 and 39(1)(*a*) of the Constitution.
61 S 9(1) of the Constitution.
62 *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) par 28.

and freedoms").[63] The Constitutional Court *SAPS v Solidarity obo RM Barnard*[64] has also found that the achievement of equality must occur within the discipline of our Constitution and that measures designed at remedying past discrimination must be formulated with due care not to invade unduly the dignity of others.[65] These measures, said the Court, are not punitive nor retaliatory.[66]

As equality protects the equal worth of people, it is strictly speaking not a right to equal treatment but a right to have one's equal worth with others respected, protected, promoted and fulfilled.[67] Although race, class and gender inequalities are particularly visible, South Africa is also marked by other inequalities that intersect with race and gender. The Constitution itself acknowledges this fact and prohibits unfair discrimination on several grounds.[68]

The interrelationship between the values of dignity and equality has already been considered above.[69] The equality jurisprudence of the Constitutional Court emphasises the interrelationship of equality and human dignity.[70] In *President of the Republic of South Africa and Another v Hugo*[71] the Court stated that at the heart of the prohibition of unfair discrimination is the recognition that all human beings must be afforded equal dignity.[72] Consider the test that the Court adopted in *Harksen v Lane*[73] to determine if unfair discrimination occurred for purposes of the 1993 Constitution (which contained its equality clause in section 8 thereof).[74] The impact

63 S 9(2) of the Constitution.
64 2014 6 SA 123 (CC).
65 Par 30.
66 *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) par 43.
67 Rautenbach "Introduction to the Bill of Rights" in LexisNexis (eds) *Bill of Rights Compendium* (2011) 1A57.1.
68 S 9(3) and (4) of the Constitution. Including including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
69 § 2.
70 *SAPS v Solidarity obo RM Barnard* 2014 6 SA 123 (CC) par 176.
71 1997 4 SA 1 (CC) par 41.
72 Par 41. See also *Dawood v Minister of Home Affairs; Shalabi v Minister of Home; Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC) par 35 and *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) par 42.
73 1998 1 SA 300 (CC) par 53: "Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner".
74 Constitution of the Republic of South Africa Act 200 of 1993.

of a particular form of discrimination on the dignity of an affected person will be key to a court's decision if a differentiation amounts to unfair discrimination.[75]

The value of dignity informs the equality analysis in two stages. Firstly, it allows us to distinguish differentiation from discrimination. Differentiation on a listed ground in section 9(3) amounts to discrimination because distinctions in terms of those grounds[76] are an affront to dignity.[77] If the differentiation is on an unspecified ground, then whether or not there is discrimination will depend upon whether, the ground is based on attributes and characteristics that can impair the fundamental human dignity of persons as human beings.[78] Secondly, the extent to which a discriminatory measure impairs the complainant's dignity will determine whether discrimination is found to be unfair.[79]

According to Woolman a court will ask three questions, related to different conceptions of dignity,[80] to determine the unfairness of the discrimination: "[i]s the complainant a member of a class of persons subject to past patterns of systematic discrimination?", "[d]oes the discriminatory law or conduct in question impair the dignity, or some other fundamental right of the complainant?" and "[i]s the discriminatory law or conduct in question designed to achieve an important societal goal and is the discriminatory law or conduct in question narrowly tailored to achieve this legitimate goal?".[81] In considering the history of labour exclusion of millions of South Africans from the protective ambit of labour legislation prior to the advent of constitutionalism, it is clear that interpreters must advance interpretations that recognise and advance the equal worth of all workers. Such and interpretation must advance the key societal value of equality.

[75] *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) par 31.
[76] Race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
[77] Woolman (n 21) 36-26.
[78] N 73 above.
[79] Woolman (n 21) 36-26.
[80] See § 2 above.
[81] Woolman (n 21) 36-26-36-37.

4 *Social justice*

Social justice occupies a central place within South African jurisprudence in general and labour law in particular. The preamble of the Constitution states that the aim of the Constitution is to "[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights".[82] The express purpose of the LRA "is to advance economic development, social justice, labour, peace and the democratisation of the work place".[83] This obligation is also recorded in the Basic Conditions of Employment Act.[84] Van der Walt avers that "[e]ven now, after the establishment of a constitutional democracy, social justice does not prevail in South African society – it has to be attained through reform and transformation".[85] *In Government of the Republic of South Africa v Grootboom*[86] it was stated that "[t]he people of South Africa are committed to the attainment of social justice and the improvement of the quality of life for everyone".[87]

In a purely linguistic exercise, social justice would simply mean the application of the concept of justice on a social scale. This simple statement conceals a labyrinth of problems, for what is justice in the first place, and can it not be said that all justice is indeed social? It is these questions that have troubled humankind from Plato to Dworkin, and that will undoubtedly never be susceptible to any one satisfactory answer. These problems aside, Novak has lamented the use of the conception as nothing more than an instrument of ideological intimidation "for the purpose of gaining the power of legal coercion" and has averred that the concept is often left undefined so as to avoid running into embarrassing intellectual difficulties.[88]

82 Preamble of the Constitution.
83 S 1 of the LRA.
84 S 2 of the Basic Conditions Employment Act 75 of 1997.
85 Van der Walt "A South African reading of Frank Michelman's theory of social justice" 2004 *SA Publiekreg/Public Law* 253 254.
86 2001 1 SA 46 (CC).
87 Par 1. See also *Kaunda v President of the Republic of South Africa* 2005 4 SA 235 (CC) par 56; *Daniels v Campbell* 2004 5 SA 331 (CC) par 20; *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) par 30; *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) par 54 and *Bel Porto School Governing Body v Premier of the Western Cape Province* 2002 3 SA 265 (CC) par 6.
88 Novak "Defining social justice" 2000 First Things https://www.firstthings.com/article/2000/12/defining-social-justice (05-07-2017).

This is not to say that it is not possible to usefully employ the value so as to determine the parties to the employment relationship. In the first instance, the value should be understood within prevailing legal thought on justice (especially within a collective context, as opposed to individual justice).[89] At the very least the value of social justice requires that judges engage with these jurisprudential concerns and weigh the interests of the many against the interests of the few. In the second instance, this is possible (at least within the field of labour law) through a process of comparative interpretation to describe this concept more accurately than may be possible in other fields of law, and with the authority of legal instruments. The International Labour Organisation (ILO) has a rich jurisprudence on the achievement of social justice and the body of work of the ILO is uniquely suited to inform the South African understanding of social justice, as the achievement of social justice is also the main goal of the organisation.[90]

In the third instance, it is also possible to give the concept some flesh through a process of teleological interpretation. The ultimate aim of the Constitution is a society that reflects the fundamental values of equality, human dignity and freedom. As such, it is possible to argue that a society reflective of these values will be a society where social justice prevails. The practical implication hereof is that courts in their interpretive tasks must advance interpretations that do justice. This does not mean to say that the judiciary will always be asked to consider complex legal-philosophical question about the requirements of justice, but rather that the courts must advance an interpretation that advances the Constitution's vision of a just society.

[89] According to Van Blerk *Jurisprudence: An Introduction* (2002) 127-128 the concept of social justice remains a contentious issue for modern jurisprudence as "the opposing interests of the individual versus the collective, and of freedom versus equality, have added new tension to the dynamic of this debate". Nevertheless, three conceptions of this concept have emerged within the modern debate. Welfare liberalism, in the first instance, "claim[s] that social justice is satisfied when people receive according to their needs". John Rawls therefore famously espoused the welfare state as the basis of social justice. "For Rawls, fairness is the indispensable attribute of the just state, and he includes in this ideal of fairness the right to basic social welfare and the right to equal opportunity." The theory of libertarianism is the second conception of social justice and states that "the demands of social justice are met when people are rewarded in keeping with their contribution to society (be it at the workplace or in the wider social sphere)". In the third place, socialist theories in the tradition of the writings of Karl Marx state that "social justice is done only when everyone receives the same". The highest political ideal of socialist society is therefore the achievement of equality.

[90] See Van Staden "Towards a South African understanding of social justice: the International Labour Organisation perspective" 2012 *TSAR* 91.

5 *Fair labour practices*

Section 23 of the Constitution, titled "labour relations" has had the most profound effect on the employment relationship.[91] The rights contained therein serves as a tool against which legislation may be tested and a vehicle in terms of which legislation should be interpreted (and the common law developed).[92] The section contains labour rights of both an individual and a collective nature.[93] Although the Constitutional Court has had little occasion to interpret the section (most likely because of the extensive statutory regulation of labour relations which is compounded by the subsidiary principle), the Constitutional Court has interpreted the section generously.[94] The Court has, for example, held that the notion "worker" as contained in the section should be generously interpreted.[95] The term could therefore encompass persons who have not entered into a formal contract of employment but are in work relationships "akin" to the employment relationship governed by a contract of employment, such as atypical work relationships.[96]

Firstly, section 23(1) of the Constitution enshrines the right to fair labour practices. This right is extended to "everyone". The Constitutional Court has held that the term, in consequence of being included in the section dealing with labour relations is inevitably curtailed thereby and that the term engages the relationship between the

[91] The section reads as follows: "(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)."

[92] Van Niekerk and Smit (eds) *Law@work* (2015) 36.

[93] Cooper "Labour relations" in Woolman, Roux and Bishop (eds) *Constitutional Law of South Africa* (2014).

[94] Above 53-3.

[95] *South African National Defence Union v Minister of Defence* 1999 4 SA 469 (CC).

[96] Par 24.

worker and employer.[97] The Court also held that the term refers to both employees and employers (whether a natural of juristic person).[98]

The Constitutional Court ruled that it is unnecessary and undesirable to define the concept. The Court preferred that the content of the concept must be developed by means of interpretation.[99] As the term is not contained in international instruments or encountered within the same context in other jurisdictions, it might be more useful to look at our own law and especially the historical development of the term in the former Industrial Court.[100] The Court also found that what is "fair" would depend on a value judgement on the circumstances of each case.[101] The Court also found that the focus of the right is "the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both". The interests of both must be balanced.[102]

Secondly, sections 23(2) and (3) of the Constitution, read together with section 18 thereof,[103] enshrine the right to freedom of association. The Constitution guarantees every worker the right to form and join a trade union and to participate in the activities and programmes of the union.[104] Employers are similarly safeguarded in regard to their own organisations.[105] It guarantees that organisations may determine their own administration, activities and programmes.[106] A pertinent question is whether the right to form and join trade unions includes the right not to do so. It is often accepted that right to engage in a certain course of action includes the right not

97 *National Education Health and Allied Workers Union v University of Cape Town* 2003 3 SA 1 (CC) (*NEHAWU v UCT*) par 40.

98 Par 113. The concept "unfair labour practice" originated in the United States, as a result of the work of the Wiehahn Commission, it was employed in a different context in the South African law. See South African Law Reform Commission "Report of the Wiehahn Commission of Enquiry into Labour Legislation" *Revision of Labour Legislation Workpiece* 47, Project 27 (1981); see Basson "Labour law and the constitution" 1994 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 498 502 for an exposition of the term in American law.

99 Par 33-34.

100 Cooper (n 93) 53-12. See Le Roux and Van Niekerk *The South African Law of Unfair Dismissal* (1994) 1-2; and Landman "Fair labour practices: the Wiehahn legacy" 2004 *Industrial Law Journal* 805, 806.

101 *NEHAWU v UCT* par 33.

102 Par 40.

103 This section provides that "[e]veryone has the right to freedom of association".

104 S 23(2)(*a*) and (*b*) of the Constitution.

105 Above.

106 S 23(4) of the Constitution.

to do so. Other jurisdictions (such as Germany and Canada) have accepted that the right to join a trade union includes the right not to do so.[107]

Section 23(6) permits national legislation to recognise union security arrangements contained in collective agreements. To pass constitutional muster the legislation must comply with section 36 and limit constitutional rights as little as possible. The LRA provides for collective agreements containing closed and agency shops which limit the right of employees not to associate.[108] Although the constitutionality of these arrangements has not been challenged, Cooper argues that they should pass constitutional muster as the provisions comply with section 23(6).[109]

Thirdly, section 23(4) of the Constitution enshrines the right to organise. This right refers to the right of an organisation to build its structures so as to effectively represent its members and engage in collective bargaining.[110] Organisational rights enable trade unions to "secure a foot in the door" of an employer by allowing trade unions to "build up, consolidate and maintain a power-base of sufficient strength among the employers' employees".[111] Trade unions need numbers in order to bargain effectively with employers. In addition to the fact that employers are economically stronger, they have a range of legal recourses to keep union officials from gaining access to the workplace, such as the crime of trespassing[112] to keep union officials from work premises and the principle of "no work, no pay" to keep employees from performing trade union functions.[113]

Depending on their level of representativeness, the LRA provides for a number of statutory organisational rights. They are: the right of a trade union to obtain access to the employer's premises;[114] and to have trade union subscriptions or levies deducted from the remuneration of union members by the employer and paid over to the trade

[107] Cooper (n 93) 53-24 n 137.
[108] Ss 25 and 26 of the LRA.
[109] Cooper (n 93) 53-26.
[110] Cooper (n 93) 53-28.
[111] Mischke "Getting a foot in the door: organisational rights and collective bargaining in terms of the LRA" 2004 *Contemporary Labour Law* 51 52.
[112] See s 1 of the Trespass Act 6 of 1959.
[113] Mischke (n 111).
[114] S 12 of the LRA.

union by the employer;[115] the right of an employee who is an office-bearer of a sufficiently representative union to take reasonable leave during working hours for the purpose of performing his or her trade union functions;[116] the right to elect trade union representatives;[117] and the right to the disclosure of information relevant to consultations or bargaining.[118] A registered trade union that is a party to a council automatically has the right of access to the employer's premises and the deduction of trade union subscriptions or levies.[119] Employer and trade unions are also free to conclude a collective agreement regulating organisational rights.[120]

Fourthly, section 23(5) enshrines the right to engage in collective bargaining. Whether or not the section imposes a duty upon the parties to bargain in good faith has been the subject of some disagreement.[121] It is the object of the LRA to provide a framework for collective bargaining within which employees, trade unions, employers and employers' organisations can bargain collectively on matters of mutual interest. A further object is to promote orderly collective bargaining and orderly bargaining at sectoral level.[122] It is therefore surprising that the LRA contains no general duty to bargain. Instead the LRA follows a voluntary approach where engagements and bargaining between an employer and a trade union is left up to the parties.[123] The LRA tempers the effect of voluntarism by providing for the resolution of disputes relating to refusals to bargain, and by providing for the acquisition of organisational rights by trade unions. Industrial action in the form of a strike is a union's most appropriate response to an employer's refusal to bargain with it.[124]

Fifthly, section 23(2)(*c*) of the Constitution enshrines the right to strike. The right to strike is of substantial importance to the protection of workers. There exists an interrelationship between the right to strike and the right to fair labour practices,

[115] S 13 of the LRA.
[116] S 15 of the LRA.
[117] S 14 of the LRA.
[118] S 16 of the LRA.
[119] S 19 of the LRA.
[120] S 20 of the LRA.
[121] Compare *South African National Defence Union v Minister of Defence* 2003 3 SA 239 (T) with *South African National Defence Union v Minister of Defence* 2004 4 SA 10 (T).
[122] S 1(*c*) and (*d*)(i) and (ii) of the LRA.
[123] Mischke (n 111) 52.
[124] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) par 66.

freedom of association, to organise and to engage in collective bargaining. The strike weapon is *sine qua non* for a successful collective bargaining system,[125] and can also be employed to gain organisational rights and to protect the right of workers to associate freely.[126] The right to fair labour practices interrelate in a significant way with the right to strike. If workers are not protected from unfair dismissals or victimisation for participating is strikes, then this right would be meaningless.[127] As such, the Constitutional Court has "jealously protected the right to strike".[128] In *National Union of Metalworkers of South Africa v Bader Bop Pty Ltd*,[129] the Constitutional Court endorsed an interpretation of the LRA that permitted a minority trade union to strike in order to acquire a right of representation through a collective agreement.[130] As such, the LRA should be interpreted in a manner that accorded with the right to strike.[131]

In *Association of Mineworkers and Construction Union v Chamber of Mines of South Africa*[132] the Constitutional Court however came to the conclusion that minority trade unions do not have the right to strike where the dominant unions have concluded a collective agreement that limits that right.[133] In effect the Court held that, although its finding limited the constitutional right to strike, such a limitation was justifiable so as to protect the principle of majoritarianism.[134] Majoritarianism,[135] the Court held,

[125] Above.
[126] Cooper (n 93) 53-45.
[127] Ss 67(4) and 187(1) of the LRA.
[128] Van Eck "In the name of 'workplace and majoritarianism': thou shalt not strike — *Association of Mineworkers & Construction Union & others v Chamber of Mines & others* (2017) 38 ILJ 831 (CC) and *National Union of Metalworkers of SA & others v Bader Bop (Pty) Ltd & another* (2003) 24 ILJ 305 (CC). (2017) 38 ILJ 1496" 2017 *Industrial Law Journal* 1496 1496, with reference to *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC); and *National Union of Metalworkers of South Africa v Bader Bop Pty Ltd* 2003 3 SA 513 (CC).
[129] 2003 3 SA 513 (CC).
[130] Par 36.
[131] See also *South African Post Office v Commissioner Nowosenetz No* 2013 2 BBLR 216 (LC); *POPCRU v Ledwaba* 2013 11 BLLR 1137 (LC); and *Transnet SOC Ltd v National Transport Movement* 2014 1 BLLR 98 (LC).
[132] 2017 3 SA 242 (CC).
[133] Par 58.
[134] Par 50.
[135] The principle was described by the Labour Appeal Court in *Kem-Lin Fashions CC v Brunton* 2001 22 ILJ 109 (LAC) par 19) where it held: "The legislature has also made certain policy choices in the Act which are relevant to this matter. One policy choice is that the will of the majority should prevail over that of the minority. This is good for orderly collective bargaining as well as for the democratisation of the workplace and sectors. A situation where the minority dictates to the majority is, quite obviously, untenable. But also a proliferation of trade unions in one workplace or

"benefits collective bargaining" The Court based its conclusion on an overly-literalistic interpretation[136] of the term "workplace"[137] in section 23(1)(*d*)(iii) of the LRA which provides for the extension of collective agreements.[138] The Court held that the focus of the definition was on employees collectively and, secondly, there is a "relative immateriality of location" where the employees work.[139]

Van Eck has criticised the emphasis of the Court on the principle of majoritarianism as this approach has been adopted more than 20 years ago and as the Court has failed to consider how the principle could contribute to the achievement of labour peace in the workplace.[140] According to the author, the Court failed to consider recent labour unrests and the fact that recent amendments to the LRA have relaxed some of the majoritarian principles which restrict minority unions.[141] It is submitted that the interpretive approach of the Court is out of touch with a teleological model of statutory interpretation which emphasises, *inter alia*, values and context. It may be questioned whether the Court was correct in attaching more weight to the principle of majoritarianism than the (constitutionally entrenched) right to strike.

It should be noted that the corollary of the strike weapon, the lock-out, is not mentioned in the Constitution. In the *First Certification Case*[142] the Constitutional Court accepted that it would have upset the balance between the powers of employers and workers and that the inclusion of such a right would have been unnecessary as employers have a range of other economic weapons at their disposal.[143] The LRA

in a sector should be discouraged. There are various provisions in the Act which support the legislative policy choice of majoritarianism."

136 Van Eck (n 128) 1497.

137 S 213 of the LRA defines a workplace as "the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation constitute the workplace for that operation".

138 This subparagraph provides that a collective agreement binds employees who are not members of the signatory unions if "(i) the employees are identified in the agreement; (ii) the agreement expressly binds the employees; and (iii) that trade union or those trade unions [that are party to the collective agreement] have as their members the majority of employees employed by the employer in the workplace".

139 Par 24.

140 Van Eck (n 128) 1510.

141 Above 1506.

142 *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC).

143 Par 64-68.

places substantive and procedural limitations on the right to strike.[144] Although it may be argued that such limitations are unconstitutional, these provisions would in all likelihood survive constitutional muster, as they are justifiable in terms of section 36(1) of the Constitution.[145] The ILO has indicated that the right to strike is not absolute.[146]

It is important that interpreters interpret labour legislative provisions in general, and provisions affecting the question who should be regarded as party to the employment relationship in particular, in a sufficiently generous manner so as to advance the value of fair labour practices. It is submitted that the judgment of the majority of the Labour Appeal Court in *Business South Africa v Congress of South African Trade Unions*[147] was also plainly wrong when the Court concluded that the purpose of the LRA did not necessarily require an expansive or liberal interpretation of section 77 thereof (a provision dealing with the related concept of picketing).[148] It is submitted that the majority's approach is curious, especially when compared to the teleological model of statutory interpretation described in this study.

6 *Security of employment*

Security of employment is a core value in the LRA.[149] The ILO defines employment security as "the protection of workers against fluctuations in earned income as a result of job loss. Job loss may occur during economic downturns, as part of restructuring, or be related to other various reasons for dismissals".[150] Security of employment is achieved primarily through dismissal protection and social protection in the event of loss of employment.[151]

[144] S 65.

[145] "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (*a*) the nature of the right; (*b*) the importance of the purpose of the limitation; (*c*) the nature and extent of the limitation; (*d*) the relation between the limitation and its purpose; and (*e*) less restrictive means to achieve the purpose."

[146] Cooper (n 93) n 284 and 284.

[147] 1997 18 *ILJ* 474 (LAC).

[148] 479A-B.

[149] *Code of Good Practice: Who is an Employee?* 2007 28 ILJ 96 r 62.

[150] ILO "Employment security" http://www.ilo.org/global/topics/employment-security/lang--en/index.htm (12-07-2017).

[151] According to Cheadle "Regulated flexibility: revisiting the LRA and the BCEA" 2006 *Industrial Labour Journal* 663 668, the broader term "security" includes labour market security such as

6.1 Dismissal protection

An important objective of the LRA is to enhance the security of employment.[152] The Constitutional Court has found that security of employment is a core value of the LRA.[153] The right not to be unfairly dismissed, said the Court, is "essential to the constitutional right to fair labour practices".[154] This is primarily done by defining the conditions in which employees are dismissed,[155] prescribing the circumstances in which a dismissal would be fair or unfair,[156] by creating specialised forums who are

opportunities for employment; employment security such as protection against arbitrary loss of employment, job security such as the protection against arbitrary loss of or alteration to the job; work security which include health and safety in the workplace and representation security which deals with representation in the workplace.

[152] Grogan *Workplace Law* (2014) 164.

[153] *NEHAWU v UCT* par 42.

[154] Above.

[155] S 186(1) of the LRA describes six instances in which a dismissal has taken place: "'Dismissal' means that (*a*) an employer has terminated employment with or without notice; (*b*) an employee employed in terms of a fixed term contract of employment reasonably expected the employer (i) to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; or (ii) to retain the employee in employment on an indefinite basis but otherwise on the same or similar terms as the fixed term contract, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee; (*c*) an employer refused to allow an employee to resume work after she took maternity leave in terms of any law, collective agreement or her contract of employment; (*d*) an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; (*e*) an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee; or (*f*) an employee terminated employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer."

[156] In terms of section 187(1) of the LRA a dismissal will be regarded as automatically unfair under the following circumstances. Firstly, a dismissal will be automatically unfair if the employer dismisses the employee in contravention of s 5 of the LRA (which confers protections relation to the right to freedom of association and on members of workplace forums). Secondly, A dismissal would be automatically unfair if the reason for the dismissal is: "(*a*) that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Chapter IV; (*b*) that the employee refused, or indicated an intention to refuse, to do any work normally done by an employee who at the time was taking part in a strike that complies with the provisions of Chapter IV or was locked out, unless that work is necessary to prevent an actual danger to life, personal safety or health; (*c*) a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer; (*d*) that the employee took action, or indicated an intention to take action, against the employer by (i) exercising any right conferred by this Act; or (ii) participating in any proceedings in terms of this Act; (*e*) the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy; (*f*) that the employer unfairly discriminated against an *employee*, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility; (*g*) a transfer, or a reason related to a transfer, contemplated in section 197 or 197A; or (*h*) a contravention of the Protected Disclosures Act, 2000, by the employer, on account of an *employee* having made a protected disclosure defined in that Act." If a dismissal is not automatically unfair, it will be unfair according to s 188 of the LRA if an employer fails to prove "(*a*) that the reason for dismissal is a fair reason (i) related to the employee's conduct or capacity; or (ii) based on the employer's operational requirements; and (*b*) that the dismissal was effected in accordance with a fair procedure."

tasked with determining if a dismissal occurred and whether such a dismissal was unfair,[157] and extending remedies against unfair dismissal.[158] In order for dismissal protection to be activated, a claimant will first have to prove that she was an employee, as only employees may be dismissed.[159] As such, admittance to the circle of employees is essential for workers to enjoy security of employment.

6.2 Social protection

Security of employment cannot solely be achieved through dismissal protection. Many other factors also impact upon the security of employment of workers.[160] So, for example, an enabling market economy which allows workers to quickly find alternative employment following the loss thereof, as well as appropriate social protection mechanisms designed to protect workers in the event of such loss of employment, are essential. Social protection is an essential feature of the ILO's decent work agenda.[161] Although the term is incapable of precise definition,[162] the ILO has defined social protection as:

> "the set of measures provided by society to protect its members from: (1) poverty and social exclusion, (2) the financial consequences of "life cycle risks" (ill health, sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member) and (3) insufficient family support particularly for children and adult dependants."[163]

Social protection is therefore generally perceived to be a wider concept than social security.[164] The traditional view of social security has been criticised as being too

[157] The LRA establishes the Commission for Conciliation, Mediation and Arbitration (s 112) and the Labour Court (s 151).

[158] S 193(1) of the LRA reads as follows: "If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may (*a*) order the employer to re-instate the employee from any date not earlier than the date of dismissal; (*b*) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or (*c*) order the employer to pay compensation to the employee."

[159] Grogan (n 152) 164.

[160] Cheadle (n 151) 668.

[161] Saith *Social Protection, Decent Work and Development* (2004) 1.

[162] Van Niekerk and Smit (n 92) 474.

[163] ILO *The ILO DW for SDGs Notes Series: Social Protection* (2017) 2. See also ILO *World Labour Report: Income Security and Social Protection in a Changing World* (2000) 29 and ILO *Principles of Social Security* (1998) 8.

[164] ILO *Introduction to Social Security* (1984) 3, defines social security as "[t]he protection which society provides for its members, through a series of public measures, against the economic and social distress that otherwise will be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age and death; the provision of medical care; and the provision of subsidies for families and children."

limited and, as such, the basic conception of social security has been widened to refer to matters such as active labour market policies.[165]

According to section 27(1)(*c*) of the Constitution "[e]veryone has the right to have access to social security, including, if they are unable to support themselves and their dependents, appropriate social assistance". Section 27(2) requires that "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights". In *Government of the Republic of South Africa v Grootboom*[166] it was held that a "right to have access to" is a wider notion than "right to". A "right of access to" social security is protected because social security intersects with other rights in the Bill of Rights as they are interrelated, interdependent and mutually supporting.[167] Nyenti[168] described the purpose of this right as enabling people to avoid destitution and affording that their basic needs are met upon stoppage or disruption of their income or their earning potential never developing. It seeks to provide protection against destitution and protect human beings from poverty and material insecurity.[169]

Viewed in this way, including in context of other constitutional rights and values, the constitutional right to access to social security is wide enough to encompass a wider view of social security that also includes social protection. The South African social security system protects workers from the following contingencies: employment injuries and diseases,[170] unemployment,[171] old age and retirement[172] and health.[173]

[165] Van Niekerk and Smit (n 92) 474.
[166] 2001 1 SA 46 (CC).
[167] Par 23-24.
[168] Nyenti "Role of constitutional principles and values in the development of social protection in South Africa" 2016 *Global Social Policy* 201.
[169] 202.
[170] Occupational Diseases in Mines and Works Act 78 of 1973; Occupational Health and Safety Act 85 of 1993; Mine Health and Safety Act 29 of 1996; and Compensation for Occupational Injuries and Diseases Act 130 of 1993.
[171] Unemployment Insurance Act 63 of 2001; and Unemployment Insurance Contributions Act 4 of 2002.
[172] There is currently no public insurance scheme in South Africa. S 10 of the Social Assistance Act 13 of 2004 does however provide for a means-tested old age grant for persons who have attained the age of 60 years. Although employees have the option to join an occupational retirement vehicle, there is no statutory obligation to do so in terms of the Pension Funds Act 24 of 1956. Most people employed in the informal economy or who find themselves in atypical employment relationships would, according to Van Niekerk and Smit (eds) (n 92) 488 n 87, end up relying on the old-age grant instead of an occupational retirement vehicle.
[173] Although medical and sickness benefits are payable under public social insurance schemes, there is no separate public scheme that covers the contingency of health in South Africa. Employees are

The extension of such protection will in most cases,[174] however, only be available for workers who are "employee" for purposes of the particular legislative instrument. Additionally, South African legislation advances skills development and (re)training.[175] A key goal of social security mechanisms is to encourage those who receive or apply for social security benefits to find employment.[176]

7 *Labour market flexibility*

The value of security of employment is often contrasted with the competing value of labour market flexibility.[177] Botha has indicated that the quest for flexibility is fuelled

however free to become a member of a medical scheme in terms of the Medical Schemes Act 131 of 1998 or to insure themselves against the risk of ill-health through private insurance.

[174] Occupational Diseases in Mines and Works Act 78 of 1973; Occupational Health and Safety Act 85 of 1993; Mine Health and Safety Act 29 of 1996; Compensation for Occupational Injuries and Diseases Act 130 of 1993; Unemployment Insurance Act 63 of 2001; and Unemployment Insurance Contributions Act 4 of 2002.

[175] Skills Development Act 97 of 1998, Skills Development Levies Act 9 of 1999, Employment Services Act 4 of 2014 and Employment Tax Incentive Act 26 of 2013. The purposes of the Skills Development Act are to develop the skills of the South African workforce to improve the quality of life of workers, their prospects of work and labour mobility; to improve productivity in the workplace and the competitiveness of employers; to promote self-employment; and to improve the delivery of social services; to increase the levels of investment in education and training in the labour market and to improve the return on that investment; to encourage employers to use the workplace as an active learning environment; to provide employees with the opportunities to acquire new skills; to provide opportunities for new entrants to the labour market to gain work experience; and to employ persons who find it difficult to be employed; to encourage workers to participate in learning programmes; to improve the employment prospects of persons previously disadvantaged by unfair discrimination and to redress those disadvantages through training and education; and to ensure the quality of learning in and for the workplace.

[176] Saunders "Welfare to work in practice: introduction and overview: in Saunders (ed) *Welfare to Work in Practice: Social Security and Participation in Economic and Social Life* (2005) 1 1.

[177] *Nape v INTCS Corporate Solutions Pty Ltd* 2010 31 ILJ 2120 (LC) par 62. During the 2000's, the European Union adopted a strategy of "flexicurity". It was defined 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." See Wilthagen and Tros "The concept of 'flexicurity': a new approach to regulating employment and labour markets" 2004 *Transfer: European Review of Labour and Research* 166 169 and Wilthagen and Rogowski "Legal regulation of transitional labour markets" in Schmid and Gazier (eds) *The Dynamics of Full Employment: Social Integration through Transitional Labour Markets* (2002) 250. According to Van Eck the *raison d'être* of the strategy is to balance the protection of fundamental rights of workers, and to establish flexibility in the labour market so as to enable employers to respond to changing market conditions. See Van Eck "Regulating flexibility and the Labour Relations Amendment Bill of 2012" 2013 *De Jure* 600 602 603. Four broad mutually supportive conduits are advanced to seek this balance: flexible and reliable contractual arrangements to promote the transition from non-standard contractual arrangements to a situation of full protection; the promotion of comprehensive lifelong learning; active labour market policies that strengthen the transition between jobs; and the modernisation of social security systems to enhance the mobility of workers in the labour market. Flexicurity implies a relationship between flexibility and security characterised by a "win-win" situation that implies high levels of flexibility and security that can be contained simultaneously. Muffels "Flexibility and employment security in Europe: setting the scene" Muffels (ed) *Flexibility and Employment Security in Europe: Labour Markets in Transition* (2008) 1 12.

by the need to remain competitive in a global economy.[178] Labour market flexibility can be seen as a necessary instance of the constitutional right to freedom of trade, occupation and profession. Labour market flexibility includes "the freedom to change employment levels quickly and cheaply"; "the freedom to determine wage levels without restraint"; and "the freedom to alter work processes, terms and conditions of employment, etc quickly and cheaply".[179]

Section 22 of the Constitution guarantees "[e]very citizen has the right to choose their trade, occupation or profession freely".[180] This right protects the ability to perform activities by means of which a livelihood is pursued.[181] The Constitutional Court described the right as "one's right to earn a living".[182] It protects the freedom to choose and the freedom to carry on a trade, occupation or profession,[183] and allows every individual "to take up any activity which he or she believes himself or herself prepared to undertake as a profession and to make that activity the very basis of his or her life".[184] As section 7(2) of the Constitution provides that the state has the duty to respect, protect, promote and fulfil the rights in the Bill of Rights, the state is duty bound to provide an enabling environment for employers to do business in.

High labour market flexibility usually entails low security for workers. Conversely, high security for workers usually entails low labour market flexibility. As Du Plessis

[178] Botha *Employee participation and voice in companies: A legal perspective* (2015 thesis North-West University) 77. It produces, according to the author "flatter management structures, 'atypical' employees, centralised collective bargaining, the individualisation of the employment relationship as well as a worldwide decline in union membership and power".

[179] Cheadle (n 151) 668.

[180] This right can be traced back to section 41 of the Magna Carta of 1215 held that "[a]ll merchants are to be safe and secure in leaving and entering England, and in staying and traveling in England... to buy and sell free from all maletotes by the ancient and rightful customs, except, in time of war, such as come from an enemy country [who] shall be detained without damage to their persons or goods, until we or our chief justiciar know how the merchants of our land are treated in the enemy country; and if ours are safe there, the others shall be safe in our land". Section 22 of the Constitution is practically identical to, and inspired by, article 12(1) of the German Basic Law (*Grundgesetz für die Bundesrepublik Deutschland*). As such the South African Constitutional Court has indicated in *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) par 64 that section 22 must be interpreted in a manner consistent with the interpretation given by the German judiciary.

[181] Rautenbach "Introduction to the Bill of Rights" in LexisNexis (eds) *Bill of Rights Compendium* (2011) 1A70. See also Rautenbach IM "The right to choose and practice a trade, occupation or profession" 2005 *Tydskrif vir die Suid-Afrikaanse Reg* 851 ao.

[182] *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) par 59.

[183] Par 63-67.

[184] Par 59.

points out, statutory interpretation often involves the balancing of interests.[185] There is also a canon of statutory interpretation that legislation seeks to promote the public interest.[186] Either black workers were excluded directly from the provisions of the act or workers were indirectly excluded from the provisions of an act due to their inability to comply with the statutory definition of the term "employee".[187]

In South Africa the discourse has been framed in terms of the label "regulated flexibility".[188] According to Van Eck, regulated flexibility represents "a policy framework which provides for the selective application of legislative standards, depending on the remuneration earned by workers and the size of employers' undertakings".[189] It is not merely a balance between the interests of flexibility and security, "but a framework within which an appropriate balance is struck".[190]

Flexicurity is a key public law value in South Africa. A key objective of the LRA is the advancement of economic development and the constitutional right to freedom of trade, occupation and profession, whilst the LRA and Constitutions seeks to protect employment through dismissal protection and social protection mechanisms. The Cheadle Task Team who prepared South Africa's first set of post-apartheid labour legislation, was tasked to "balance the demands of international competitiveness and the protection of fundamental rights of workers".[191] Van Eck has argued that "policy makers do take account of the fact that it is not the sole purpose of labour law to provide protection to workers", 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".[192] Similarly, the author has argued that recent amendments to the South African labour law regime is alert to the

[185] Du Plessis "Interpretation of the Bill of Rights" in Woolman, Roux and Bishop (eds) *Constitutional Law of South Africa* (2014) 32-141.

[186] *Ex Parte Hathorn: In re OC, Durban Prison Command* 1960 2 SA 767 (D); *Rossouw v Sachs* 1964 2 SA 551 (A); *Kaplan v Inc Law Society, Tvl* 1981 2 SA 762 (T); *Schermbrucker v Klindt* 1965 4 SA 606 (A); *S v Sikwane* 1980 4 SA 257 (B); *S v Caroto* 1981 3 SA 17 (A); *S v De Castro* 1979 2 SA 1 (A); *S v Fiddian-Green* 1979 2 SA 451 (W); *S v Posel* 1977 4 SA 476 (N); *S v Weinberg* 1979 3 SA 89 (A).

[187] See Chapter 6 § 4.1.

[188] Standing, Sender and Weeks *Restructuring the Labour Market: The South African Challenge: An ILO Country Review* (1996) 1-10 and Cheadle (n 151) 668.

[189] Cheadle (n 151) 668.

[190] Above.

[191] Cheadle Commission "Explanatory Memorandum prepared by the Ministerial Task Team" 1995 ILJ 278 285-286.

[192] Van Eck (n 177) 603.

overarching policy of regulated flexibility and that it does "not merely introduce new obligations on employers without taking account of the fact that it may impact negatively on especially smaller employers and lower earning employees to implement additional obligations on employers".[193]

8 *Freedom of contract*

Contractual freedom is not listed as a right in the text of the Constitution. The Constitutional Court has however noted that the principle, often expressed in terms of the maxim *pacta sunt servanda*,[194] "gives effect to the central constitutional values of freedom and dignity".[195] As such, the value of freedom of contract has obtained a constitutional character. The Court has however also held that the principle of contract *pacta sunt servanda* is not a sacred cow that should trump all other considerations and that it is not absolute under our constitutional dispensation.[196] The Court has also stated that freedom of contract is not inviolate, but merely that "within bounds, contractual autonomy claims some measure of respect".[197] Indeed, the Court noted, the principle has not even been absolute under the common law.[198]

The value of freedom of contract becomes particularly relevant in cases of disguised employment where "the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee".[199] Rautenbach has also shown that "contractual freedom is an indispensable instrument for the efficient exercise of other rights".[200] Freedom of contract is therefore protected in the South African Bill of Rights as a power that may be exercised for the protection and

[193] Above 611.
[194] Translated as "agreements must be kept".
[195] *Barkhuizen v Napier* 2007 5 SA 323 (CC) par 57 and *Paulsen v Slip Knot Investments 777 (Pty) Limited* 2015 3 SA 479 (CC) par 70. See also *Brisley v Drotsky* 2002 4 SA 1 (SCA) par 94.
[196] *Barkhuizen v Napier* above par 15 and 30.
[197] *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2015 1 SA 1 (CC) par 65.
[198] *Paulsen v Slip Knot Investments 777 (Pty) Limited* 2015 3 SA 479 (CC) par 71.
[199] A 4*(b)* of the ILO Employment Relationship Recommendation 198 of 2006.
[200] Rautenbach "Constitution and contract – exploring the possibility that certain rights may apply directly to contractual terms or the common law that underlies them'" 2009 *TSAR* 613 629-630 and Rautenbach "The constitutional status of contractual freedom" 2016 *TSAR* 467 476.

promotion of the rights that are expressly guaranteed and that it therefore has the same constitutional status as those rights.[201]

There are instances where our courts would place importance on the principle of freedom of contract. In *Vermooten v Department of Public Enterprises*[202] the Labour Appeal Court held that, when parties in relatively equal bargaining positions choose to enter into an agreement that excludes the contract of employment, then in the absence of any overriding policy considerations, neither a tribunal nor a court may ignore its terms.[203] In *CMS Support Services v Briggs*[204] the Labour Appeal Court found that, because there was no personal contract between the respondent and the employee, the respondent was not an employee.[205]

Our courts have been willing to look beyond the form of a contract and, in considering the true nature of the relationship between the parties, to disregard the express will of the parties. In *Buffalo Signs Co Ltd v De Castro*[206] the Labour Appeal Court held that there is no such thing as a fictional employer and that the true employer is the party that fits the definition of employer and that the real employer "may be plucked from his hiding place behind the corporate veil".[207] In *Denel Pty Ltd v Gerber*[208] the Labour Appeal Court held that a person was an employee "on the basis of the realities – on the basis of substance and not form or labels".[209] The Court held that, although there may be an agreement to the contrary, such an agreement does not alter the realities of the relationship that exists between the parties.[210]

What these divergent cases indicate is that our Courts will advance the value of freedom of contract in interpreting key concepts relevant to determining the parties of the employment relationship. There are however many other values that impact upon this question, and it is therefore also true that the value of freedom of contract will

[201] Above (2016) 482.
[202] Case no JA91/2015 (LAC) (unreported).
[203] Par 26.
[204] 1998 19 ILJ 271 (LAC).
[205] 277H.
[206] 1999 20 ILJ 1501 (LAC).
[207] 1506.
[208] 2005 26 ILJ 1256 (LAC).
[209] Par 22. See also *Rumbles v Kwa Bat Marketing (Pty) Ltd* 2003 24 ILJ 1587 (LC).
[210] Par 21.

not always be decisive, as the interpreter must weigh this value against all others and give it a relational weight *vis-à-vis* the other values.[211] The interpreter will however not be free to ignore this value in a teleological model of interpretation, although this value need not necessarily be decisive.

9 *Conclusion*

Teleological interpretation is the "value-realising dimension" of interpretation.[212] Because of the subsidiary principle ("[w]here there is legislation giving effect to a right in the Bill of Rights, a claimant is not permitted to rely directly on the Constitution")[213] the Constitution will have little influence on ordinary workers if legislative provisions are not interpreted to advance core societal values. As such, the interconnectedness of teleological interpretation and transformative constitutionalism is highlighted. Those who find themselves outside of the employment relationship will ultimately be denied their constitutionally guaranteed rights and the aspirations of the Constitution will be circumvented.

The exclusion of certain categories of persons from the employment relationship will ultimately have broad and wide ranging societal implications. The concept "employee" must be widely interpreted to advance the values of human dignity, equality, fair labour practices and security of employment, labour market flexibility, social justice and freedom of contract to interpret the term "employee". The Constitutional Court explained in *National Education Health and Allied Workers Union v University of Cape Town*[214] that "the courts and the legislature act in partnership to give life to constitutional rights".[215] It is therefore incumbent on interpreters to interpret statutory provisions relevant to the question of who should be included in the employment relationship in a sufficiently broad and liberal manner and in a way that advances and gives life to key societal values. In doing so, the

[211] Dworkin *Taking Rights Seriously* (1977) 23.
[212] Du Plessis (n 185) 2C48.
[213] *Sali v National Commissioner of the South African Police Service* 2014 9 BLLR 827 (CC) par 4, 72 and n 2. See also *S v Mhlungu* 1995 3 SA 867 (CC) par 59, *MEC for Education: KwaZulu Natal v Pillay* 2008 1 SA 474 (CC), and *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) par 51.
[214] 2003 3 SA 1 (CC).
[215] Par 14.

interpreter will have to determine how much relational weight is to be given to each individual value.[216]

[216] N 211.

CHAPTER 8

The comparative dimension

"Only by manifold contrasts the contrary becomes completely clear; only by the observation of similarities and differences and the reasons for both may the peculiarity and inner nature be recognised in an exhaustive manner."[1]

1 *Introduction*

The phenomena of casualisation and externalisation are international phenomena brought about by globalisation.[2] The International Labour Organisation (hereafter the ILO) has noted that globally there is "a general increase in the precarious nature of employment and the reduction of workers' protection".[3] The issue of who is an employee and who is not, has become problematic in recent times as a result of major changes in work organisation and the growing inadequacy of labour law to adapt to those changes.[4] Consequently, new forms of employment relationships have arisen which do not always fit properly into traditional parameters and where workers find

1 Anselm von Feuerbach; quoted in English is Hug "The history of comparative law" 1931/1932 *Harvard Law Review* 1027 1047.
2 Fourie "Non-standard workers: the South African context, international law and regulation by the European Union" 2008 *Potchefstroomse Elektroniese Regsblad* 110 143.
3 ILO *Meeting of Experts on Workers in Need of Protection: Basic Technical Document* (2000) 4-6.
4 Casale "The employment relationship: a general introduction" in Casale (ed) *The Employment Relationship: A Comparative Overview* (2011) 1 1.

themselves in situations where their employment status is unclear or outside of the scope of protection associated with the employment relationship.[5] As such, the subject of the employment relationship has increasingly been on the agenda of the ILO.[6]

Globalisation has resulted in rapid economic integration among countries driven by trade liberalisation and technological change.[7] The impact of globalisation has been uneven in the extent that it has benefited (and disadvantaged) countries, enterprises and workers.[8] As the problem of identifying the parties to the employment relationship is a concern shared among many other jurisdictions, it is therefore appropriate to explore the experiences and lessons learnt at the international level and in other jurisdictions in order to inform our understanding thereof. From a geopolitical view, there is no such thing as a closed world any more. It is therefore exceedingly important to learn from each other and to look beyond the European and North American experience. Within the context of the decolonisation of knowledge it has become important to also consider the African experience.

This chapter will explore how the standards of the ILO can shed light on the question as to who are parties to the employment relationship. Section 233 of the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution) requires that legislation must be interpreted in compliance with international law. According to section 39(1)(*b*) of the Constitution "[w]hen interpreting the Bill of Rights, a court, tribunal or forum ... must consider international law". In addition, section 37(4)(*b*)(i) requires legislation that derogates from the Bill of Rights to be "consistent with the Republic's obligations under international law applicable to states of emergency". The international law that must be considered includes international law not binding on South Africa, such as international customary law.[9] The Constitutional Court has stressed that these provisions only mean that international law should serve as an interpretive aid and not that international law should be applied.[10] Interpreting in a way that does not violate the international law ensures, according to Du Plessis "that

5 Above 3.
6 Above 1.
7 Above.
8 Above 3.
9 *S v Makwanyane* 1995 3 SA 391 (CC) par 35.
10 *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) par 98.

the state's international obligations are honoured in the application of municipal law and that international standards for the protection of fundamental rights and freedoms are upheld by the state."[11] Thereafter, According to section 39(1)(*c*) of the Constitution "[w]hen interpreting the Bill of Rights, a court, tribunal or forum ... may consider foreign law".

As a point of departure it should be noted that, although national situations and circumstances are both diverse and dynamic, the employment relationship is a universal notion and a current issue in all countries. In all countries there are workers who do not have the same protection as other workers due to the fact that they find themselves in the precarious position between employment and self-employment. It should also be noted that all countries draw a distinction between employment and self-employment.[12]

2 *International law*

In contrast to national systems and with the exception of the Employment Relations Recommendation, 2006,[13] there has been little attempt in the Conventions and Recommendations of the ILO (collectively referred to as International Labour Standards (or ILS)) to distinguished between independent contractors and employees.[14] The term "worker" is used in ILS as the preferred term of reference with very little guidance given as to whom the term is meant to apply. In some instances the term clearly encompasses employees and independent contractors, in other instances the term clearly applies only to employees and in other instances there is uncertainty as to which category of workers they are meant to apply.[15]

In what follows the approach of the ILO in relation to the categories of workers to which ILS apply will be analysed. To this end the study will consider the approach of

[11] Du Plessis *Re-Interpretation of Statutes* (2002) 173.
[12] Marín "The employment relationship: the issue at the international level" in Davidov and Langille (eds) *The Boundaries and Frontiers of Labour Law* (2006) 339 342 and Creighton and McCrystall "Who is a "worker" in international law?" 2016 *Comparative Labor Law and Policy Journal* 691 691.
[13] See § 2.5 below.
[14] Creighton and McCrystall (above) 692.
[15] Above.

the ILO in the organisation's four "core" rights and the eight conventions that give effect thereto. According to the Declaration on Fundamental Principles and Rights at Work, 1998 all members, even those who have not ratified any relevant conventions, and simply by virtue of membership of the organisation, have a constitutional obligation to promote and to realise the principles concerning four fundamental rights. These are: freedom of association and free collective bargaining, the elimination of forced labour, the abolition of child labour, and the elimination of discrimination.[16] Additionally, it has been argued that these core rights (as well as certain obligations and principles contained in its Constitution) should be recognised as part of customary international law and, as such, form part of national law to the extent that they are consistent with the Constitution.[17]

The eight conventions that give effect to the four "core" rights of the ILO are: the Freedom of Association and Protection of the Right to Organise Convention, 1948; the Right to Organise and Collective Bargaining Convention, 1949; the Forced Labour Convention, 1930; the Abolition of Forced Labour Convention, 1957; the Minimum Age Convention, 1973; the Worst Forms of Child Labour Convention, 1999; the Equal Remuneration Convention, 1951; and the Discrimination (Employment and Occupation) Convention, 1958.[18] South Africa has ratified all of these Conventions.[19]

Thereafter, other ILS relevant to the employment relationship will be considered. The Employment Relations Recommendation, 2006 will be considered followed by an exploration of other key ILS such as the Domestic Workers Convention, 2011; the Home Work Convention, 1996; the Maternity Protection Convention, 2000; the Part-Time Work Convention, 1994; the Protection of Wages Convention, 1949; the Rural Workers' Organisation Convention, 1975; the Termination of Employment

16 A 2 of the Declaration on Fundamental Principles and Rights at Work, 1998.

17 Rubin "International labour law and the new South Africa" 1998 *South African Law Journal* 685 708-709.

18 These conventions have been ratified in excess of 1,367 times, representing 91,4% of the possible number of ratifications. A further 129 ratifications are required to meet the objective of universal ratification. See ILO "Conventions and recommendations" http://ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm (11-04-2017).

19 See ILO "Ratifications for South Africa" http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102888 (11-04-2017).

Convention, 1982; the Work Health and Safety Convention, 1981; and the Workers with Family Responsibility Convention, 1981. The purpose of this exposition is not to provide a summary of South Africa's public international law obligations,[20] but rather to show how the body of ILS that have developed within the ILO may inform our understanding of who are to be regarded as a party to the employment relationship for purposes of interpreting the concept "employee" in South Africa.

2.1 Freedom of association and free collective bargaining

Article 2 of the Freedom of Association and Protection of the Right to Organise Convention, 1948 guarantees the right of "workers and employers *without distinction whatsoever*, to establish and join organisations of their own choosing, without prior state authorisation".[21] The Freedom of Association Committee has held that the criteria for determining whether persons are covered by the Convention is not based on the existence of an employment relationship and self-employed workers in general should enjoy the right to organise.[22] The Committee of Experts on the Application of Conventions and Recommendations (CEACR) has held that the terminology "workers and employers without distinction whatsoever" applies to all workers, regardless of occupation, sex, colour, race, creed, nationality, or political opinion.[23] Additionally, it was held that the term applies to self-employed workers and workers without employment contracts.[24] South Africa has ratified the Convention and compliance with its provisions is therefore obligatory.[25]

Article 4 of the Right to Organise and Collective Bargaining Convention, 1949 reads:

[20] In fact, many of these standards have not been ratified by South Africa and do therefore not necessarily create any public international law obligations for the country, in so far as it is not possible to argue that a customary international law principle has been established. S 232 of the Constitution provides that "[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament".

[21] Emphasis added.

[22] ILO *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (1996).

[23] ILC *Freedom of Association and Collective Bargaining, ILO General Survey of the Reports on the Freedom of Association and Right to Organise Convention 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention 1949 (No. 98)* (1994) par 45.

[24] Creighton and McCrystall (n 12) 701.

[25] Van Niekerk and Smit (eds) *Law@work* (2015) 59.

> "Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements."

Unlike the 1948 Convention, the text of the 1949 Convention uses the terms "employment" and "terms and conditions of employment". Therefore the effect of the Convention will only be to protect workers against acts of anti-union discrimination in respect of their employment. In addition, it requires state action "with a view to the regulation of terms and conditions of employment by means of collective agreements".[26] It would therefore be wrong to view the terminology employed in the Convention as reducing the scope of protection afforded thereby.[27] Instead it may be averred that the use of the term "employment" was intended only to mean that the Convention applies to the terms and conditions under which workers are engaged.[28] As such, it can clearly be concluded that the 1948 Convention and the 1949 Convention applies to employees and independent contractors as well as workers at the periphery thereof or in non-standard forms of employment.

2.2 The elimination of forced labour

Article 2(1) of the Forced Labour Convention, 1930 defines forced or compulsory labour as "all work or service which is exacted from any person under the menace of penalty". The Abolition of Forced Labour Convention, 1957 contains no definition of "forced or compulsory labour". The CEACR has however held that the term has the same meaning as in the 1930 Convention and that both instruments are intended to encompass forms of work performed by all persons.[29] These Conventions do not use the term worker but it has been held by the CEACR that they refer to work in the broadest possible sense.[30]

These Conventions therefore have the same field of operation as the Freedom of Association and Protection of the Right to Organise Convention, 1948 and the Right to Organise and Collective Bargaining Convention, 1949. Unlike the 1948 and 1949

[26] Creighton and McCrystall (n 12) 700.
[27] Above.
[28] Above 701.
[29] Above 705.
[30] Above.

Conventions, however, they contain no exclusionary or limiting provisions. It can be concluded that the 1957 Convention and the 1930 Convention applies to employees and independent contractors as well as workers at the periphery thereof or in non-standard forms of employment.

2.3 The abolition of child labour

The Minimum Age Convention, 1973 and the Worst Forms of Child Labour Convention, 1999 do not refer to child workers; instead they refer to child labour, and admission to employment or work. The CEACR[31] has observed that the 1973 Convention is meant to be applicable to all economic sectors and all forms of employment irrespective of whether there is a contractual employment relationship, or if the work is remunerated. *Inter alia* it applies to work in the informal economy, in family enterprises, domestic premises, agriculture and farming, and self-employment.[32] The 1973 Convention allows for countries to exclude certain categories of workers from the scope of the Convention, allowing a government to adapt the Convention to a particular national context.[33] The Convention does not list the categories of employment that may be covered by such exclusion, but states that exclusions may not include types of employment likely to jeopardize the health, safety or morals of young persons.[34] The CEACR has held on several occasions that the flexibility clause, used to limit the scope of application, can only be used at the time of ratification, and that it may not be invoked subsequently.[35]

The 1999 Convention applies to all children under 18 years of age. The Convention specifies that for the purposes of the Convention, "the term 'child' shall apply to all persons under the age of 18.[36] Because the 1999 Convention focuses specifically on the most extreme forms of child labour, this narrow focus permits a wide scope of application to all children.[37] The 1999 Convention applies equally to boys and girls,

[31] ILC *Giving Globalization a Human Face: General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* (2012).
[32] Par 322 and 433.
[33] A 4(1) of the 1973 Convention.
[34] As 3 and 4(3) of the 1973 Convention.
[35] ILC (n 31) par 366.
[36] A 2 of the 1999 Convention.
[37] ILC (n 31) par 433.

citizens and non-citizens, employed and self-employed children, as well as legal and illegal work.[38] Unlike the 1973 Convention, the 1999 Convention permits for no exceptions.[39] Determination of the types of hazardous work is however left open to each State, after consultation with the employers and workers concerned.[40] Although these conventions allows for certain exceptions in its field of operation, it is also the case, as with the other core rights, that these conventions are meant to apply in the broadest sense possible and to employees and independent contractors as well as workers at the periphery thereof or in non-standard forms of employment.

2.4 The elimination of discrimination

Equality has always played a central role in the jurisprudence of the ILO.[41] The ILO Constitution, 1919 (Part XIII of the Treaty of Versailles) sets out nine principles "of special and urgent importance" and includes the principle that "men and women should receive equal remuneration for work of equal value".[42] The Declaration of Philadelphia, 1944[43] contains an extensive list of objectives "which should inspire the policy of its Members". Chief amongst these, the Declaration provides that "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity".[44] The reference in the principle of equality of the terms "men and woman" and "all human beings" is insightful and highlights the universality of its application.

The Equal Remuneration Convention, 1951 applies to all workers and extends to all workers the principle of equal remuneration for men and women workers for work of equal value. Remuneration is defined as the "ordinary, basic or minimum wage or salary ... payable directly or indirectly ... by the employer to the worker and arising

38 Above.
39 A 3(a)-(c) of the 1999 Convention.
40 A 4(1) of the 1999 Convention.
41 ILC (n 31) par 658.
42 A 427 of the Treaty.
43 The declaration was incorporated into the ILO Constitution in 1946 and was reproduced as an annex thereto.
44 A 1 of the Declaration.

out of the worker's employment".[45] The CEACR[46] has stated that "the principle of equal remuneration for men and women shall apply everywhere".[47]

The Discrimination (Employment and Occupation) Convention, 1958 does however not refer to workers but uses the term "persons". The Convention applies to "employment and occupation" which is defines as "access to vocational training, access to employment and to particular occupations, and terms and conditions of employment".[48] The CEACR has held that the use of the term employment in these Conventions is not intended in any way to limit the scope of application thereof. The CEACR stated:

> "There are no exclusions permitted under Convention No 100: it applies to all workers, both nationals and non-nationals, in all sectors of activity, in the public and the private sectors, and in the formal and informal economy."[49]

Again, it can be concluded that these conventions are meant to apply in the broadest sense possible and to employees and independent contractors as well as workers at the periphery thereof or in non-standard forms of employment.

2.5 The employment relationship

In 2000 the ILO organised a tripartite meeting of experts to consider which workers were in need of protection, how they should be defined, and what were appropriate means of protecting them. In a positive development, the meeting of experts produced a report for the Governing Body which noted that the legal definition of employment, in many countries, does not "accord with the realities of working relationships" with the consequence that workers who should be protected are not.[50] The report identified a need "to provide clear guidance about employment relationships, particularly as to the difference between dependent workers and self-employed persons; to combat disguised employment, which has the effect of depriving workers of proper legal

[45] A 1(*a*) of the 1951 Convention.
[46] ILC *Equal Remuneration: General Survey of the Reports on the Equal Remuneration Convention (No. 100) and Recommendation (No. 90), 1951* (1986).
[47] Par 170.
[48] A 1(3) of the 1958 Convention.
[49] ILC (n 31) par 658.
[50] ILO "Report of the Meeting of Experts on Workers in Situations Needing Protection" Conclusions adopted by the 279the session Governing Body (2000) 38.

protection; and not to interfere with genuine commercial or independent contracting".[51]

In 2003 the International Labour Conference founded a Committee on the Employment Relationship. In its Report to the Conference, the Committee proposed a series of Conclusions in which it attempted to clarify the meaning of the terms "employee," "employer," and "worker" which were adopted by the Conference.[52] They correctly concluded that:

> "[t]he term employee is a legal term which refers to a person who is a party to a certain kind of legal relationship which is normally called an employment relationship. The term worker is a broader term that can be applied to any worker, regardless of whether or not she or he is an employee. ... The employment relationship is a notion which creates a legal link between a person, called the 'employee' with another person, called the 'employer' to whom she or he provides labour or services under certain conditions in return for remuneration. Self-employment and independent work based on commercial and civil contractual arrangements are by definition beyond the scope of the employment relationship."[53]

Importantly, the Conclusions accepted that the term worker is broader than the term employee. The Conclusions also acknowledged that between the two extremes of employment and self-employment, there are groups of "disguised" or "ambiguous" employees where the status of these employees are uncertain.[54] The Conclusions proposed the adoption of a recommendation focused on the phenomenon of disguised employment.[55]

The ILO consequently adopted the Employment Relationship Recommendation, 2006.[56] The Preamble of the Recommendation clearly roots the instrument in the

[51] Creighton and McCrystall (n 12) 711.
[52] ILO "Report of the committee on the employment relationship" Provisional record no 21 91st session International Labour Conference (2003).
[53] 21/52.
[54] Above.
[55] The difficult "adoption" of the Recommendation, as opposed to a Convention can be explained with reference to the failure of the ILC to adopt a Convention or Recommendation on contract labour. Although a draft convention was prepared and submitted to the Conference, no consensus could be reach thereon. Instead the focus of the Conference shifted to the adoption of a recommendation, as there was general awareness that a recommendation on this topic was more likely to secure the requisite majority of two thirds of delegates present and voting in the ILC than was a proposal for a Convention. See Freedland "Application of labour and employment Law beyond the contract of employment" 2007 *International Labour Review* 3 18; and Servais *International Labour Law* (2014) 219.
[56] The Recommendation has been described as the result of "a long-lasting and difficult debate" which has resulted in an anodyne instrument that has attracted little interest within the ILO, or in the secondary literature.

principles set out in the ILO Declaration on Fundamental Principles and Rights at Work, 1998[57] and the Decent Work Agenda.[58] The Preamble affirms, "the protection of workers is at the heart of the mandate of the International Labour Organisation". Additionally, the Preamble acknowledges the difficulties of establishing whether an employment relationship exists where there has been an attempt to disguise the employment relationship, or where inadequacies or limitations exist in the legal framework, or in its interpretation or application. The Preamble further acknowledges the fact that contractual arrangements can have the effect of depriving protection that is due to workers. Insightfully, and quite correctly so, the Preamble recognises that difficulties in establishing the existence of an employment relationship creates serious problems for workers, communities, and society at large.

The Recommendation provides members with guidance on how to establish the existence of the employment relationship. The Recommendation deals with the phenomenon of disguised employment which are agreements that are cast in terms that, on the face of it, establish a relationship other than employment, but which is an employment relationship in practice.[59] The Recommendation advises that a decision as to who is an employee should be directed by the facts relating to the performance of work rather than the character and content of a contract between the parties.[60]

The Recommendation also suggests that member states should consider the following factors to consider the existence of the employment relationship. They are: if the work is carried out under the instructions and control of another party; if the worker is integrated into the organisation of the enterprise; if the work is to be done mainly for the benefit of the other party; if the work is carried out personally by the worker; if the work is performed within specified working hours; or if the work requires the

[57] See n 16 above.

[58] The decent work agenda promotes four strategic objectives. They are promoting employment, developing and enhancing measures of social protection (that is, social security and labour protection), promoting social dialogue and tripartism, and respecting, promoting and realising the fundamental principles and rights at work. See a I of the Declaration on Social Justice for a Fair Globalisation, 2008. A II of the Declaration states that members have a "key responsibility" to contribute to the decent work agenda through their social and economic policy, although member states are free to determine how to achieve the strategic objectives. According to Creighton and McCrystall (n 14) 716 "the issue of coverage of labor standards necessarily underlies attempts to provide decent work and achieve social justice".

[59] A 4(*a*) of the Recommendation.

[60] A 9 of the Recommendation.

provision of materials, machinery and tools by the party; and who requests the work to be done.[61] These indicators reflect the tests[62] developed by courts in England and in South Africa.[63] These indicators were first set out in *Smit v Workmen's Compensation Commissioner*[64] and are now codified in the presumption in favour of employment and the Code of Good Practice: Who is an Employee?

The Recommendation also advocates that national policies should ensure protection to those affected by uncertainty, including the most vulnerable workers such as young people, workers in the informal economy and migrant workers.[65] Importantly, the Recommendation accepts that certain categories of workers may justifiably be excluded from labour law protections. Particularly, it would be justifiable to exclude workers who are genuinely self-employed from protections that are afforded to workers who are engaged in an employment relationship. The Recommendation has been criticised for doing little more than codifying the traditional demarcation line between employees and independent contractors in the common-law and civil-law tradition, and for not dealing with the grey area in-between these positions.[66] In addition, South Africa had already, at the time of the adoption of the recommendation, adopted a presumption in favour of employment and the Code of Good Practice: Who is an Employee?[67]

2.6 Other international labour standards

An exploration of the eight key ILO Conventions and the Employment Relations Recommendation, 2006 are important as they provide key insights into the approach of the ILO in determining who should be protected by employment legislation. Several other international standards have also been adopted to deal with specific (vulnerable) groups of workers in an attempt to extend labour protection to them and to bring them into the ambit of employment. A selection of the most appropriate

61 A 13 of the Recommendation.
62 Refer to Chapter 4.
63 Fourie (n 2) 135.
64 1979 1 SA 51 (A).
65 A 5 of the Recommendation.
66 Servais (n 55) 225.
67 Refer to Chapter 5 § 3.2 and 3.3.

instruments will be analysed to further determine what the approach of these instrument is with regard to their scope of application.

The Protection of Wages Convention, 1949[68] applies to all persons to whom wages are paid or payable.[69] Wages are however defined as "remuneration or earnings ... payable in virtue of a written or unwritten contract of employment by an employer to an employed person for work done or to be done or for services rendered".[70] The Convention seems to confine its scope to persons engaged in an employer-employee relationship. The CEACR[71] has, however, held that the term "wages" is not intended to be used in a technical sense, and instead applies "all the various forms and components of labour remuneration" and "clearly aims at the protection of all workers without exception".[72] The CEACR has warned that "the obligations deriving from the Convention with respect to the protection of workers' wages cannot be bypassed by mere terminological subterfuges".[73]

The Part-Time Work Convention, 1994[74] not only recognises part-time work, but also provides for the extension of protection for these workers. The Convention recognises

> "the importance of productive and freely chosen employment for all workers, the economic importance of part-time work, the need for employment policies to take into account the role of part-time work in facilitating additional employment opportunities, and the need to ensure protection for part-time workers in the areas of access to employment, working conditions and social security."[75]

Part-time worker is defined as "an employed person whose normal hours of work are less than those of comparable full-time workers".[76] Comparable full-time worker is defined as

> "a full-time worker who has the same type of employment relationship; is engaged in the same or a similar type of work or occupation; and is employed in the same establishment or, when there is no comparable full-time worker in that establishment, in the same enterprise or, when

[68] This Convention has not been ratified by South Africa.
[69] A 2(1) of the 1949 Convention.
[70] A 1 of the 1949 Convention.
[71] ILC *General Survey of the Reports Concerning the Protection of Wages Convention (No. 95) and the Protection of Wages Recommendation (No. 85), 1949* (1994).
[72] Creighton and McCrystall (n 12) 718. ILC (above) par 64.
[73] Above.
[74] This Convention has not been ratified by South Africa.
[75] Preamble.
[76] A 1(*a*) of the 1994 Convention.

> there is no comparable full-time worker in that enterprise, in the same branch of activity, as the part-time worker concerned."[77]

The Convention provides that measures must be taken to ensure that part-time workers receive the same protection as comparable full-time workers with regard to the right to organise, the right to bargain collectively and the right to act as workers' representatives, occupational safety and health and discrimination in employment and occupation.[78] Additionally, measures must be taken to ensure that part-time workers receive conditions equivalent to those of comparable full-time workers in the fields of maternity protection, termination of employment, paid annual leave and paid public holidays; and sick leave (although pecuniary entitlements may be determined in proportion to hours of work or earnings).[79] The Conventions also necessitates measures to be taken to facilitate access to productive and freely chosen part-time work that meets the needs of both employers and workers, including the review of laws and regulations that may prevent or discourage recourse to acceptance of part-time work and the use of employment services where they exist.[80]

The Home Work Convention, 1996[81] recognises that there are workers in need of protection who do not work at the place of the employer.[82] The Convention states that international labour standards of general application concerning working conditions are applicable to homeworkers, and that the particular conditions specific to home work make it desirable to improve the application of those standards to homeworkers, and to supplement them by standards which take into account the special characteristics of home work.[83] The term "home work" is defined as

> "work carried out by a person ... in his or her home or in other premises of his or her choice, other than the workplace of the employer; for remuneration; which results in a product or service as specified by the employer, irrespective of who provides the equipment, materials or other inputs used, unless this person has the degree of autonomy and of economic independence necessary to be considered an independent worker under national laws, regulations or court decisions."[84]

77 A 1(*c*) of the 1994 Convention.
78 A 4 of the 1994 Convention.
79 A 7 of the 1994 Convention.
80 A 9 of the 1994 Convention.
81 This Convention has not been ratified by South Africa.
82 Fourie (n 2) 137.
83 Preamble of the 1996 Convention.
84 A 1(*a*) of the 1996 Convention.

The Convention also offers a definition of the term employer as "a person, natural or legal, who, either directly or through an intermediary, whether or not intermediaries are provided for in national legislation, gives out home work in pursuance of his or her business activity".[85] Notably, the employer is identified and held accountable on the basis of the existence of an identifiable economic relationship and not a contract of employment. The Convention provides that the national policy on home work of each member which has ratified the Convention must promote, as far as possible, equality of treatment between homeworkers and other wage earners, taking into account the special characteristics of home work and, where appropriate, conditions applicable to the same or a similar type of work carried out in an enterprise.[86]

The Workers with Family Responsibility Convention, 1981[87] applies to all workers with responsibilities in relation to their dependent children, where such responsibilities restrict their possibilities of preparing for, entering, participating in or advancing in economic activity.[88] This Convention applies to all branches of economic activity and all categories of workers.[89] According to Fourie, the Convention acknowledges that the problems workers with family responsibilities are wider societal issues.[90] The Convention requires that measures compatible with national conditions and possibilities must be taken to take account of the needs of workers with family responsibilities in community planning; and to develop and to promote community services such as child-care and family services and facilities.[91]

The Rural Workers' Organisation Convention, 1975[92] defines the term rural worker as "any person engaged in agriculture, handicrafts or a related occupation in a rural area, whether as a wage earner or as a self-employed person such as a tenant,

[85] A 1(*c*) of the 1996 Convention.
[86] A 4(1) of the 1996 Convention. A 4(2) provides that equality of treatment shall be promoted, in particular, in relation to: the homeworkers' right to establish or join organizations of their own choosing and to participate in the activities of such organizations; protection against discrimination in employment and occupation; protection in the field of occupational safety and health; remuneration; statutory social security protection; access to training; minimum age for admission to employment or work; and maternity protection.
[87] This Convention has not been ratified by South Africa.
[88] A 1(1) of the 1981 Conventions.
[89] A 2 of the 1981 Conventions.
[90] Fourie (n 2) 138.
[91] A 5 of the 1981 Conventions.
[92] This Convention has not been ratified by South Africa.

sharecropper or small owner-occupier".[93] The Convention however applies only to those tenants, sharecroppers or small owner-occupiers who derive their main income from agriculture, who work the land themselves, with the help only of their family or with the help of occasional outside labour and who do not permanently employ workers; or employ a substantial number of seasonal workers; or have any land cultivated by sharecroppers or tenants.[94] The Convention *inter alia* provides that all categories of rural workers, whether they are wage earners or self-employed, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations, of their own choosing without previous authorisation.[95] Interestingly, therefore, the Convention extends protection to the traditional categories of workers of independent contractors as well as employees.

The exposition traced thus far illustrates that, with the exception of the Employment Relations Recommendation, 2006 that endorses the traditional binary divide between employees and independent contractors, international labour standards have generally extended to workers in the broadest possible sense. The Termination of Employment Convention, 1982,[96] however excludes workers who are not in an employee-employer relationship. Although the Convention applies to "all branches of economic activity", its protection extends only to "employed persons".[97] The Convention makes it clear that this means only persons who are engaged under a contract of employment.[98] The CEACR has observed that the application of the Convention is expressly limited to persons in an employment relationship and not to self-employed persons.[99]

Similarly, the Work Health and Safety Convention, 1981[100] states that the Convention applies to "all branches of economic activity" and to "all workers in the branches of economic activity covered".[101] The term worker is defined as "all employed persons, including public employees".[102] As such the Convention is silent with regards to self-

[93] A 2(1) of the 1975 Convention.
[94] A 2(2) of the 1975 Convention.
[95] A 3(1) of the 1975 Convention.
[96] This Convention has not been ratified by South Africa.
[97] A 2(1) of the 1982 Convention.
[98] A 2(2) of the 1982 Convention.
[99] Creighton and McCrystall (n 12) 719.
[100] This Convention has not been ratified by South Africa.
[101] A 1(1) and a 2(1) of the 1981 Convention.
[102] A 3(*b*) of the 1981 Convention.

employed persons. Also, the Domestic Workers Convention, 2011[103] applies to "any person engaged in domestic work within an employment relationship".[104] As such, the Convention seems to apply only to those workers who are engaged under a contract of employment, although the preparatory materials of the Convention suggests it was intended to apply more broadly.[105] From the above it is clear that, with some exception, international labour standards are generally wide enough to encompass employees and independent contractors in addition to workers in the periphery of these relationships.

3 *Foreign law*

There are three important and distinct reasons as to why an interpreter should consider the comparative experience of other countries in dealing with the interpretive problem of who should be regarded as a party to the employment relationship. Firstly, it may be argue that the identification of the parties to the employment relationship is cut from a universal cloth and that all courts are engaged in the identification, interpretation, and application of the same set of norms so as to identify the parties.[106] Those norms are understood as universal legal principles.[107]

Secondly, it is often argued that legal systems are often bound together by complicated historical relationships and that those relationships are sufficient justification to import and apply foreign law norms.[108] Courts will favour comparisons with judicial systems which share our legal tradition and which have historically impacted on our understanding of our problem. Thirdly, courts can identify the normative and factual assumptions underlying our own understanding of the parties to the employment relationship by engaging with comparable jurisprudence of other jurisdictions.[109]

[103] This Convention has been ratified by South Africa.
[104] A (1) of the 2011 Convention.
[105] Creighton and McCrystall (n 12) 722.
[106] Choudhry S "Globalisation in search of justification: towards a theory of comparative constitutional interpretation" 1999 *Indiana Law Journal* 820 825.
[107] Above 833 and 841.
[108] Above 838 and 866.
[109] Above 835 and 855.

In *K v Minister of Safety and Security*[110] the Constitutional Court warned that it is important not "to equate legal institutions which are not, in truth, comparable".[111] The Court however went on to hold that "the approach of other legal systems remains of relevance to us" and that "[i]t would seem unduly parochial to consider that no guidance, whether positive or negative, could be drawn from other legal systems' grappling with issues similar to those with which we are confronted".[112] The Court found that the responses of other legal systems may enlighten our understanding of our own law, and assist us in developing it further.[113] It is also trite that the problems associated with identification of the parties to the employment relationship is a shared concern amongst many legal jurisdictions.

It is also important to look to the experiences of other African countries, as they provide an overview of legislative inventions which function in much of the same economic realities as those that South African workers are faced with. As pressure mounts upon the South African judiciary to contribute to the decolonisation of knowledge, it is foreseen that the judiciary will turn ever increasingly to the African experience. It should however be noted that other African countries are not free from colonial influences (either directly or via South African inception). Although beyond the scope of this study, the judiciary will have to consider historic and contemporary contextual factors within which the legal provisions of African countries operate.

In what follows key insights with regard to a selection of themes relevant to identification of the parties to the employment relationship will be identified. They are: definitions relevant to the binary divide between employees and independent contractors; the distinction between employees and independent contractors; the relevance, if any, of the contract of employment; and factors relevant to identifying the employment relationship. Countries surveyed include: Australia; Canada; India; the United Kingdom; Morocco; Namibia; Swaziland; Tanzania; Zimbabwe; Germany; and the Netherlands. Note that the exposition is not meant to be a complete account of the regulation of the employment regulation in these countries. Instead the exposition will highlight significant legislative, judicial and critical academic

[110] 2005 6 SA 419 (CC).
[111] Par 34.
[112] Par 35.
[113] Above.

responses to the regulation of the employment relationship in these countries that might me valuable to the South African judiciary in identifying the parties to the employment relationship.

3.1 Definitions

A definition acquires, for purposes of a specific statute, a technical meaning that may deviate from their ordinary meaning.[114] The definition of "employee" as used in employment legislation therefore obtains a technical meaning that may differ from the public's ordinary understanding of the term. As such it may be useful to contrast and compare the definition that has been given to concepts relevant to determining the parties of the employment relationship so as to elucidate the South African understanding of similar provisions in South African labour law.

It is significant to note that in many countries there is no statutory definition of the term "employee". Australian labour legislation does not provide any workable statutory definitions of the concept of employee. The Australian Fair Work Act,[115] for example, merely defines the term as having its ordinary meaning.[116] So too, despite the importance of the concept of "employee" in extending (individual and collective) labour protection to workers in Canada and the acceptance of the binary divide between employees and independent contractors in the country, the concept is largely left undefined in Canadian labour legislation.[117]

Although some countries choose to provide no statutory definition of "employee", they often utilise so-called deeming provisions to explicitly provide that certain categories of workers are employees. In Australia, some cleaners, outworkers and drivers of public passenger vehicles who might ordinarily be considered independent contractors are however deemed employees under the Fair Work Act.[118] In the United

[114] Du Plessis "Interpretation of statutes and the Constitution" in *LexisNexis* (ed) *Bill of Rights Compendium* (2012) 2C32.2C34.
[115] 28 of 2009.
[116] Ss 11 and 12.
[117] Sack, Phillips and Leal-Neri "Protecting workers in a changing workworld: the growth of precarious employment in Canada, the United States and Mexico" in Casale (ed) *The Employment Relationship: A Comparative Overview* (2011) 233.
[118] Ss 4 and 5.

Kingdom, Ministers may extend employment rights to certain individuals, and may provide that such individuals are to be treated as parties to employment contracts.[119] In Morocco, the Labour Code, 2004 specifically includes groups of workers that are often unprotected, such as salespersons and home workers.[120] In Tanzania, the Minister is given the express authority to deem any individual an employee.[121]

The vast array of countries surveyed, have however chosen to provide a statutory definition of the term "employee",[122] or of similar terms.[123] The majority of African countries surveyed has defined the term "employee" is practically identical to the definition of employee contained in South African labour legislation.[124] Although not much help can be discerned from the statutory definitions of the term utilised in these countries, much guidance can be sought form the interpretation given to the term in these countries.

In Zimbabwe, the term "contractor" is defined as "a person who renders to an employer services which are related to or connected with those of the employer's

[119] S 23 of the Employment Relations Act, 1999.
[120] S 2 of the Moroccan Labour Code.
[121] S 4(*c*) of the Tanzanian Employment and Labour Relations Act 6 of 2004.
[122] S 2(*e*) of the Indian Payment of Gratuity Act 39 of 1972 defines "employee" as "any person (other than an apprentice) who is employed for wages, whether the terms of such employment are express or implied, in any kind of work, manual or otherwise, in or in connection with the work of a factory, mine, oilfield, plantation, port, railway company, shop or other establishment to which this Act applies, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity". See also s 2 of the Swaziland Industrial Relations Act 1 of 2000 and s 2 of the Swaziland Employment Act 5 of 1980.
[123] S 2(*s*) of the Indian Industrial Disputes Act 14 of 1947, for example, defines "workmen" as "any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person (i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or (ii) who is employed in the police service or as an officer or other employee of a prison; or (iii) who is employed mainly in a managerial or administrative capacity; or (iv) who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature." S 6 of the Moroccan labour Code provides that provides that "'[w]age earners/salaried workers' include every person who is engaged to carry out a professional activity under the direction of one or more employers in return for remuneration, whatever the nature and method of payment".
[124] S 1 of the Namibian Labour Act 11 of 2007 defines an employee as "an individual, other than an independent contractor, who (*a*) works for another person and who receives, or is entitled to receive, remuneration for that work; or (*b*) in any manner assists in carrying on or conducting the business of an employer".

undertaking".[125] Many countries, such as Namibia,[126] Swaziland,[127] and Zimbabwe[128] have also chosen to include a, workable,[129] statutory definition of the term "employer". Davies and Freedland have argued that many difficulties about the scope of labour law coverage can be resolved, or at least better understood, by shifting the focus of the debate from the question who an employee is to the question who is an employer.[130] As such, the inclusion of a definition of employer serves as an important potential instrument in determining the scope and application of labour legislation.[131]

Untill recently, no statutory definition of the term *Arbeitnehmer* (employee) or *Arbeitverstrag* (contract of employment) was present in German labour law.[132] There

[125] S 2 of the Labour Act 17 of 2002.

[126] Employer is defined in s 1 of the Namibian Labour Act 11 of 2007 as "any person, including the State who (*a*) employs or provides work for, an individual and who remunerates or expressly or tacitly undertakes to remunerate that individual; or (*b*) permits an individual to assist that person in any manner in the carrying or, conducting that person's business".

[127] S 2 of the Swaziland Employment Act 5 of 1980 defines "employer" as "any person or undertaking, contractor, corporation, company, public authority or body of persons who or which has entered into a contract of employment with an employee and includes any agent, representative, foreman or manager of such person, undertaking, corporation, public authority or body of persons who is placed in authority over that employee; and in the case of any such person who has died, his executor; who has become of unsound mind, his Curator Bonis; who has become an insolvent, the trustee of his insolvent estate; which is a company in liquidation, the liquidator of the company".

[128] Employer is defined in s 2 of the Labour Act 17 of 2002 as "any person whatsoever who employs or provides work for another person and remunerates or expressly or tacitly undertakes to remunerate him, and includes (a) the manager, agent or representative of such person who is in charge or control of the work upon which such other person is employed; and (*b*) the judicial manager of such person appointed in terms of the Companies Act; (*c*) the liquidator or trustee of the insolvent estate of such person, if authorised to carry on the business of such person by (i) the creditors; or (ii) in the absence of any instructions given by the creditors, the Master of the High Court; (*d*) the executor of the deceased estate of such person, if authorised to carry on the business of such person by the Master of the High Court; (*e*) the curator of such person who is a patient as defined in the Mental Health Act), if authorised to carry on the business of such person in terms of section 88 of that Act".

[129] The definition of "employer" as contained in South African labour legislation cannot be appropriately described as "workable". See Chapter 6 § 3.4.

[130] Davies and Freedland "The complexities in the employment enterprise" in Davidov and Langille (eds) *The Boundaries and Frontiers of Labour Law* (2006) 273.

[131] Benjamin (assisted by Bhoola) "Subordination, parasubordination and self-employment: a comparative study of selected African countries" in Casale (ed) *The Employment Relationship* (2011) 119.

[132] Section 611a(1) of the *Bürgerliches Gesetzbuch* (Civil Code) defined the *Arbeitverstrag* (contract of employment) as follows: "*Durch den Arbeitsvertrag wird der Arbeitnehmer im Dienste eines anderen zur Leistung weisungsgebundener, fremdbestimmter Arbeit in persönlicher Abhängigkeit verpflichtet. Das Weisungsrecht kann Inhalt, Durchführung, Zeit und Ort der Tätigkeit betreffen. Weisungsgebunden ist, wer nicht im Wesentlichen frei seine Tätigkeit gestalten und seine Arbeitszeit bestimmen kann. Der Grad der persönlichen Abhängigkeit hängt dabei auch von der Eigenart der jeweiligen Tätigkeit ab. Für die Feststellung, ob ein Arbeitsvertrag vorliegt, ist eine Gesamtbetrachtung aller Umstände vorzunehmen. Zeigt die tatsächliche Durchführung des Vertragsverhältnisses, dass es sich um ein Arbeitsverhältnis handelt, kommt es auf die Bezeichnung im Vertrag nicht an*." Translated as: "An employee is any person who, pursuant to a civil law

was only a definition of the term *Selbständer* (self-employed). Section 84(1) of the *Handelsgesetzbuch* (Commercial Code) defines the term as follows: "*Selbständig ist, wer im wesentlichen frei seine Tätigkeit gestalten und seine Arbeitszeit bestimmen kann*."[133] From the above, personal freedom is deduced to be the main characteristic of being self-employed. Conversely, *Persönliche Abhängigkeit* (personal subordination) is taken to be the main characteristic of being employed.[134] Personal subordination has been understood to mean something different than economic dependency.[135] The *Sozialgesetzbuch* (German Social Security Code) does however contain a definition of *Beschäftigung* (employment): "*Beschäftigung ist die nichtselbständige Arbeit, insbesondere in einem Arbeitsverhältnis. Anhaltspunkte für eine Beschäftigung sind eine Tätigkeit nach Weisungen und eine Eingliederung in die Arbeitsorganisation des Weisungsgebers*."[136]

In the Netherlands, the *Burgerlijk Wetboek* (Dutch Civil Code) establishes and defines two forms of contracts relating to the performance of work: *de arbeidsovereenkomst* (the employment agreement) and *de opdracht* (the contract for services). The *arbeidsovereenkomst* is defined as follows:

> "(1) *De arbeidsovereenkomst is de overeenkomst waarbij de ene partij, de werknemer, zich verbindt in dienst van de andere partij, de werkgever, tegen loon gedurende zekere tijd arbeid te verrichten.* (2) *Indien een overeenkomst zowel aan de omschrijving van lid 1 voldoet als aan die van een andere door de wet geregelde bijzondere soort van overeenkomst, zijn de bepalingen van deze titel en de voor de andere soort van overeenkomst gegeven bepalingen naast elkaar van toepassing. In geval van strijd zijn de bepalingen van deze titel van toepassing.*"[137]

contract, is obligated to perform, subject to instructions, work determined by a third party in relation to whom the person is personally dependent. The right to give instructions can concern the content, performance, time, duration and place of the activity. An employee is any employed person who cannot essentially determine freely his/her activities and his/her working hours; the degree of personal dependency is also determined by the specific nature of the activity in each case. All of the related circumstances must be given consideration in determining whether a person is an employee within this sense. If the actual performance of the contractual relationships demonstrates that it is an employment relationship, the designation in the contract is irrelevant."

133 Translated as: Anybody who essentially is free in organising his work and in determining his working time is presumed to be self-employed.

134 Weiss and Schmidt *Labour Law and Industrial Relations in Germany* (2008) 45. For recent developments and a discussion of the definition of the contract of employment in Germany, see Jünger *Arbeitrecht* (2017) 8 ao.

135 Above.

136 S 7.1, Book IV. Translated as: Employment is not self-employed work, especially when it is done within the confines of the employment relationship. Indicators of employment are that the work is done under the control of another person and that the worker is part the employer's organisation.

137 A 7:610 CC. Translated as: (1) An employment agreement is an agreement under which one of the parties ('the employee') engages himself towards the opposite party ('the employer') to perform work for a period of time in service of this opposite party in exchange for payment.

Opdracht, which is the contract under which independent contractors will operate, is defined as follows:

> "*De overeenkomst van opdracht is de overeenkomst waarbij de ene partij, de opdrachtnemer, zich jegens de andere partij, de opdrachtgever, verbindt anders dan op grond van een arbeidsovereenkomst werkzaamheden te verrichten die in iets anders bestaan dan het tot stand brengen van een werk van stoffelijke aard, het bewaren van zaken, het uitgeven van werken of het vervoeren of doen vervoeren van personen of zaken*."[138]

Accordingly, three core elements must be present in order for an employment agreement to exist under Dutch civil law. Firstly, the employer must be entitled to give orders as to how the work is to be carried out (relationship of authority). What is determinative is if the employer is entitled to give orders, not if he actually does. Secondly, the worker must carry out the work personally (exclusively). Thirdly, the worker must receive remuneration (wages) for his work from the employer.[139]

3.2 The binary divide between employees and independent contractors

In *ACE Insurance Ltd v Trifunovski*[140] the Federal Court of Australia dealt with the distinction between employees and independent contractors. The Court found that "the distinction between an employee and an independent contractor is rooted fundamentally in the difference between a person who serves his employer in his, the employer's, business, and a person who carries on a trade or business of his own".[141] The Court stressed that the answers to the question as to who is an employee must be determined by reference to the totality of the relationship.[142]

(2) When an agreement has the characteristics of both, an agreement as meant in paragraph 1 and of another statutory regulated particular agreement, then the statutory provisions of the present Title and the statutory provisions set by law for this other particular agreement shall apply simultaneously (side by side) to that agreement. In the event of a conflict between these statutory provisions, the statutory provisions of the present Title prevail.

138 A 7:400 CC. Translated as: A service provision agreement is the agreement under which one of the parties ('the service provider') has engaged himself towards the other party ('the client') to perform work on another basis than an employment agreement, which work consists of something else than the making of a tangible construction, the safekeeping of property, the publication of a work or the transportation of persons or goods.

139 Oberman "The Netherlands" in L&E Global (eds) *Employees vs Independent Contractors: Understanding the Distinction between Contractors and Employees and the Re-characterization of a Contractor into an Employee* (2014) 131 134.

140 2011 FCA 1204.

141 Par 29.

142 Above.

Some countries have moved beyond a mere binary divide and have moved towards recognising further categories of workers. Canada has taken significant steps towards recognising an intermediate category of worker between employee and independent contractor. A number of Canadian provinces, as well as the federal government have deemed "dependent contractors" to be employees for purposes of labour relations legislation in order to extend collective bargaining rights to such workers. So, for example, the Ontario Labour Relations Act, 1995 defines "dependent contractor" as

> "a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor."[143]

The Canadian Labour Board have considered the following factors as relevant to determine if a worker is a dependent contractor: if the worker exercised independent judgement when providing services; control over scheduling; method of payment; if the worker negotiates the rate of pay; how essential the worker's service is to the operations of the enterprise, opportunity for profit and loss; compliance with employee manuals; worker evaluation and discipline.[144]

The British Columbia Court of Appeal in *Old Dutch Foods Ltd v Teamsters Local Union No 213*[145] considered the statutory definition of dependent contractor (identical to Ontario's definition) and established a two-part test for dependent contractor status. The first part is whether a worker "performs work or services for compensation or reward" and whether the worker is economically dependent on the employer. The Court further found that, in determining dependent contractor status, it is important to assess the "the substance of the relationship, not merely its form". Arthurs has suggested that the Canadian government should recognise, for the purposes of individual labour standards protection, a category of so-called "autonomous workers" who "inhabit some of the same workplaces and labour

[143] S 1(1).
[144] Sack, Phillips and Leal-Neri (n 117) 258.
[145] 2006 BCJ No 3127 (BCCA).

markets [as employees and who] must deal with many of the same practical and contractual issues".[146]

In Tanzania the legislature has adopted a definition of "employee" designed to widen the scope of application of labour protection to the so-called "middle-category" between employee and self-employed.[147] The Tanzanian Employment and Labour Relations Act[148] includes within the definition of employee as: an individual who has entered into a contract, other than a contract of employment" under which "the individual undertakes to work personally for the other party to the contract and the other party is not a client or customer of any profession, business, or undertaking carried on by the individual".[149] The definition is based on the definition of "worker" contained in section 230 of the United Kingdom Employment Rights Act, 1996.[150] The UK Employment Appeals Tribunal has used the economic dependence test to determine if a person falls within this definition.[151] In *Flynn v Torith Ltd*[152] it was found that the term is wide enough to include many casual, freelance and self-employed workers.

3.3 The contract of employment

In several countries the existence of a valid contract of employment is a *conditio sine qua non* for the establishment of an employment relationship. In Australia, an employee is someone who performs work under a contract of employment. There can be no employment relationship without a valid contract of employment between a

[146] Arthurs *Fairness at Work: Federal Labour Standards for the 21st Century* (2006) 61.
[147] Davies *Perspectives on Labour Law* (2004) 87.
[148] 6 of 2004.
[149] S 4.
[150] The term "worker" has been defined in s 230(3) of the Employment Rights Act as "an individual who has entered into or works under (or, where the employment has ceased, worked under) (*a*) a contract of employment, or (*b*) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly." In *Flynn v Torith Ltd* 2003 All ER (D) it was found that the term is wide enough to include many casual, freelance and self-employed workers.
[151] Above 88.
[152] 2003 All ER (D).

putative employer and a putative employee.[153] The Australian Courts have refused to classify workers as employees in the absence of any contract of employment, even when the relationship had all the hallmarks of an employment relationship.[154] So too in the United Kingdom, according to section 230(1) of the UK Employment Rights Act,[155] an employee is someone who works under a contract of employment. In Zimbabwe, legislative amendments in 2002 removed the existence of a valid contract of employment as a requirement for the establishment of an employment relationship.[156] Such legislative interventions were however short lived as legislation was again amended in 2005[157] so as to require the existence of at least some form of agreement between the parties.[158]

In Swaziland, a contract of employment is a requirement to establish the existence of the employment relationship for purposes of the Swaziland Employment Act,[159] but not for the Swaziland Industrial Relations Act.[160] The Industrial Court of Swaziland has held in *Maphosa v Max Enterprises (Pty) Ltd*[161] that the Act therefore applies only to persons who are employees under a common law contract of employment, the *locatio conductio operarum.*[162] As Benjamin notes, the inconsistent usage in Swaziland's labour legislation creates the situation where certain "quasi-employees" may have collective labour rights under the Industrial Relations Act but no dismissal protection or minimum conditions of employment under the Employment Act.[163]

It is evident that the judiciaries of several countries have moved beyond the principle of *pacta sunt servanda*.[164] The Australian Courts will uphold the true nature of a work relationship despite attempts to label an employer-employee relationship as

[153] *R v Brown; Ex parte Amalgamated Metal Workers and Shipwrights; Union* 1980 144 CLR 426 475. See also Floyd, Steenson, Coulthard, Williams and Pickering *Employment, Labour and Industrial Law in Australia* (2017) 4.
[154] *Advanced Workplace Solutions Pty Ltd v Fox and Kangan Batman TAFE* 1999 AIRC 731.
[155] 1996.
[156] S 2 of the Labour Act 17 of 2002.
[157] S 2 of the Labour Act 7 of 2005.
[158] See Gwisai *Labour and Employment Law in Zimbabwe: Relations of Work Under Neo-colonial Capitalism* (2006) 55 and Madhuku *Labour Law in Zimbabwe* (2015) 25.
[159] 5 of 1980.
[160] 1 of 2000.
[161] 392/03.
[162] Par 11.
[163] Benjamin (n 131) 122.
[164] Translated as "agreements must be kept".

something else.[165] The Canadian Federal Court of Appeal in *Wiebe Door Services Ltd v Canada (Minister of National Revenue)*[166] looked to the factual situation of the various company workers in deciding the company's liability for their taxes, workers' compensation, unemployment insurance and pension contributions. While noting that the agreement that the workers would be running their own businesses and be therefore responsible for their own taxes and other contributions, the Court stated that "[s]uch an agreement is not of itself determinative of the relationship between the parties, and a court must carefully examine the facts in order to come to its own conclusions".[167] In the United Kingdom, judges have similarly demonstrated a willingness to imply such a contract of employment, notwithstanding contractual evidence to the contrary.[168]

In the Netherlands, however, the Dutch Courts will classify the contract as a contract of employment if the three core criteria described above are met,[169] notwithstanding any arrangement the parties may have to the contrary.[170] If a relationship is labelled as an employment contract, the employee is protected by Dutch employment laws, for example regarding minimum wages, holidays, sickness, termination, pension rights, and collective bargaining agreements.[171] However, when dealing with the increase in workers who find themselves in non-standard forms of employment, a number of Dutch labour laws have been extended to include workers who work under the direction of others, even if the contract is not a contract of employment.[172]

Interestingly, the statutory definition of "employee" in Swaziland Industrial Relations Act[173] extends the Act's protection to two categories of workers who may not be able to establish the existence of a (legally valid) contract of employment. These are persons who work under an arrangement in terms of which they are under the control

[165] *Hollis v Vabu Pty Ltd (t/as Crisis Couriers)* 2001 207 CLR 21.
[166] 1986 3 FC 553.
[167] Above.
[168] See *Dacas v Brook St Bureau* 2004 ICR 1437.
[169] See § 3.1 above.
[170] Jacobs *Labour Law in the Netherlands* (2004) 47.
[171] Oberman (n 139) 140.
[172] Jacobs (n 170) 48.
[173] 1 of 2000. S 2 of the Act defines employee as: "a person, whether or not the person is an employee in common law, who works for pay or other remuneration under a contract of service or under any other arrangement involving control by, or sustained dependence for the provision of work upon, another person".

of another person, or a person who works under an arrangement in terms of which there is a sustained dependence for the provision of work upon another person. The definition makes it clear that there are persons who may be covered by the definition who are not common law employees.[174] The Industrial Court of Swaziland in *Lokotfwako v Swaziland Television Broadcasting Corporation t/a Swazi TV*[175] has described the implications of this wider definition as follows:

> "This extended definition means that the Industrial Court may even have jurisdiction over independent contractors and their principals, provided that the necessary degree of control or sustained dependence for work is shown to be present in the relationship. ... In our view, the definition of employee in the Act extends to include a category of quasi-employees: where the dominant impression in that a person is an independent contract or agent under some arrangement other than a contract of service, such person will nevertheless be regarded as employee for purposes of the Act if the arrangement involves control or sustained dependence for work."[176]

Interestingly, some countries have also criminalised the phenomenon of disguised employment. In Australia, the Independent Contractors Act[177] and the Workplace Relations Amendment (Independent Contractors) Act [178] impose penalties on employers who use sham arrangements to either disguise employees as independent contractors or coerce employees into independent contracting arrangements. Under the Fair Work Act an employer may not misrepresent an employment relationship as an independent contractor relationship (sham contracting),[179] may not dismiss an employee to engage them as an independent contractor[180] and must not make a false statement to encourage someone to be engaged as an independent contractor.[181]

3.4 Factors relevant to identifying the employment relationship

The dominant impression test, that had been transplanted in South African law and which primarily remains the approach of the South African judiciary to this interpretive question, does not represent the final doctrinal development on the matter in English law. Although not the intention of the author, English courts in the 1980's

[174] Benjamin (n 131) 121.
[175] 151/2007.
[176] Par 9 and 18.
[177] 162 of 2006.
[178] 163 of 2006.
[179] S 357 of the Fair Works Act.
[180] S 358 of the Fair Works Act.
[181] S 359 of the Fair Works Act.

adopted the so-called "mutuality of obligations" test because of the influence of the work of Freedland.[182] This test operates in addition to the other tests developed by the English courts such as the control test, the integration test, the mixed test and the economic reality test.[183]

In addition to these tests, the English courts also require that beyond the exchange of work for remuneration there must be a promise to employ and be employed as such a mutuality of obligations is the essence of any contract of employment.[184] The absence of mutuality of obligation will therefore exclude a claim of employee status without in itself being a sufficient condition.[185] In all likelihood such a test would either be rejected in the South African context (due to its narrow contractual nature), or regulated to the status of "just another factor" to be considered alongside all other factors relevant to the so-called dominant impression test.

In *ACE Insurance Ltd v Trifunovski*[186] the Federal Court of Australia highlighted a list of non-exhaustive *indicia* which the Australian Courts have, to varying degrees, used to determine the parties to the employment relationship. They are: the terms of the contract; the intention of the parties; whether tax is deducted and what is disclosed in the tax returns; whether sub-contracting is permitted; whether uniforms are worn and tools are supplied; whether holidays permitted; the extent of control; whether wages or commissions are paid; whether one party represents the other; the benefit for who the goodwill in the business inure; how business-like the business is; and if there are systems, such as manuals and invoices.[187]

The Canadian judiciary has similarly developed tests to identify the parties to an employment relationship. Although the Canadian Courts relied heavily on the presence or absence of control to determine the existence of an employee relationship, it was found in *Montreal v Montreal Locomotive Works Ltd*[188] that,

[182] Freedland *The Contract of Employment* (1976).
[183] Clarke "Mutuality of obligations and the contract of employment: *Carmicheal and Another v National Power plc*" 2000 *Modern Law Review* 757 757.
[184] Above.
[185] Above.
[186] 2011 FCA 1204.
[187] Above.
[188] 1937 1 DLR 161 (PC).

because of the complexity of modern industry, a "fourfold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss".[189] The Court found that control in itself is not always conclusive and that, in many cases, "the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties".[190]

The Supreme Court of Canada has made it clear that, notwithstanding and irrespective of these common-law tests, courts and tribunals must take into account the particular policy objectives of the statute when deciding if a person has employee status.[191] As such the Supreme Court of Canada has adopted a purposive approach (read: teleological approach) to the interpretation of the concept of employee. Accordingly, the Canadian judiciary should advance the protective goals of Canadian labour legislation. The shortcoming of such an approach is that different definitions of employee may develop as the concept is interpreted to give effect to the varying policy objectives of different pieces of labour legislation.[192]

So too, the Indian judiciary has been unwilling to commit itself to any singular test to the identification of the employment relationship. In *Workmen of Nilgiri Coop Mkt Society Ltd v State of Tamil Nadu*[193] the Court commented on the use of common-law tests to identify the existence of an employee relationship. It found that no single test is determinative for determining the relationship.[194] The Court advanced an integrated approach where it is determined if a person concerned was "fully integrated into the employer's concern".[195] It was held that a court is required to consider several factors. They include: who is appointing authority; who is the pay master; who can dismiss; how long alternative service lasts; the extent of control and supervision; the nature of the job; and the nature of the establishment.[196] Although acknowledging that the Indian judiciary's unwillingness to commit to any particular reasoning or test

[189] 169.
[190] Above.
[191] *Pointe-Claire (City) v Quebec (Labour Court)* 1997 1 SCR 1015 (SC) and *67112 Ontario Ltd v Sagaz Industries Canada Inc* 2001 2 SCR 1983 (SC).
[192] Sack, Phillips and Leal-Neri (n 117) 255.
[193] 2004 (101) FLR 137 par 32.
[194] Above.
[195] Above
[196] Par 37.

is hardly a peculiarity to the Indian legal system, some authors have contended that "it leads to a rather loose and unpredictable framework, further exacerbated by the extremely fragmented, informal, and deregulated realities of the [Indian] labour market".[197]

In Germany the *Bundesarbeitsgericht* has preferred to decide on a case-to-case basis who should be party to the employment relationship.[198] The Court has held that it is sufficient for any one, or any number of the indicators enunciated in the case law to be present so as to establish the existence of an employee relationship. These factors include: the sophistication of the working tasks given (that is how the tasks are performed); the ability to determine working time; the ability to determine work place; the extent that work depends on the principals' business organisation (e.g. use of equipment and resources, team work with other employees); and which of the two parties gains more directly from the performed services.[199]

For purposes of German social security law, it will be presumed that an individual is an employee if at least three of the following factors are present: if the worker does not ordinarily employ anyone covered by compulsory social insurance or whose monthly payment exceeds €400; if the person has been working for only one principle for a long time; if the principle has similar activities carried out by other employees; if the activities of the person does not display the characteristics of entrepreneurial activity; and, if the activities carried out by the person are the same as that carried out by a previous employee of the employer.[200] Consequently, the protection afforded to German workers is broader under social security laws (which admits economically dependent workers) than under labour laws (which are limited to instances of personal subordination).[201]

[197] Casale, Countouris, Fenwick, Lee and Mascarenhas "Legal regulation of the employment relationship in the Asia-Pacific Region" in Casale (ed) *The Employment Relationship: A Comparative Overview* (2011) 189 196.

[198] Above.

[199] Preedy "Germany" in L&E Global (eds) *Employees vs Independent Contractors: Understanding the Distinction between Contractors and Employees and the Re-characterization of a Contractor into an Employee* (2014) 95 96.

[200] Perulli "Subordinate, autonomous and economically dependent work: a comparative analysis of selected European countries" in Casale (ed) *The Employment Relationship* (2011) 137 155.

[201] Above. A wider number of indicators have therefore been enunciated in case law dealing with social security law that are indicative of an employee relationship: if the worker has to provide services in person or may the worker engage an employee/subcontractor himself; which party

The Dutch Courts have looked to the following elements to determine whether a contract was an *opdracht* or an *arbeidsovereenkomst*: the freedom of the worker regarding the organisation of his work; the nature of the remuneration; if payments are made directly by several clients; the extent to which the worker bears an entrepreneurial risk; the extent to which the worker supplies raw materials and consumables and tools; if there is continued payment during vacation time, illness and leave; the extent to which, in addition to the agreed work, other work is performed; the occasional nature of the work; any deduction of social security contributions and payroll taxes by the (potential) employer and any payment of Value Added Tax by the worker.[202]

4 *Conclusion*

An important conclusion that may be drawn from the survey conducted of international instruments and foreign jurisdictions is that to a varying degree the ILO and all countries surveyed are increasingly dealing with the proliferation in non-standard forms of employment and the ever-increasing amount of workers who find themselves in precarious positions as a result thereof. The jurisprudence of the ILO is insightful to our understanding of who should be the beneficiaries of international labour standards. The eight Conventions that constitute the basis of the decent work agenda are clear that they are intended to apply to all workers.[203] They apply to all workers, irrespective of the kind of contractual arrangement (if any) under which individuals are engaged.[204] They are meant to apply to all workers without distinction

carries the economic risk of no performance or poor performance; if the worker is integrated into the business organisation; if the worker is named in duty rosters; if the worker provides the equipment for the work performance; if the worker has a regular workplace at the principal's location; if the worker has an e-mail address or a telephone number; if the worker is registered in the principal's telephone book; if the worker has branded business cards of the principal; if the worker attends internal team meetings; if the worker attends training sessions; if the worker attends internal events like Christmas parties; if the worker is obliged to notify about holidays or other leave; if the worker receives fixed monthly remuneration or if the worker is paid only for the services actually provided; if the worker has to write invoices; if the worker is covered for sick leave or for holidays; if the worker has a trade license or registered business; if the worker advertises his services; if the worker only works for one principle; if the worker receives more than 5/6 of his overall income form the principle; and the amount of time the worker works for the principal. See Preedy (n 199) 96.

[202] Oberman (n 139) 135.

[203] Creighton and McCrystall (n 12) 692.

[204] Above 706.

or discrimination of any kind. In addition to applying to workers of all races, genders, religions, political affiliations, etc., they also apply to all kinds of work relationship in which a worker happens to be engaged.[205]

South Africa has ratified all of these instruments and consequently it is easy to argue that the South Africa government (including the judiciary) is under a public international law obligation to extend the protection of these standards to as many workers as possibly, especially within the context of the four core rights. Recall that admission to the concept of "employee" will be a prerequisite for the extension of many of these rights. The judiciary can meet this end by interpreting the concept of employee broadly. The same is true of many other international labour standards surveyed,[206] although some instruments clearly apply only to workers who may be said to be employees.[207]

The Employment Relationship Recommendation, 2006 recognises that some workers may justifiably be denied labour protection, both in international and municipal law, according to the category of worker to which they belong. In particular, it is seen to be justifiable to exclude workers who genuinely are independent contractors (self-employed). The purpose of the Recommendation is to ensure that workers are not excluded from protections to which they ought to have access through the use of disguised employment or other avoidance strategies. Beyond this fact, however, the Recommendation offers little guidance as to who should be regarded as an employee for purposes of international law (other than the factors which are deemed indicative of the employment relationship).[208]

Although all countries surveyed have seen an increase in the amount of workers who find themselves in the precarious position between employment and self-employment, legislative and judicial responses have been varied. Whilst the existence of the employment relationship is dependent upon the conclusion of a (valid) contract

[205] Above 273.
[206] The Home Work Convention, 1996; the Maternity Protection Convention, 2000; the Part-Time Work Convention, 1994; the Protection of Wages Convention, 1949; the Rural Workers' Organisation Convention, 1975; and the Workers with Family Responsibility Convention, 1981.
[207] The Domestic Workers Convention, 2011; the Termination of Employment Convention, 1982; and the Work Health and Safety Convention, 1981.
[208] Creighton and McCrystall (n 12) 716.

of employment (such as in Australia, Zimbabwe and The Netherlands), there are examples where the employment relationship extends beyond the contract of employment (such as in Swaziland for purposes of collective labour law). While there exists no (workable) legislative definition of the concept "employee" in several countries (such as Australia; Canada and Germany for purposes of labour law), other countries have often extensive legislative definitions thereof or of the contract of employment (such as India, Namibia and The Netherlands). Some countries (such as Namibia) also define the concept of an employer legislatively.

Some countries have also deemed certain categories of workers to be employees so as to remove any uncertainty about their status (such as Australia and Morocco). The judiciary in some countries will uphold the true nature of a work relationship despite attempts to label an employer/employee relationship as something else (such as in Australia and Canada). Australia imposes penalties on employers who use sham arrangements to either disguise employees as independent contractors.

In many countries, no single factor is determinative of the employment relationship (such as in Australia, Canada, India and Germany). Factors that the judiciary consider in Germany and the Netherlands might be important for South African courts in their quest to determine who should be regarded as part of the employment relationship and who should not. The strikingly teleological approach of the Canadian judiciary are understandably of substantial importance for the South African approach to the interpretation of the concept of "employee" as our courts have adopted such an approach to the interpretation of statutes. In Canada, courts and tribunals must take into account the particular policy objectives of the statute when deciding if a person has employee status. The extension to labour protection to intermediate categories of worker in Canada ("dependent contractors"), United Kingdom ("workers") and Tanzania (extensive definition of "employees" other than those who operate under a contract of employment) will ostensibly also impact upon the South African understanding of the employment relationship.

PART D: FINDINGS AND RECOMMENDATIONS

CHAPTER 9

Conclusion

"Culture, the shared meanings, practices, and symbols that constitute the human world, does not present itself neutrally or with one voice. It is always multivocal and overdetermined, and both the observer and the observed are always enmeshed in it; that is our situation. There is no privileged position, no absolute perspective, no final recounting."[1]

1 *Introduction*

Legal treatises on the employment relationship often advocate for normative interpretation of concepts such as "employee" that are often not rooted in sound interpretive methodology or which ignores such methodology entirely.[2] This study has considered in what way the definition of "employee", as contained in various labour legislative provisions, is to be interpreted. Put differently, the study has focussed on how the term is to be interpreted instead of what the correct interpretation should be. Nevertheless, the consideration of how the term is to be interpreted, or at least a judge's assessment thereof, will inevitably impact upon what

[1] Rabinow and Sullivan "The interpretive turn: emergence of an approach" in Rabinow and Sullivan (eds) *Interpretive Social Science: A Reader* (1979) 1 6.

[2] See Chapter 1 fn 8.

interpretation is ultimately given to the term. Some have also advocated for a radical new approach to the question as to who should be protected by labour law.

So, for example, the idea has been put forward that it might me more useful to ask who is an employer (instead of who is an employee) and asking what such an employer's duties are.[3] It has also been argued that instead of asking who is an employee it might be more useful to ask who the bearers of the right to fair labour practices are.[4] Laudable as they are, such a shift in the approach to determining who should be protected by labour legislation would require massive legislative intervention. This is because the courts are bound by the elements of statutory interpretation and, as things stand, the concept of an "employee" is firmly entrenched in our labour law and constitutional order. Put differently, it could be said that interpreters are bound to interpret the legislative environment in which they find the relevant legislative provision.

The South African approach has shown that such conceptual re-evaluations may be unnecessary. Following the advent of constitutional democracy, the judiciary and the legislature has done much to bring more workers into the fold of labour protection. *Inter alia* "form was abandoned for substance, presumptions and deeming provisions were introduced, the common-law requirements of the contract of employment were discarded, and the focus shifted to the presence of an employment relationship".[5] Additionally, the LRA has recently been amended to address problems of the dynamics of labour broking, outsourcing and short-term contracts.[6]

Le Roux has argued that there will inevitably be pushback against these interventions by unscrupulous employers, "pushing more and more workers beyond the reach of protective labour legislation".[7] The potential pushback of the judiciary should not be underestimated. Emboldened by powers of interpretation and a teleological model of

3 Prassl "Autonomous concepts in labour law? The complexities of the employment enterprise revisited" in Bogg, Costello, Davies and Prassl (eds) *The Autonomy of Labour Law* (2015) 151 151. See also Davies P and Freedland M "The complexities in the employment enterprise" in Davidov G and Langille B (eds) *The Boundaries and Frontiers of Labour Law* Hart Publishing Portland (2006) 273.

4 Fredman "Equality law: labour law or an autonomous field?" in Bogg, Costello, Davies and Prassl (eds) *The Autonomy of Labour Law* (2015) 257 259.

5 "Employment: a Dodo, or simply living dangerously?" 2014 *Industrial Law Journal* 30 33.

6 S 45 of the Labour Relations Amendment Act 6 of 2014.

7 Le Roux (n 5) 33.

interpretation, our courts can do (and have done) much to protect vulnerable workers and bring workers into the fold of labour protection.

2 *Findings*

2.1 The importance of legislation in regulating the employment relationship

Legislation is the most important contemporary source of labour law.[8] The study has found that, especially in the South African context, a vast body of legislative instruments regulate the employment relationship. With some exception, labour lawyers have been loath to except this fact. This is chiefly because[9] the regulation of the employment relationship by means of legislations is contrary to the traditional conception of the purpose of labour law as mitigating the disequilibrium in the employment relationship that was to be achieved through the forces of collective bargaining. As such, the function of legislation was viewed as supporting the primacy of collective bargaining.

The study did not consider normative arguments as to why the regulation of the employment relationship by means of legislation should be preferred over and above collective bargaining (or for that matter the contract of employment). Instead the study has found that, irrespective of such arguments, legislation has already surpassed all other sources of law as the preferred way to regulate the employment relationship. The study also found that, as non-standard or atypical forms of employment, driven by the fourth industrial revolution and other forces of globalisation, proliferates, governments will increasingly turn towards legislation in addressing these problems and to extend protection to workers who find themselves outside of the confines of the traditional employee-employer relationship.

The finding that legislation is the most important contemporary source of labour law may have far-reaching consequences for labour law (such as that a re-appraisal of the purposes of the subject field). For purposes of this study the consequences of this finding are twofold. Firstly, arguments about the importance of statutory

[8] See Chapter 2 § 6.
[9] For an exposition of other objections raised see Chapter 2 § 5.

interpretation[10] is strengthened by the realisation that legislation is the most important contemporary source of labour law. In the wake of the proliferation of labour legislation, labour lawyers will be called upon to interpret such legislation with more regularity in a way that is sound in legal science. Secondly, the interpretation of the term "employee" would therefore also have increased correspondingly. Recall that membership into the employee-employer relationship, facilitated by the definition of "employee", is a prerequisite to benefit from labour legislation.

2.2 The proper approach to the interpretation of the term "employee"

The Constitutional Court has adopted a teleological model of statutory interpretation.[11] It is through this mode of interpretation that the term "employee" in particular, and labour legislation in general, must be interpreted. Teleological interpretation requires that the term "employee" must be interpreted so as to advance the purposes of the legislation in which it is contained in the light of the spirit, purport and objects of the Bill of Rights in the Constitution.[12] The study has traced the historical change from orthodox and literalist forms of interpretation to more progressive forms thereof. Teleological interpretation may be seen as a species of purposive interpretation.[13] To better understand what a teleological model of statutory interpretation requires, the study has considered the views that underlie any theory of statutory interpretation. They are considerations of the relevance of the intention of the legislature, the nature and function of language, the role of the judiciary in the interpretation of statutes, and the time frame within which statutes operate.

The study has found that legislative intent is of fundamental importance to the interpretation of statutes.[14] Legislators have lexical intentions, semantic intentions, communicative intentions, practical intentions, and legal intentions.[15] Teleological interpretation rejects conceptions of actual specific intent or subjective intent. It also

[10] See Chapter 1 § 4.1.
[11] See Chapter 1 § 4.3.
[12] See Le Roux "Directory provisions, section 39(2) of the Constitution and the ontology of statutory law *African Christian Democratic Party v Electoral Commission*" 2006 S*APR/PL* 382 ao.
[13] See Chapter 3 § 2.1 where the historical roots of statutory interpretation in South Africa were explored.
[14] See Chapter 3 § 3.1 above.
[15] Popkin *Statutes in Court: The History and Theory of Statutory Interpretation* (1999) 185.

rejects literalism-cum-intentionalism conceptions of legislative intent in which it is assumed that the legislature couches or encodes its intention in the language of the statutory provision to be construed.[16] Teleological interpretation requires the interpreter to enquire into the objects, purposes or intentions of a hypothetical, reasonable legislature.[17]

The study has found that, due to the nature of language, there are no instances in which statutory provisions do not have to be interpreted.[18]Additionally, language itself cannot alone suffice in giving meaning to legislative provisions – consequently interpreters will have to look beyond the language employed in the legislative instrument to ascertain the meaning of the legislative provision. As such, every application of the term "employee" to a factual scenario requires interpretation. There is no general relation between the language used in legislation to define and prescribe who is an employee, and the law that is ultimately made. This is not to say that language is unimportant. In fact, teleological interpretation acknowledges that textual consideration will control the range of possible meanings that can be attributed to a legislative provision.[19]

The term "employee" can also be said to be vague, but it has been argued that the legislature's choice to leave such a term vague is legitimate. In essence this means that the task of giving content to the term has been transferred from the legislature (by the legislature) to the judiciary. This is justifiable because judges possess specialised expertise to develop norms and because the doctrine of precedent will allow them to develop the norm incrementally and to revise general principles through the processes of appeal. The processes of the courts mean that general rules would develop after taking cognisance of parties to a dispute in which the term is deployed.[20] This does not mean to say that the interpreter has an unfettered discretion. Teleological interpretation ascribes certain basic principles that constrain interpreters. Specifically this study has shown that, not only text, but also context, values, history, and foreign and international law will constrain interpreters.

[16] Du Plessis "Interpretation of the Bill of Rights" in Woolman, Roux and Bishop (eds) *Constitutional Law of South Africa* (2014) 32-32.
[17] Popkin (n 15) 185.
[18] See Chapter 3 § 3.2 above.
[19] *Xaba v Portnet Ltd* 2000 21 ILJ 1739 (LAC) par 3.22.
[20] Above.

The theory of teleological interpretation is also rooted in a particular understanding of the separation of powers, democracy, rule of law, and the role of a judge in a democracy where judges do some legislating.[21] Such an approach is consistent with the approach of the Constitutional Court that concerns on the separation of powers, although important, cannot be used to avoid the constitutionally imposed obligations of a court.[22] The study has further justified the powers of judges to legislate and to act as legislatures when they look beyond the text of a statutory provisions to considerations (such as values) outside of the text.

Teleological interpretation is both forward and backward looking.[23] It requires that the linguistic conventions at the time when a statutory provision was adopted should be taken seriously and that the historical situations that gave rise to the adoption of a legislative provision should similarly be regarded with sufficient circumspection so as to identify and give effect to the true purposes of a statutory provision. As such Du Plessis has averred that "[t]eleological interpretation is forward-looking interpretation based on what can be learnt from past experience".[24] Teleological interpretation is forward-looking as it seeks to bring about a future historical possibility in which the purpose(s) of a legislative provision is achieved in a way that also furthers the achievement of key societal (constitutional) values.

Teleological interpretation is also advanced by, and advocated for by several constitutional waymarks, all of which contribute to illuminate the teleological model of interpretation. Section 8 of the Constitution delineates the ambit of the Bill of Rights and determines the impact thereof on existing law, the functions of the legislature, the executive, the judiciary and organs of state, and on natural persons and on juristic persons.[25] These factors are essential to our understanding of the proper approach to the interpretation of statutes in a constitutional democracy.

[21] See Chapter 3 § 3.3 above.
[22] *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) par 200.
[23] See Chapter 3 § 3.4 above.
[24] Du Plessis (n 16) 32-169.
[25] See Chapter 3 § 4.1 above.

The Constitution also contains key societal values and interacts with all public law values in a significant way.[26] In a teleological model of statutory interpretation values are central and imperative. The Constitution also contains significant guidance on both the interpretation of statutes and the Bill of Rights.[27] The Constitution also enshrines, although not specifically mentioning, the principle of interpretation in conformity with the Constitution.[28] Section 36 of the Constitution is also the most openly and frequently relied on interpretive waymark, as it embodies the operative provisions that set constitutionally acceptable limits to rights.[29] The Constitution also contains several rights that impact both on the interpretation of statutes generally and on the interpretation of labour legislation in particular.[30] The Preamble of the Constitution is similarly regarded as an important interpretive aid.[31]

2.3 Important consideration in interpreting the term "employee"

2.3.1 Historical considerations

The historical dimension of the teleological model of statutory interpretation does not seek to argue that, at least historically, there is a most appropriate or even best way of identifying the parties to the employment relationship. It does not seek to argue that the terminological dichotomy between employees and independent contractors (or the common-law tests employed to differentiate between them) is the most appropriate device for identifying the parties to the employment relationship. Paradoxically, the historical dimension of teleological interpretation allows us to move beyond these historical devices by seeing that these devices are historic responses to societal problems and that they are not preordained. As new societal problems seek our attention, it may be desirable to reimagine devices for identifying the parties to the employment relationship. The historical dimension allows us to do so.

The following salient points should bear upon the interpretation of the term "employee": Firstly, the dichotomy between employees and independent contractors

[26] See Chapter 3 § 4.2 above.
[27] See Chapter 3 § 4.3 above.
[28] See Chapter 3 § 4.4 above.
[29] See Chapter 3 § 4.5 above.
[30] See Chapter 3 § 4.6 above.
[31] See Chapter 3 § 4.7 above.

can be traced back to the Roman law and the *locatio conductio operarum* and *locatio conductio operis*.[32] Secondly, it is the *locatio conductio operarum* of Roman law that became the *dienstcontract* of Roman-Dutch law that still serves as the historical roots of the contemporary contract of employment.[33] Thirdly, Roman-Dutch law, although cementing the dichotomy between employees and independent contractors, contained very little guidance to identify the parties to the employment relationship.[34] Fourthly, it was the English law that our courts looked to for guidance in identifying employees.[35] Fifthly, it was social security legislation that was first to employ the terminology of the "contract of service" and the "contract of employment" in the United Kingdom.[36]

Sixthly, as in the case of the United Kingdom, it was social security legislation that first employed the dichotomy between employees and independent contractors in South Africa. Seventhly, in the wake of the constitutionalisation of labour law, form has been abandoned for substance, presumptions and deeming provisions has been introduced, the common-law requirements of the contract of employment has been discarded, and the focus has shifted to the presence of an employment relationship. Additionally, the LRA has been amended to address problems of the dynamics of labour broking, outsourcing and short-term contracts.

2.3.2 Textual considerations

The linguistic and semantic component of a legislative provision "shapes the range of semantic possibilities within which the interpreter acts as a linguist".[37] These possibilities may be express or implied. The interpreter will ultimately choose what the meaning of the text is from one of the semantic possibilities and is therefore restricted thereby.[38] The Constitution must be the starting point to determine the meaning of "employee". Although legislative protection is generally only applicable to employees, the Constitution does not utilise this term. Instead, constitutional

[32] See Chapter 4 § 3 above.
[33] See Chapter 4 § 4 above.
[34] See Chapter 4 § 4 above.
[35] See Chapter 4 § 5.2 above.
[36] See Chapter 4 § 5.1 above.
[37] Barak *Purposive Interpretation in Law* (2005) 88.
[38] Above.

guarantees of a labour nature are applicable to "everyone" or "workers.[39] Although the unqualified language contained in the Constitution suggests that the section applies, not only to employees, but also to independent contractors and categories of persons excluded from the definition of "employee", it has been held that the term "workers" can encompass persons who have not entered into a formal contract of employment but are in work relationships "akin" to the employment relationship.[40] The use of the broader terms does however indicate that the term "worker" could include those on the margins of the employment relationship and in employee-like relationships and, consequently, that the term "employee" should be interpreted broadly and expansively (as the judiciary has in fact done).[41]

The textual environment in which the concept "employee" is used in labour and social security legislation does not do much to assist interpreters in identifying the parties to the employment relationship. The definition merely excludes independent contractors and identifies an employee as a person who works for another person for remuneration or a person who in any manner assists in carrying on or conducting the business of an employer. The vagueness of the statutory definitions means that the courts have relied, as in the case with other labour legislation, on considerations outside of the language to determine the existence of the employment relationship.

Much more textual guidance is obtained in more recent legislative interventions which further elucidates the question. The presumption in favour of employment, and the factors listed therein, can do much to assist the interpreter to identify the parties to the employment relationship. As such, the presumption does more than merely shifting the evidentiary burden of proof from the employee to the employer. The presumption and the factors listed therein may be used from the outset, and in the event that a person earns more than the threshold amount, to determine the existence of an employment relationship.[42]

[39] Section 23 of the Constitution.
[40] See Chapter 5 § 2.1.1.
[41] See for example *Wyeth SA (Pty) Ltd v Manqele* 2005 26 ILJ 749 (LAC).
[42] See Chapter 5 § 2.2.

The Code of Good Practice: Who is an Employee? was specifically issued to assist in the interpretation of the concept.[43] The stated aim of the Code is "to set out the interpretive principles contained in the Constitution, labour legislation and binding international standards that apply to the interpretation of labour legislation, including the determination of who is an employee".[44] Importantly, the LRA directs the interpreter to take the Code into account for the purpose of determining whether a particular person is an employee.[45] The Code contains several interpretive and substantive principles that are to be taken into consideration when identifying the parties to the employment relationship. As such, the Code, read together with the presumption in favour of employment, represents the most important textual considerations to guide the interpreter.

There are also other legislative provisions relevant to identifying the employment relationship in the textual environment.[46] There are provisions applicable to placed workers,[47] fixed-term contract employees,[48] part-time employees[49] and to the phenomenon of simulated arrangements or corporate structures that are intended to defeat the purposes of the LRA.[50] There are also legislative provisions that highlight the move away from a formal and legally valid contract of employment to the existence of an employment relationship.[51] In addition there are definitions of the term "employer" than can be useful to identify the parties to the employment relationship from a different angle of incidence.[52]

The common law imposes guidelines that are applicable to the legislative environment.[53] They are the ordinary-meaning rule, the presumption that technical words and expressions are generators of technical meaning, the presumption that language is not used unnecessarily, the interpretive canon that courts may have regard to statutes in different languages to elucidate the English text, the presumption that

43 See Chapter 2.3.
44 R 2(*b*).
45 S 203(3) and (4) of the LRA.
46 See Chapter 5 § 2.4.
47 Ss 189 and 189A of the LRA.
48 S 189B of the LRA.
49 S 189C of the LRA.
50 S 200B(1) of the LRA.
51 S 186(1)(*a*) of the LRA.
52 S 200 B(1) of the LRA; s 1 of the UIA; and s 1 of the COIDA.
53 See Chapter 5 § 3.

legislation does not contain a *casus omissus*, the presumption that words and phrases bear the same meaning throughout a legislative provision.

2.3.3 Contextual considerations

Contextual interpretation requires that we understand a provision in the light of the text of the act (i.e. the Constitution) as a whole (the "intra-textual environment") and of principles outside of the act (the "extra-textual environment"). The "intra-textual environment" includes the preamble of the act, the long title, the definition clause, the objects of an act an interpretation provisions, headings above chapters and articles and annexures. An interpreter, trying to ascertain if a person is an employee for purposes of section 213 of the LRA will therefore be required to look beyond the definition of employee contained in section 213 to the other intra-textual environment, of which the section forms part. Chief amongst these, the interpreter will *inter alia* have to consider the purpose[54] and interpretive provision of the LRA,[55] the presumption as to employment[56] and the Code of Good Practice as to who is an employee. If this is not done, section 213 of the LRA will become disintegrated from the rest of the textual environment (the LRA) of which it forms part.

The "extra-textual environment" refers to the "wider network of enacted law and other normative law-texts such as precedents" as well as to "the political and constitutional order, society and its legally recognized interests and the international legal order".[57] An interpreter, trying to ascertain if a person is an employee for purposes of section 213 of the LRA, for example, will therefore be required to look beyond the intra-textual environment to considerations outside of the LRA.[58] This requires an interpreter to consider section 23 of the Constitution, impacting constitutional (or public) values, the provisions of other akin legislation, precedents, the societal impact that a given interpretation of employee might display, as well as the foreign law and international law context. If this is not done, the provision will become disintegrated from the rest of the legal order. The historic exclusion of certain

[54] S 1 of the LRA.
[55] S 2 of the LRA.
[56] S 200A of the LRA.
[57] Du Plessis (n 16) 32-159 and 32-166.
[58] *Jaga v Dönges; Bhana v Dönge* 950 4 SA 653 (A) 662-663 and *Du Toit v Minister for Safety and Security* 2009 12 BCLR 1171 (CC) par 37.

races from the employment relationship in South Africa and the global rise in non-standard forms of employment are the "mischief" that our legislative scheme is designed to remedy.[59]

Interpreters will have to consider the history of racial exclusion of the majority of South Africa's population prior to the adoption of South Africa's first justiciable Constitution. Cognisance will therefore have to be taken of the mechanisms, both direct and indirect, that were utilised to achieve the exclusion from millions of South Africans from the ambit op labour protection.[60] Although definitions of "employee" in labour law are racially neutral,[61] this fact would not in its own prevent the racial exclusion of certain category of workers on racial (or any other prohibited) grounds.

Interpreters must also consider the judicial[62] and legislative[63] responses that have been adopted to cure this societal mischief. Interpreters must also be cognisant of the interrelationship between the law relevant to determining the parties to the employment relationship and discrimination law. An understanding of the genesis of the concept "unfair discrimination" as an incidence of the "unfair labour practice" jurisdiction of the former Industrial Court, and the subsequent development thereof (including within the context of the constitutionalisation of labour law, the codification of the jurisprudence of the Industrial Court and recent legislative amendments) are therefore all important interpretive waymarks relevant to determining the parties to the employment relationship.

Interpreters must be aware of the global drivers of change affecting the employment relationship.[64] They must understand the phenomenon of non-standard forms of employment and new models of the employment relationships between employers and employees (or clients and workers); and new work patterns, so as to effectively identify and respond to these forms of employment. They must correspondingly understand the precarious nature in which such workers find themselves, as well as the personal and societal impact of these forms of employment. As these phenomena

[59] See Chapter 6 § 2.
[60] See Chapter 6 § 3.1.
[61] See Chapter 5 § 3.1.
[62] See Chapter 5 § 3.3.
[63] See Chapter 5 § 3.2.
[64] See Chapter 5 § 4.1.

serve to further complicate the identifications of parties to the employment relationship and push workers outside of the protection afforded thereby, further legislative interventions will inevitably be required.[65] Interpreters will be necessitated to also have cognisance of the current judicial[66] and legislative responses[67] in order to respond effectively to the changing nature of work.

The legislature has sought to provide more guidance regarding who should be considered as employees and who should not.[68] The legislature has chosen to prohibit or to impose strict conditions on certain employment relationships.[69] The legislature has allowed for categories of persons to be deemed employees for the purposes of the whole or any part of the BCEA or any other employment law or sectoral determination.[70] The chief judicial response has been to interpret the concept "employee" extensively,[71] as well as legislative provisions designed to protect vulnerable workers.[72]

2.3.4 Teleological considerations

Within the teleological model of statutory interpretation, the element of values is the most important. This element requires that over and above the other elements of interpretation, that interpreters must advance key societal or public law values. It is therefore incumbent on interpreters to interpret statutory provisions relevant to the question of who should be included in the employment relationship in a sufficiently broad and liberal manner and in a way that advances and gives life to key societal values. Seven values have been identified in this study that will be particularly relevant to the question as to who should be party to the employment relationship. They are: dignity, equality, social justice, fair labour practices, security of employment, labour market flexibility, and freedom of contract. This is not to say that

65 See Chapter 2 § 4.2.
66 See Chapter 5 § 4.3.
67 See Chapter 5 § 4.2.
68 Such as the definition of employment (s 213 of the LRA), the presumption of employment (s 200A of the LRA) and *Code of Good Practice: Who is an Employee?*
69 Ss 189; 189A; and 189B of the LRA.
70 S 83 of the BCEA.
71 See Chapter 4 § 7.2.
72 *Aviation Union of South Africa v South African Airways Pty Ltd* 2012 1 SA 321 (CC); and *NUMSA v Assign Services* 2017 38 ILJ 1978 (LAC).

other public law values may not be relevant to considering who should be regarded as an employee and who should not. The interpreter will have to decide what relational weight is to be given to each individual value.[73]

The value of dignity is central to our understanding of who should be party to the employment relationship as a person's work is part of one's identity and is constitutive of one's dignity. It requires that the interpreter must be cognisant of the fact that the individual is an end in herself, that society must respect the equal worth of persons, that an enabling environment is required where every person can achieve her own maximum potential and possibilities, that all persons have the ability to set ends for themselves through their capacity to reason, that dignity should also focus on broader societal ends.[74] In considering the history of labour exclusion of millions of South Africans from the protective ambit of labour legislation prior to the advent of constitutionalism, it is clear that interpreters must advance interpretations that recognise and advance the equal worth of all workers. Such and interpretation must advance the key societal value of equality.[75]

The stated aim of the Constitution,[76] as well as the LRA[77] and the BCEA,[78] is the achievement of social justice. Courts in there interpretive tasks must advance interpretations that do justice. This does not mean to say that the judiciary will always be asked to consider complex legal-philosophical questions about the requirements of justice, but rather that the courts must follow an interpretation that advances the Constitution's vision of a just society. The ultimate aim of the Constitution is a society that reflects the fundamental values of equality, human dignity and freedom. As such, it is possible to argue that a society reflective of these values will be a society where social justice prevails.[79]

[73] Dworkin *Taking Rights Seriously* (1977) 23.
[74] See Chapter 7 § 2.
[75] See Chapter 7 § 3.
[76] Preamble of the Constitution.
[77] S 1 of the LRA.
[78] S 2 of the BCEA.
[79] See Chapter 7 § 4.

The constitutional right to fair labour practices as contained in section 23 of the Constitution encompasses various aspects.[80] The Constitutional Court has said that the right to fair labour practices is incapable of precise definition. The court preferred that the content of the concept must be developed by means of interpretation.[81] Although the Court emphasised the jurisprudence of the former Industrial Court and the International Labour Organisation in giving content to the right, it should first and foremost be interpreted in a teleological manner that advances the key values of the Constitution.[82] The right to fair labour practices also encompasses the right to freedom of association,[83] the right to organise,[84] the right to engage in collective bargaining,[85] and the right to strike.[86] It is important that interpreters interpret labour legislative provisions in general, and provisions affection the question who should be regarded as party to the employment relationship in particular, in a sufficiently generous manner so as to advance the value of fair labour practices.

Security of employment, a core LRA value,[87] encompasses dismissal protection[88] and social protection.[89] In order for dismissal protection to be activated, a claimant will first have to prove that she was an employee as only employees may be dismissed. So too, many of the South African protection mechanisms can only be accessed by those who may be said to be "employees". As such it is incumbent on interpreters to take cognisance of the value of security of employment in interpreting the term "employee".[90] The value of security of employment is often contrasted with the competing value of labour market flexibility. Labour market flexibility is a necessary instance of the constitutional right to freedom of trade, occupation and profession. It includes the freedom of employees to change employment levels quickly and

80 *National Education Health and Allied Workers Union v University of Cape Town* 2003 3 SA 1 (CC).
81 Par 33-34.
82 See Chapter 7 § 5.
83 S 23(2) and (3) of the Constitution.
84 S 23(4) of the Constitution.
85 S 23(5) of the Constitution.
86 S 23(2)(*c*) of the Constitution.
87 *Code of Good Practice: Who is an Employee?* 2007 28 ILJ 96 r 62.
88 See Chapter 7 § 6.1.
89 See Chapter 7 § 6.2.
90 See Chapter 7 § 6.

cheaply; the freedom to determine wage levels without restraint; and the freedom to alter work processes and terms and conditions of employment quickly and cheaply.[91]

Freedom of contract gives effect to the central constitutional values of freedom and dignity.[92] Courts will advance the value of freedom of contract in interpreting key concepts relevant to determining the parties of the employment relationship. There are however many other values that impact upon this question, and it is therefore also true that the value of freedom of contract will not always be decisive, as the interpreter must weigh this value against all others and give it a relational weight *vis-à-vis* the other values. The interpreter will however not be free to ignore this value in a teleological model of interpretation, although it need not necessarily be decisive.[93]

2.3.5 Comparative considerations

As casualisation and externalisation are international phenomena brought about by globalisation, it is important that interpreters take into consideration global responses to these global problems. The problem of identifying the parties to the employment relationship is a concern shared among many other jurisdictions, and it is therefore appropriate to explore the experiences and lessons learnt at the international level and in other jurisdictions to inform our understanding thereof. Although national situations and circumstances are both diverse and dynamic, the employment relationship is a universal notion and a current issue in all countries.[94]

This study has surveyed how the standards of the ILO can shed light on the question as to who are parties to the employment relationship,[95] and key themes relevant to this question that have emerged in other jurisdictions.[96] They are: definitions relevant to the binary divide between employees and independent contractors; the difference

[91] See Chapter 7 § 7.
[92] *Barkhuizen v Napier* 2007 5 SA 323 (CC) par 57 and *Paulsen v Slip Knot Investments 777 (Pty) Limited* 2015 3 SA 479 (CC) par 70. See also *Brisley v Drotsky* 2002 4 SA 1 (SCA) par 94.
[93] See Chapter 7 § 8.
[94] Marín "The employment relationship: the issue at the international level" in Davidov and Langille (eds) *The Boundaries and Frontiers of Labour Law* (2006) 339 342 and Creighton and McCrystall "Who is a "worker" in international law?" 2016 *Comparative Labor Law and Policy Journal* 691 691.
[95] See Chapter 8 § 2.
[96] See Chapter 8 § 3.

between employees and independent contractors; the relevance, if any, of the contract of employment; and factors relevant to identifying the employment relationship. Countries surveyed include: Australia; Canada; India; the United Kingdom; Morocco; Namibia; Swaziland; Tanzania; Zimbabwe; Germany; and the Netherlands.

From the eight Conventions that constitute the basis of the decent work agenda, it is clear that they are intended to apply to all workers.[97] They apply to all workers, irrespective of the kind of contractual arrangement (if any) under which individuals are engaged. They are meant to apply to all workers without distinction or discrimination of any kind. In addition to applying to workers of all races, genders, religions, political affiliations, etc., they also apply to all kinds of work relationship in which a worker happens to be engaged.

South Africa has ratified all of these instruments and consequently it is easy to argue that the South African government (including the judiciary) is under a public international law obligation to extend the protection of these standards to as many workers as possible, especially within the context of the four core rights. Recall that admission to the concept of "employee" will be a prerequisite for the extension of many of these rights. The judiciary can meet this end by interpreting the concept of employee broadly. The same is true of many other international labour standards surveyed,[98] although some instruments clearly apply only to workers who may be said to be employees.[99]

The Employment Relationship Recommendation, 2006 recognises that some workers may justifiably be denied labour protection, both in international and municipal law, according to the category of worker to which they belong. In particular, it is seen to be justifiable to exclude workers who genuinely are independent contractors (self-employed). The purpose of the Recommendation is to ensure that workers are not excluded from protections to which they ought to have access through the use of disguised employment or other avoidance strategies. Beyond this fact, however, the

[97] See Chapter 8 § 2.1-2.4.

[98] The Home Work Convention, 1996; the Maternity Protection Convention, 2000; the Part-Time Work Convention, 1994; the Protection of Wages Convention, 1949; the Rural Workers' Organisation Convention, 1975; and the Workers with Family Responsibility Convention, 1981.

[99] The Domestic Workers Convention, 2011; the Termination of Employment Convention, 1982; and the Work Health and Safety Convention, 1981.

Recommendation offers little guidance as to who should be regarded as an employee for purposes of international law (other than the factors which are deemed indicative of the employment relationship).[100]

Whilst the existence of the employment relationship is dependent upon the conclusion of a valid contract of employment, there are examples where the employment relationship extends beyond the contract of employment (such as in Swaziland for purposes of collective labour law).[101] While there exists no (workable) legislative definition of the concept "employee" in several countries, other countries often have extensive legislative definitions thereof, or of the contract of employment.[102] Some countries also have legislative definitions of the concept of an employer.

Some countries have deemed certain categories of workers to be employees so as to remove any uncertainty about their status.[103] The judiciary in some countries will uphold the true nature of a work-relationship despite attempts to label an employer-employee relationship as something else.[104] Australia imposes penalties on employers who use sham arrangements to disguise employees as independent contractors.

In many countries, no single factor is determinative of the employment relationship.[105] Additional factors that the judiciaries consider to determine the nature of the employment relationship might be important for South African courts in their quest to determine who should be regarded as part of the employment relationship and who should not. The strikingly, the teleological approach of the Canadian judiciary is understandably of importance for the South African approach to the interpretation of the concept of "employee" as our courts have adopted a similar approach to the interpretation of statutes. In Canada, courts and tribunals must take into account the particular policy objectives of the statute when deciding if a person

[100] See Chapter 8 § 2.5.
[101] See Chapter 8 § 3.2.
[102] See Chapter 8 § 3.1.
[103] Above.
[104] See Chapter 8 § 3.2.
[105] See Chapter 8 § 3.4.

has employee status.[106] The extension of labour protection to intermediate categories of worker, such as "dependent contractors", will ostensibly also impact upon the South African understanding of the employment relationship.[107]

2.4 Interpreting the term "employee" and social justice

Klare, in perhaps the most highly renowned article in South African public law history, has described transformative constitutionalism as "an enterprise of inducing large-scale social change through nonviolent political processes grounded in law".[108] At its core, transformative constitutionalism requires non-formalist, non-legalist and non-literalist approaches to the interpretation of the Constitution and arguably other statutes. In his critique of Klare's thesis, Roux summarises the thesis as follows:[109] It is possible to interpret the Constitution in a number of different ways in terms of conventional legal reasoning.[110] A postliberal interpretation is one such possible interpretation.[111] A postliberal reading is different from other readings because it does *better* interpretive justice to the Constitution.[112] The Constitution requires us to reimagine legal method, analysis and reasoning to be consistent with its transformative goals.[113] The only correct method of constitutional interpretation is one that is politically engaged and transparent.[114] A progressive legal culture is a precondition for the Constitution's vision of transforming society.[115]

Klare's thesis is not specifically a theory of interpretation and would be better viewed as a critique on interpretive practices of judges (although his thesis does have implications for the interpretation of statutes).[116] He argues that, for example, in contrast to American lawyers, South African lawyers display a "relatively strong faith

[106] *Pointe-Claire (City) v Quebec (Labour Court)* 1997 1 SCR 1015 (SC) and *67112 Ontario Ltd v Sagaz Industries Canada Inc* 2001 2 SCR 1983 (SC).
[107] See Chapter 8 § 3.3.
[108] Klare "Legal culture and transformative constitutionalism" 1998 *South African Journal of Human Rights* 146 153.
[109] Roux "Transformative constitutionalism and the best interpretation of the South African Constitution: distinction without a difference?" 2009 *Stellenbosch Law Review* 259.
[110] Above 261.
[111] Above.
[112] Above 262.
[113] Above 263 and Klare (n 108) 156.
[114] Above 265.
[115] Above 270 and Klare (n 108) 170.
[116] See Van Marle "Transformative constitutionalism as/and critique" 2009 *Stellenbosch Law Review* 286.

in the precision, determinacy and self-revealingness of words and texts. Legal interpretation in South Africa tends to be more highly structured, technicist, literal and rule-bound".[117] The author has also noted the "reluctance to press legal materials toward the limits of their pliability, a tendency to underestimate the plasticity of the legal materials, and an exaggerated concern to give the appearance of conforming to traditional canons of interpretive fidelity".[118] Klare's vision can be achieved by either a Hartian or Dworkinian approach to the interpretation of statutes.[119]

A different (and perhaps more insightful) way of approaching the relationship between interpretation and transformative constitutionalism might be to forgo the question as to what interpretive approach transformative constitutionalism requires (as Klare does) and instead to consider if the teleological model of statutory interpretation advances the transformative vision of the Constitution. This might be more useful as the Constitutional Court has already adopted a teleological approach to the interpretation of statutes. It might therefore be more useful to enquire whether the teleological approach of statutory interpretation satisfies Klare's thesis.

A model of teleological interpretation that is not rooted in transformative constitutionalism is entirely empty. Teleological interpretation requires giving effect to the purpose of the statute in light of constitutional values. An interpretation that does not further the values of the Constitution will not be teleological. This is the key difference between purposive and teleological interpretation. As Du Plessis points out, interpretation that only furthers the purpose of a statutory provision may be restrictive because statutory purpose may be restrictive.[120] It is foreseeably that statutory purpose may be unconstitutional. Interpretation that furthers constitutional values must however, by its very nature, be transformative.

Few would argue that social justice has been achieved and that society represents the key constitutional values of equality, human dignity and freedom. Social justice will

[117] Klare (n 108) 168.
[118] Above 171.
[119] Roux (n 109) 271.
[120] Du Plessis (n 16) 32-54.

have to be achieved through reform and transformation.[121] The courts must be part of this project. An interpretation that disregards the values and transformative vision of the Constitution is not teleological. Accordingly, the teleological model of interpretation is the only correct method of interpretation in South Africa.[122] Put differently, teleological interpretation is transformative interpretation.

3 *Recommendations*

A teleological model for interpreting the term "employee" in particular, and all legislative provisions affecting labour law, is advocated. Teleological interpretation assumes that the goal of statutory interpretation is to give effect to the purpose of a statutory provision in light of constitutional values.[123] But the purpose of a statute can only be determined through a process of interpretation, requiring interpreters to have regard to all the elements of a statutory provision to determine what the broad purposes of a provision is. These elements are, the text, context, *telos*, history and comparative environment of a provision.[124]

Teleological interpretation requires, firstly, that the purpose of a provision must be established. Thereafter, it should be asked if "that purpose would be obstructed by a literal interpretation of the provision". If that is the case, "an alternative interpretation of the provision that 'understands' its central purpose" must be adopted. Lastly, it must be ensured "that the purposive reading of the legislative provision also promotes the object, purport and spirit of the Bill of Rights".[125] Although the South African Constitution has expressly adopted such an approach for purposes of labour law matters in *National Education Health and Allied Workers Union v University of Cape Town*,[126] it is however also trite that the entire judiciary has not uniformly adopted this approach.

[121] Van der Walt "A South African reading of Frank Michelman's theory of social justice" 2004 *SAPR/PL* 253 254.
[122] N 114 above.
[123] See Chapter 1 § 4.3.
[124] See Chapter 1 § 4.4.
[125] Le Roux "Directory provisions, section 39(2) of the Constitution and the ontology of statutory law *African Christian Democratic Party v Electoral Commission*" 2006 S*APR/PL* 382386.
[126] 2003 3 SA 1 (CC) par 62. See also *Aviation Union of South Africa v South African Airways Pty Ltd* 2012 1 SA 321 (CC) par 34-35.

Although it has not been the purpose of this study to advocate for legislative amendments to extend labour protection to vulnerable categories of workers, some amendments may nevertheless be advocated as they may serve to ease the task of interpreters trying to decide who should be protected by labour law, and who should not be. Further legislative intervention to create a richer textual environment to help interpreters to identify the parties to the employment relationship should also be considered. Such legislative interventions should move beyond merely summarising the existing legal position as to who is an employee. Furthermore, legislative interventions could also be provided to expand on the definition of "employer" so as to assist with the same investigation from a different angle of incidence.

The Code of Good Practice: Who is An Employee? could do more than merely codify the common-law tests to identify employees and should be updated regularly so as to keep abreast of legal developments. If this is not done, the Code, with its central role in the textual environment of teleological interpretation, could become an overly conventional aid to the interpretation of the term "employee" and an obstacle to the constitutional injunction contained in section 23 of the Constitution to guarantee fair labour practices to "everyone". To this end, the legislature may also choose to deem more categories of workers as employees, so as to extend labour protection to them, or may choose to create new categories of workers such as "dependent contractors".

4 *Further study required*

Further study required on the broad topic of the interpretative approach to ascertaining the parties to the employment relationship, flows primarily from the methodology employed herein and the limitations thereof.[127] Due to the fact that the study is doctrinal in nature, the question has not been primarily approached from a jurisprudential, socio-legal, comparative or empirical perspective. In this study the question as to who should be party to the employment relationship was approach doctrinally from the perspective of what the law (as interpreted through the teleological model of interpretation) is, and not what the law should be. Of course certain indispensable consequences for a law reform project may flow therefrom. So,

[127] See Chapter 1 § 5 where the methodology employed and the limitations thereof are discussed.

for example, it may be argued that, properly understood and interpreted through a teleological model of interpretation, future scholars can argue that legislative intervention is needed to expand the meaning of the concept.

Such a study could ostensibly be approached jurisprudentially, not by asking what the current law is (who is an employee?), by asking what the law ought to be (who should be an employee?). Any appropriate theory of law or justice could be utilised in such a study. This question could also be approached from a socio-legal perspective where the question is situated in a societal context where law is understood as a social phenomenon and social experience. Similarly the matter may be approached comparatively by asking how other jurisdictions have (or must) interpret the concept "employee". It could also be useful to enquire what the societal impact of the current legal position as to who a party to the employment relationship is and if the current legal position is enforced.[128]

It may also be useful to repeat this study through a consideration of another similarly vague concept. For example, the concept of "unfair labour practice"[129] (and its corollary "unfair dismissal")[130] as well as the standards "rational", "unfair" and "justifiable" which are utilised in the context of labour discrimination law,[131] may similarly be explored. In doing so scholarship in regard to the proper interpretation of labour legislative concepts could be further advanced and concretised.

5 *Concluding remarks*

In 1944 the United States Supreme Court in *National Labor Relations Board v Hearst Publications*[132] averred that few problems in the law have given greater interpretive difficulty as that of identifying the parties to the employment relationship. In 2017 this statement is equally apt.[133] It is also not foreseen that a situation will soon (or ever) be reached where this question does not give rise to complex legal interpretive difficulties. As the forces of globalisation gains impetus, it is foreseen that such

[128] Refer in general to Morris and Murphy *Getting a PhD in Law* (2011) 31.
[129] S 23 of the Constitution.
[130] S 186 of the LRA.
[131] S 11 of the EEA.
[132] 1944 322 US 111.
[133] 121.

interpretive difficulties will become even more commonplace. This does not mean, however, that legal scholarship on the matter should be ignored. It is also possible through such analysis to contribute to predictability of outcome. It is also trite, however, that the methodology that is to be employed in determining the parties to the employment relationship has also change significantly since this famous statement was first made.

It is submitted that the judiciary would do well in advancing a teleological model of statutory interpretation that serves the values of our social order, firmly rooted in the elements of text, context, values, history, and foreign and international law. A teleological approach to the identification of the parties to the employment relationship also requires that the interpreter must distinguish between workers who need the protection of labour law and workers who do not.[134] Such an interpretive methodology would advance interpretive predictability, and advance the transformative vision of the Constitution. In addition, such an interpretive approach is sufficiently flexible so as to effectively respond to fast-changing contextual factors of a socio-economic nature. As such, and as the employment relationship becomes increasingly regulated by means of legislation, labour lawyers will inevitably be increasingly required to consider matters related to interpretation. This will however require that labour lawyers are cognisant of the public law requirements of the interpretation of statutes and accepting of the notion that the ultimate meaning given to a labour legislative provision will often require more than an in-depth knowledge of labour law as a subject field.

[134] Davidov *A Purposive Approach to Labour Law* (2016) 127.

BIBLIOGRAPHY

1 *Books*

Adler MJ and Van Doren C *How to Read a Book* Simon and Schuster New York (1972)

Arthurs H *Fairness at Work: Federal Labour Standards for the 21st Century* Human Resources and Skills Development Canada Gatineau (2006)

Balint J *Genocide, State Crime and the Law: In the Name of the State* Rutledge Abingdon (2012)

Barak A *Purposive Interpretation in Law* Princeton University Press New Jersey (2005)

Bell J and Engle G *Cross Statutory Interpretation of Statutes* Oxford University Press New York (1978)

Bell J and Engle G *Cross Statutory Interpretation of Statutes* Oxford University Press New York (2005)

Bendix S *Industrial Relations in South Africa* Juta Cape Town (2010)

Bhorat H, Mayet N, Tian N and Tseng D *The determinants of wage inequality in South Africa, Country Case Studies on Inequality* International Labour Office Geneva (2013)

Bickel A *The Least Dangerous Branch* Vail-Ballou Press New York (1962)

Blackstone W *The Commentaries of the Laws of England of Sir William Blackstone Volume 1* Callaghan Chicago (1876, 2013)

Botha C *Statutory Interpretation: An Introduction for Students* Juta Cape Town (2005)

Botha C *Statutory Interpretation: An Introduction for Students* Juta Cape Town (2012)

Brassey M *Employment and Labour Law* Juta Cape Town (2000)

Campbell TD *The Legal Theory of Ethical Positivism* Aldershot Dartmouth (1996)

Davidov G *A Purposive Approach to Labour Law* Oxford University Press Oxford (2016)

Davies ACL *Perspectives on Labour Law* Cambridge University Press Cambridge (2004)

De Vos and Freedman (eds) *South African Constitutional Law in Context* Oxford University Press Cape Town (2014)

Deakin S and Morris GS *Labour Law* Butterworths London (1998)

Deakin S and Wilkinson F *The Law of the Labour market: Industrialization, Employment and Legal Evolution* Oxford University Press Oxford (2005)

Du Toit D *et al Labour Relations Law: A Comprehensive Guide* LexisNexis Durban (2015)

Claybourne A *Greek Myths* Windmill Books New York (2009)

Clement Duly L "A revisit with the Cape's Hottentot Ordinance of 1828' in Kooy M (ed) *Studies in Economics and Economic History* Macmillan London (1972)

Coke E *The Fourth Part of the Institutes of the Laws of England* Bell Yard London (1797)

Cross F *Theory and Practice of Statutory Interpretation* Stanford University Press Stanford (2009)

Currie I and De Waal J *The Bill of Rights Handbook* Juta Cape Town (2013)

Davies P and Freedland M *Kahn-Freund's Labour and the Law* Stevens London (1983)

De Ville JR *Constitutional and Statutory Interpretation* Interdoc Consultants Johannesburg (2000)

Deakin S and Wilkenson F *The Law of the Labour Market* Oxford University Press Oxford (2005)

Derrida J *Positions* University of Chicago Press Chicago (1981)

Devenish GE *Interpretation of Statutes* Juta Cape Town (1992)

Dias RWM *Jurisprudence* Butterworths London (1985)

Du Plessis L *Re-Interpretation of Statutes* LexisNexis Durban (2002)

Du Plessis L *The Interpretation of Statutes* Butterworths Durban (1986)

Dugard J *International Law – A South African Perspective* Juta Cape Town (2005)

Dworkin R *Justice in Robes* Harvard University Press Cambridge (2006)

Dworkin R *Law's Empire* Harvard University Press Cambridge (1986)

Dworkin R *Taking Rights Seriously* Bloomsbury Academic London (1977)

Elhauge E *Statutory Default Rules: How to Interpret Unclear* Legislation Harvard University Press Cambridge (2008)

Engels F *The Principles of Communism* Progress Publishers Moscow (1847)

Eskridge W *Dynamic Statutory Interpretation* Harvard University Press Cambridge (1994)

Fish S *Doing What Comes Naturally*: *Change Rhetoric, and the Practice of Theory in Legal Studies* Duke University Press Durham (1989)

Floyd L, Steenson W, Coulthard A, Williams D and Pickering AC *Employment, Labour and Industrial Law in Australia* Cambridge University Press Melbourne (2017)

Freedland M *The Contract of Employment* Clarendon Publishing Oxford (1976)

Gagarin M *Writing Greek Law* Cambridge University Press Cambridge (2008)

Goodrich P *Reading the Law: A Critical Introduction to Legal Method and Techniques* Blackwell Publishers Oxford (1986)

Grogan J *Collective Labour Law* Cape Town (2007)

Grogan J *Workplace Law* Juta Cape Town (2007)

Grogan J *Workplace Law* Juta Cape Town (2009)

Grogan J *Workplace Law* Juta Cape Town (2014)

Gwisai M *Labour and Employment Law in Zimbabwe: Relations of Work Under Neo-colonial Capitalism Zimbabwe* Labour Centre and Institute of Commercial Law, University of Zimbabwe Harare (2006)

Harper RF *The Code of Hammurabi King of Babylon; About 2250 BC; Autographed Text Transliteration* The Lawbook Exchange Clark (2010)

Hart HLA *Esays in Jurisprudence and Philosophy* Clarendon Oxford (1983)

Hart HLA *The Concept of Law* Oxford University Press New York (1961)

Hepple BA *Labour Laws and Global Trade* Hart Publishing Oxford (2005)

Hindson D *Pass Controls and the Urban African Proletariat* Raven Press Johannesburg (1987)

Hogbin G *Power in Employment Relationships: Is There an Imbalance?* Astra Print Wellington (2006)

Holmes OW *The Common Law* Little, Brown and Company Boston (1923)

Jacobs ATJM *Labour Law in the Netherlands* Kluwer Deventer-Boston (2004)

Jellum LD and Hricik DC *Modern Statutory Interpretation: Problems, Theories, and Lawyering Strategies* Carolina Academic Press Durham (2009)

Jünger JM *Arbeitrecht* CF Mueller Heidelberg (2017)

Kahn-Freund O *Labour and the Law* Stevens London (1972)

Kant I *Groundwork of the Metaphysics of Morals* Yale University Press New Haven (1785) (trans and ed Wood AW 2002)

Kant I *Metaphysics of Morals* Cambridge University Press Cambridge (1797) (trans Gregor M 1991)

Laslett P *Locke Two Treatises of Government* Cambridge University Press Cambridge (1988)

Le Roux PAK and Van Niekerk A *The South African Law of Unfair Dismissal* Juta Cape Town (1994)

Linder M *The Employment Relationship in Anglo-American Law: A Historical Perspective* Greenwood Press New York (1989)

Lock J *An Essay Concerning Human Understanding* Griffin and Co London (1801)

Madhuku L *Labour Law in Zimbabwe* Friedrich Ebert Stiftung Harare (2015)

Meyerson D *Jurisprudence* Oxford University Press Melbourne (2011)

Montesquieu Baron de *The Spirit of the Laws* (translated by Nugent) Cossimo Classics New York (1748) 191

Morris C and Murphy C *Getting a PhD in Law* Hart Publishing Portland (2011)

O'Flaherty WD and Smith BK (trans) *The Laws of Manu* Penguin Books London (1992)

Papakonstantinou Z *Lawmaking and Adjudication in Archaic Greece* Bloomsbury Academic London (2015)

Popkin WD *A Dictionary of Statutory Interpretation* Carolina Academic Publishing Durham (2007)

Popkin WD *Statutes in Court: The History and Theory of Statutory Interpretation* Duke University Press Durham (1999)

Raaflaub KA (ed) *Social Conflicts in Archaic Rome: New Perspectives on the Conflict of the Orders* Blackwell Malden (2005)

Raz J *Ethics in the Public Domain: Essays in the Morality of Law and Politics* Clarendon Press Oxford (1994)

Raz J *The Authority of Law: Essays on Law and Morality* Clarendon Press Oxford (1975)

Robinson EW *The First Democracies: Early Popular Government Outside Athens* Franz Steiner Verlag Stuttgart (1997)

Rosenau PM *Post-Modernism and the Social Sciences: Insights, Inroads, and Intrusions* Princeton University Press New Jersey (1992)

Scalia A and Gardner BA *Reading Law: The Interpretation of Legal Texts* Thomson West St Paul (2012)

Schrift *Nietzsche and the Question of Interpretation: Between Hermeneutics and Deconstruction* Routledge New York (2014)

Seeley JR *Introduction to Political Science: Two Series of Lectures* Macmillan London (1896)

Selznick P *Law, Society and Industrial Justice* Russell Sage Foundation New York (1969)

Servais JM *International Labour Law* Kluwer Law International The Netherlands (2014)

Sinha PRN, Sinha IB and Shekhar SP *Industrial Relations, Trade Unions, and Labour Legislation* Dorling Kindersley Delhi (2006)

Standing G, Sender J and Weeks J *Restructuring the Labour Market: The South African Challenge: An ILO Country Review* International Labour Office Geneva (1996)

Sternberg RJ *Cognitive Psychology* Harcourt Brace College Publishers Fort Worth (2009)

Steyn LC *Die Uitleg van Wette* Juta Cape Town (1974)

Suber P *The Case of the Speluncean Explorers: Nine New Opinions* Routledge New York (1998)

Sunstein C *The Partial Constitution* Harvard University Press Cambridge (1993)

Thompson C and Benjamin P *South African Labour Law* Juta Cape Town (1997)

Tilly C *et al Final Report: Informal Worker Organizing as a Strategy for Improving Subcontracted Work in the Textile and Apparel Industries of Brazil, South Africa, India and China* Institute for Research on Labor and Employment University of California Los Angeles Los Angeles (2013)

Tribe LH and Dorf MC *On Reading the Constitution* Harvard University Press Cambridge (1991)

Valticos V and Von Potobsky GW *International Labour Law* Kluwer Deventer-Boston (1995)

Van Blerk AE *Jurisprudence: An Introduction* LexisNexis Durban (2002)

Van Jaarsveld SR, Fourie JD and Olivier MP *Principles and Practice of Labour Law* Butterworths Durban (2004)

Van Jaarsveld F and Van Eck S *Kompendium van Arbeidsreg* LexisNexis Durban (2006)

Van Niekerk A (ed) *Law@work* LexisNexis Durban (2008)

Van Niekerk A and Smit N (eds) *Law@work* LexisNexis Durban (2015)

Van Warmelo P *An Introduction to the Principles of Roman Civil Law* Juta Cape Town (1976)

Visagie CG *Regspleging en Reg aan die Kaap van 1652-1806* Juta Cape Town (1969)

Von Savigny FC *System des Heutigen Römischen Rechts* Veit Berlin (1840)

Waas B and Van Voss GH *Restatement of Labour Law in Europe: Vol I: The Concept of Employee* Hart Publishing Oxford (2017)

Waldron J *The Dignity of Legislation* Cambridge University Press Cambridge (1997)

Wallis MJD *Labour and Employment Law* Butterworths Durban (1995)

Waluchow *Inclusive legal Positivism* Clarendon Press Oxford (1994)

Wedderburn KW *The Worker and the Law* Penguin Middlesex (1965)

Weiss M *Labour Law and Industrial Relations in the Federal Republic of Germany* Kluwer Law International Deventer (1989)

Weiss M and Schmidt M *Labour Law and Industrial Relations in Germany* Kluwer Deventer-Boston (2008)

Wessels JW *The History of Roman-Dutch Law* The Lawbook Exchange New Jersey (1908)

Zander M *The Law Making Process* Cambridge University Press Cambridge (2004)

Ackermann L "Equality under the 1996 South African Constitution" in Wolfrum R (ed) *Gleichheit und Nichtdiskriminierung im nationalen und internationalen Menschenrechtsschutz (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht)* Springer-Verlag Berlin Heidelberg (2003)

Albertyn C and Goldblatt B "Equality" in Woolman S, Roux T and Bishop M (eds) *Constitutional Law of South Africa* Juta Cape Town (2014)

Arthurs HW "Labour law after labour" in Davidov G and Langille B (eds) *The Idea of Labour Law* Oxford University Press Oxford (2011)

Austin J "Extract from *The Province of Jurisprudence Determined*" in Freeman M (ed) *Lloyd's Introduction to Jurisprudence* Sweet and Maxwell London (2008)

Bakker R "Verfassungskonforme Auslegung" in Bakker R, Heringa AW and Stroink F (eds) *Judicial Control: Comparative Essays on Judicial Review* Maklu Antwerpen (1995)

Benjamin P "Beyond the boundaries: prospects for expanding labour market regulation in South Africa" in Davidov G and Langille B (eds) *The Boundaries and Frontiers of Labour Law* Hart Publishing Portland (2006)

Benjamin P (assisted by Bhoola U) "Subordination, parasubordination and self-employment: a comparative study of selected African countries" in Casale G (ed) *The Employment Relationship* Hart Publishing Oxford (2011)

Bosch C "Section 197 of the Labour Relations Act: The next generation" in Malherbe K and Sloth-Nielsen J *Labour Law into the Future: Essays in honour of D'Arcy du Toit* Juta Cape Town (2012)

Cameron E "Dignity and disgrace – moral citizenship and constitutional protection" in Corder U, Federico V and Orrù R (eds) *The Quest for Constitutionalism: South Africa since 1994* Routledge New York (2016)

Casale G "The employment relationship: a general introduction" in Casale G (ed) *The Employment Relationship: A Comparative Overview* Hart Publishing Oxford (2011)

Casale G, Countouris N, Fenwick C, Lee ST and Mascarenhas J "Legal regulation of the employment relationship in the Asia-Pacific Region" in Casale G (ed) *The Employment Relationship: A Comparative Overview* Hart Publishing Oxford (2011)

Cheadle H "Constitutionalising the right to strike" in Hepple B, Le Roux R and Sciarra S (eds) *Laws Against Strikes: The South African Experience in an International and Comparative Perspective* FrancoAngeli Milano (2015)

Cheadle H "Labour relations" in Cheadle H, Davis D and Haysom N (eds) *South African Constitutional Law: The Bill of Rights* LexisNexis Durban (2006)

Clark J "Towards a sociology of labour law: an analysis of the German writings of Kahn-Freund" in Wedderburn B *et at Labour Law and Industrial Relations: Building on Kahn-Freund* Clarendon Oxford (1983)

Clark J and Wedderburn B "Modern labour law: problems, functions and policies" in Wedderburn B *et at* (eds) *Labour Law and Industrial Relations: Building on Kahn-Freund* Clarendon Oxford (1983)

Clement Duly L "A revisit with the Cape's Hottentot Ordinance of 1828' in Kooy M (ed) *Studies in Economics and Economic History* Macmillan London (1972)

Cooper C "Labour relations" in Woolman S, Roux T and Bishop M (eds) *Constitutional Law of South Africa* Juta Cape Town (2014)

Countouris N "The employment relationship: a comparative analysis of national Judicial Approaches" in Casale G (ed) *The Employment Relationship: A Comparative Overview* Hart Publishers Oxford (2011)

Countouris N "Uses and misuses of 'mutuality of obligation'" in Bogg A, Costello C, Davies ACL and Prassl J (eds) *The Autonomy of Labour Law* Hart Publishers Oxford (2015)

Cowen D "Prolegomenon to a restatement of the principles of statutory interpretation" in Cowen S (ed) *Cowen on Law* (2009)

Davidov G and Langille B "Introduction: goals and means in the regulation of work" in Bogg A, Costello C, Davies ACL and Prassl J (eds) *The Autonomy of Labour Law* Hart Publishers Oxford (2015)

Davies P and Freedland M "Changing perspectives upon the employment relationship in British labour law" in Barnard C, Deakin S and Morris GS (eds) *The Future of Labour Law: Liber Amicorum Bob Hepple QC* Hart Publishing Portland (2004)

Davies P and Freedland M "The complexities in the employment enterprise" in Davidov G and Langille B (eds) *The Boundaries and Frontiers of Labour Law* Hart Publishing Portland (2006)

Deakin S "Legal origins of wage labour; the evolution of the contract of employment from industrialisation to the welfare state" in Clarke L, De Gijsel P, and Janssen J *The Dynamics of Wage Relations in the New Europe* Springer Heidelberg (2000)

Deakin S "The comparative evolution of the employment relationship" in Davidov G and Langille B (eds) *The Boundaries and Frontiers of Labour Law* Hart Publishing Portland (2006)

Deakin S "Workers, finance and democracy" in Barnard C, Deakin S and Morris GS (eds) *The Future of Labour Law: Liber Amicorum Bob Hepple QC* Hart Publishing Portland (2004)

Du Plessis LM "Interpretation of statutes and the Constitution" in *LexisNexis* (ed) *Bill of Rights Compendium* LexisNexis Durban (2012)

Du Plessis LM "Interpretation of the Bill of Rights" in Woolman S, Roux T and Bishop M (eds) *Constitutional Law of South Africa* Juta Cape Town (2014)

Du Toit D, Potgieter M and Fouché M "Labour and the Bill of Rights" in *LexisNexis* (ed) *Bill of Rights Compendium* LexisNexis Durban (2012)

Endicott T "The value of vagueness" in Marmor A and Soames S (eds) *Philosophical Foundations of Language in the Law* Oxford University Press Oxford (2013)

Eskridge WN and Frickey PP "Introduction" in Hart HM and Sacks AM (eds) *The legal Process: Basic Problems in the Making and Application of Law* Foundation Press New York (1994)

Flanagan RJ "Labour standards and international competitive advantage" in Flanagan RJ and Gould WB (eds) *International Labour Standards* Stanford University Press New York (2003)

Fowkes J "Founding provisions" in Woolman S, Roux T and Bishop M (eds) *Constitutional Law of South Africa* Juta Cape Town (2014)

Fredman S "Equality law: labour law or an autonomous field?" in Bogg A, Costello C, Davies ACL and Prassl J (eds) *The Autonomy of Labour Law* Hart Publishers Oxford (2015)

Fredman S "The ideology of new labour law" in Barnard C, Deakin S and Morris GS (eds) *The Future of Labour Law: Liber Amicorum Bob Hepple QC* Hart Publishing Portland (2004)

Gadamer H "The problem of historical consciousness" in Rabinow P and Sullivan W (eds) *Interpretive Social Science: A Reader* University of California Press Berkeley (1979)

Holton G "What, precisely, is 'thinking'? Einstein's answer" in French AP (ed) *Einstein: A Centenary Volume* Harvard University Press Cambridge (1979)

Howarth D "Making sense out of nonsense" in Gross H and Harrison R *Jurisprudence: Cambridge Essays* Clarendon Press Oxford (1992)

Javillier J "The employer and the worker: the need for a comparative and international perspective" in Davidov G and Langille B (eds) *The Boundaries and Frontiers of Labour Law* Hart Publishing Portland (2006)

Jellum LD "The theories of statutory construction and legislative process in American jurisprudence" in Araszkiewicz M and Płeszka K *Logic in the Theory and Practice of Lawmaking* Springer Heidelberg (2015)

Kahn-Freund O "Legal framework" in Flanders A and Clegg HA *The System of lndustrial Relations in Great Britain* Basil Blackwell Oxford (1954)

Kalula E "Beyond borrowing and bending" labour market regulation and the future of labour law in Southern Africa" in Barnard C, Deakin S and Morris GS (eds) *The Future of Labour Law: Liber Amicorum Bob Hepple QC* Hart Publishing Portland (2004)

Kelsen H "Extract from *The Pure Theory of Law*" in Freeman M (ed) *Lloyd's Introduction to Jurisprudence* Sweet and Maxwell London (2008)

Klare K "Countervailing workers' power as a regulatory strategy" in Collins H *et al* (eds) *Legal Regulation of the Employment Relation* Kluwer Deventer-Boston (2000)

Langille B "Labour law's back pages" in Davidov G and Langille B (eds) *The Boundaries and Frontiers of Labour Law* Hart Publishing Portland (2006)

Maley Y "The language of the law" in Gobbons J (ed) *Language and the Law* Routledge New York (1994)

Mandl I "Overview of new forms of employment" in Blanpain R, Hendrickx F and Waas B (eds) *New Forms of Employment in Europe* Wolters Kluwer The Netherlands (2016)

Maree J and Budlender D "Overview: state policy and labour legislation" in Maree J (ed) *The Independent Trade Unions 1974 – 1984* Raveb Press Johannesburg (1987)

Marín E "The employment relationship: the issue at the international level" in Davidov G and Langille B (eds) *The Boundaries and Frontiers of Labour Law* Hart Publishing Portland (2006)

Marmor A "Introduction" in Marmor A and Soames S (eds) *Philosophical Foundations of Language in the Law* Oxford University Press Oxford (2013)

Marmor A "On some pragmatic aspects of strategic speech" in Marmor A and Soames S (eds) *Philosophical Foundations of Language and Law* Oxford University Press Oxford (2013)

Morris M "Unions and the Industrial Councils – why do union's policies change?" in Nattrass N and Ardington E (eds) *The Political Economy of South Africa* Oxford University Press Oxford (1990)

Muffels R "Flexibility and employment security in Europe: setting the scene" Muffels R (ed) *Flexibility and Employment Security in Europe: Labour Markets in Transition* (2008)

Oberman P "The Netherlands" in L&E Global (eds) *Employees vs Independent Contractors: Understanding the Distinction between Contractors and Employees and the Re-characterization of a Contractor into an Employee* L&E Global Brussels (2014)

O'Higgins P "The end of labour las as we have known it?" in Barnard C, Deakin S and Morris GS (eds) *The Future of Labour Law: Liber Amicorum Bob Hepple QC* Hart Publishing Portland (2004)

Perulli A "Subordinate, autonomous and economically dependent work: a comparative analysis of selected European countries" in Casale (ed) *The Employment Relationship* Hart Publishers Oxford (2011)

Prassl J "Autonomous concepts in labour law? The complexities of the employment enterprise revisited" in Bogg A, Costello C, Davies ACL and Prassl J (eds) *The Autonomy of Labour Law* Hart Publishers Oxford (2015)

Preedy K "Germany" in L&E Global (eds) *Employees vs Independent Contractors: Understanding the Distinction between Contractors and Employees and the Re-characterization of a Contractor into an Employee* L&E Global Brussels (2014)

Rabinow P and Sullivan W "The interpretive turn: emergence of an approach" in Rabinow P and Sullivan W (eds) *Interpretive Social Science: A Reader* University of California Press Berkeley (1979)

Rautenbach IM "Introduction to the Bill of Rights" in LexisNexis (eds) *Bill of Rights Compendium* LexisNexis Durban (2011)

Raz J "On the authority and interpretation of constitutions: some preliminaries" in Alexander L (ed) *Constitutionalism: Philosophical Foundations* Cambridge University Press Cambridge (1998)

Sack J, Phillips E and Leal-Neri H "Protecting workers in a changing workworld: the growth of precarious employment in Canada, the United States and Mexico" in Casale G (ed) *The Employment Relationship: A Comparative Overview* Hart Publishing Oxford (2011)

Saomes S "What vagueness and inconsistency tell us about interpretation" in Marmor A and Soames S (eds) *Philosophical Foundations of Language in the Law* Oxford University Press Oxford (2013)

Saunders P "Welfare to work in practice: introduction and overview: in Saunders P (ed) *Welfare to Work in Practice: Social Security and Participation in Economic and Social Life* Ashgate New York (2005)

Scalia A "Common-law courts in a civil-law system: the role of United States federal courts in interpreting the constitution and laws" in Gutmann A (ed) *A Matter of Interpretation* Princeton University Press New Jersey (1996)

Seedorf S and Sibanda S "Seperation of powers" in Woolman S, Roux T and Bishop M (eds) *Constitutional Law of South Africa* Juta Cape Town (2014)

Terreblanche S and Nattrass N "A periodisation of the political economy From 1910" in Webster E, Alfred L, Bethlehem L, Joffe A, and Selikow T (eds) *Work and Industrialisation in South Africa: An Introductory Reader* Raven Press Randburg (1994)

Veneziani B "The evolution of the contract of employment" in Hepple B (ed) *The Making of Labour Law in Europe* Mansell London (1986)

Waas B "The right to strike: Germany" in Waas (ed) *The Right to Strike: A Comparative View* Kluwer Law International Alphen aan den Rijn (2014)

Waldron J "Did Dworkin ever answer the crits?" in Hershowitz S (ed) *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* Oxford University Press Oxford (2006)

Waldron J "Normative and ethical positivism" in Coleman J (ed) *Hart's Postscript: Essays on the Postscript to the Concept of Law* Oxford University Press Oxford (2001)

Waldron J "Vagueness and the guidance of action" in Marmor A and Soames S (eds) *Philosophical Foundations of Language and Law* Oxford University Press Oxford (2013)

Weiss M "Application" in Barnard C, Deakin S and Morris GS (eds) *The Future of Labour Law: Liber Amicorum Bob Hepple QC* Hart Publishing Portland (2004)

Weiss M "Judge made labour law in Germany" in Malherbe K and Sloth-Nielsen J *Labour Law into the Future: Essays in honour of D'Arcy du Toit* Juta Cape Town (2012)

Weiss M "Re-inventing labour law?" in Davidov G and Langille B (eds) *The Idea of Labour Law* Oxford University Press Oxford (2011)

Wilthagen T and Rogowski R "Legal regulation of transitional labour markets" in Schmid G and Gazier B (eds) *The Dynamics of Full Employment: Social Integration through Transitional Labour Markets* Edward Elgar Cheltenham (2002)

Woolman S "Dignity" in Woolman S, Roux T and Bishop M (eds) *Constitutional Law of South Africa* Juta Cape Town (2014)

Woolman S "Interpretation of the Bill of Rights" in Woolman S, Roux T and Bishop M (eds) *Constitutional Law of South Africa* Juta Cape Town (2014)

Woolman S "True in theory, true in practice: why direct application still matters" in Woolman S and Bishop M (eds) *Constitutional Conversations* Pretoria University Law Press Pretoria (2008)

Ackermann L "Constitutional comparativism in South Africa: a Response to Sir Basic Markesinis and Jorg Fedtke" 2005 *Tulane Law Review* 169

Ackermann L "The legal nature of the South African constitutional revolution" 2004 *New Zealand Law Review* 650

Alexander LA and Prakash SA "'Is that English you're speaking?" some arguments for the primacy of intent in interpretation" 2003 *Public Law and Legal Theory Research Paper Series* 1

Aletter C and Van Eck BPS "Employment agencies: are South Africa's recent legislative amendments compliant with the International Labour Organisation's standards?" 2016 *South African Mercantile Law Journal* 285

Alston P "'Core labour standards' and the transformation of the international labour regime" 2004 *European Journal of International Law* 457

Anonymous "The Charming Betsy canon, separation of powers, and customary international law" 2008 *Harvard Law Review* 1215

Atkinson E "Out of the household: master-servant relations and employer liability law" 2013 *Yale Journal of Law and the Humanities* 205

Barak A "The role of a supreme court in a democracy" 2002 *Hastings Law Journal* 1205

Barnett T, Bass K and Brown G "Ethical ideology and ethical judgment regarding ethical issues in business" 1994 *Journal of Business Ethics* 469

Basson AC "Labour law and the constitution" 1994 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 498

Benjamin P "A matter of ongoing concern: Judicial interpretation and misinterpretation of section 197 of the Labour Relations Act" 2005 *Law, Democracy and Development* 169

Benjamin P "An accident of history: who is (and who should be) an employee under South African labour law" 2004 *Industrial Law Journal* 787

Benjamin P "Informal work and labour rights in South Africa" 2008 *ILJ* 1579

Benjamin P "Labour law beyond employment" 2012 *Acta Juridica* 21

Benjamin P "Restructuring triangular employment: the interpretation of section 198A of the Labour Relations Act" 2016 *ILJ* 28

Berger H and Neugart M "How German labor courts decide: an econometric case study" *2011 German Economic Review R* 56

Bishop M and Brickhill J "In the beginning was the word: the role of text in the interpretation of statutes" 2012 *South African Law Journal* 681

Blatt WA "The history of statutory interpretation: a study in form and substance" 1985 *Cardozo Law Review* 799

Bosch C "'*Abantu Badidekile*": when must an applicant prove that he is an employee?" 2010 *Industrial Law Journal* 809

Bosch C "Can unauthorized workers be regarded as employees for the purposes of the Labour Relations Act?" 2006 *Industrial Law Journal* 1342

Bosch C and Le Roux R "Not letting them whistle: the Labour Appeal Court's approach to the Protected Disclosures Act and protecting parliament's employees" 2011 *Obiter* 591

Boshoff A "Constitutional interpretation: between past and future" 2001 *Stellenbosch Law Review* 357

Botha C "Interpretation of the Constitution" 1994 *SA Publiekreg/Public Law* 257

Brassey M "Fixing the laws that govern the labour market" 2012 *Industrial Law Journal* 1

Brassey M "The nature of employment" 1990 *Industrial Law Journal* 889

Bridge D "The Supreme Court, factions, and the counter-majoritarian difficulty" 2015 *Polity* 420

Bundy "The abolition of the Masters and Servants Act" 1975 *SALB* 37

Cahn N, Calmore J, Coombs M, Greene D, Miller G, Paul J and Stein L "The case of the Speluncean Explorers: contemporary proceedings" 1993 *George Washington Law Review* 1754

Cheadle H "Regulated flexibility: revisiting the LRA and the BCEA" 2006 *Industrial Law Journal* 663

Chicktay MA "Defining the right to strike: a comparative analysis of international labour organization standards and South African law" 2012 *Obiter* 260

Chomsky C "Unlocking the mysteries of Holy Trinity: Spirit, letter, and history in statutory interpretation" 2000 *Columbia Law Review* 901

Choudhry S "Globalisation in search of justification: towards a theory of comparative constitutional interpretation" 1999 *Indiana Law Journal* 820

Clarke L "Mutuality of obligations and the contract of employment: *Carmicheal and Another v National Power plc*" 2000 *Modern Law Review* 757

Creighton B and McCrystall S "Who is a "worker" in international law?" 2016 *Comparative Labor Law and Policy Journal* 691

Cohen T "Placing substance over form – identifying the true parties to the employment relationship" 2008 *ILJ* 864

Cohen T "The effect of the Labour Relations Amendment Bill 2012 on non-standard employment relationships" 2014 *ILJ* 2607

Cowen DV "Prolegomenon to a restatement of the principles of statutory interpretation" 1976 *Tydskrif vir die Suid-Afrikaanse Reg* 131

Cowen DV "The interpretation of statutes and the concept of 'the intention of the legislature'" 1980 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 374

Cowen S "Can 'dignity' guide South Africa's equality jurisprudence?" 2001 *South African Journal of Human Rights* 34

D'Amato A "The effect of legal theories on judicial decisions" 1999 *Chicago-Kent Law Review* 517

D`Amato A "The Speluncean Explorers – further proceedings" 1980 *Stanford Law Review* 467

Davidov G "The (changing) idea of labour law" 2007 *International Labour Review* 311

Davies ACL "Judicial self-restraint in labour law" 2009 *Industrial Law Journal* 278

Davis D "The twist of language and the two Fagans: please sir, may I have some literalism!" 1996 *South African Journal of Human Rights* 504

De Clercq F "Apartheid and the organised labour movement 1979 *Review of African Political Economy* 69

De Sloovere FJ "Contextual interpretation of statutes" 1936 *Fordham Law Review* 219

De Vos P "A bridge too far? History as context in the interpretation of the South African Constitution" 2001 *South African Journal of Human Rights* 1

De Villiers D "Arbitrêre gronde vir onbillike diskriminasie en die bewyslas in arbeidsgeskille" 2014 *Litnet* 169-187

Deakin S and Wilkinson F "The law of the labour market: industrialization, employment and legal evolution" 2006 *Industrial and Labour Relations Review* 2

Dekker AH "The social protection of non-citizen migrants in South Africa" 2010 *SA Merc Law Journal* 388

Devenish G "*African Christian Democratic Party v Electoral Commission:* the new methodology and theory of statutory interpretation in South Africa" 2006 *South African Law Journal* 399

Devenish G "*Department of Land Affairs v Goedgelegen Tropical Fruits* - a triumph for teleological interpretation, an unqualified contextual methodology and the jurisprudence of *ubuntu*" 2008 *South African Law Journal* 231

Devenish G "The application of the *generalia specialibus non derogant* maxim in the interpretation of statutes" 2005 *South African Law Journal* 72

Devenish G "The state is not presumed to be bound by statute: a constitutional and jurisprudential anachronism" 2009 *Obiter* 17

Du Plessis "The (re-) systematization of the canons of and aids to statutory interpretation" 2005 *South African Law Journal* 591

Du Plessis L "The status and role of legislation in South Africa as a constitutional demoracy: some exploratory observations" 2011 *Potchefstroom Electronic Review* 92

Du Plessis L and De Ville J "Bill of Rights interpretation in SA context" 1993 *Stellenbosch Law Review* 63

Du Toit D "Oil on troubled waters? the slippery interface between the contract of employment and statutory labour law" 2008 *South African Law Journal* 95

Du Toit D "Protection against unfair discrimination: cleaning up the Act" 2014 *Industrial Law Journal* 2623

Du Toit D "The evolution of the concept of 'unfair discrimination' in South African labour law" 2006 *ILJ* 1311

Duxbury N "Review of *The Dignity of Legislation* by Jeremy Waldron" 2000 *The Cambridge Law Journal* 210

Dyzenhaus D "The genealogy of legal positivism" 2004 *Oxford Journal of Legal Studies* 39

Easterbrook F "What does legislative history tell us?" 1990 *Chicago–Kent Law Review* 442

Ebrahim S "Equal pay for work of equal value in terms of the Employment Equity Act 55 of 1998: Lessons from the International Labour Organisation and the United Kingdom" 2016 *Potchefstroomse Elektroniese Regsblad* 1

Eskridge WN Jr "Dynamic statutory interpretation" 1987 *University of Pennsylvania Law Review* 1479 1479

Eskridge WN Jr "The case of the Speluncean Explorers: twentieth-century statutory interpretation in a nutshell" 1993 *Washington Law Review* 1731

Eskridge WN Jr and Frickey, PP "Statutory interpretation as practical reasoning" 1990 *Stanford Law Review* 321

Eskridge WN Jr and Frickey PP "The Supreme Court, 1993 term-foreword: law as equilibrium" 1994 *Harvard Law Review* 26

Eule JN "Judicial review of direct democracy" 1990 *The Yale Law Journal* 1503

Fagan A "In defence of the obvious – ordinary language and the identification of constitutional rules" 1995 *South African Journal of Human Rights* 545

Fagan E "The longest erratum note in history" 1996 *South African Journal of Human Rights* 79

Farber DA "Do theories of statutory interpretation matter? a case study" 2000 *Northwestern University Law Review* 1409

Flannigan R "Enterprise control: the servant-independent contractor distinction" 1987 *The University of Toronto Law Journal* 25

Fourie ES "Non-standard workers: the South African context, international law and regulation by the European Union" 2008 *Potchefstroomse Elektroniese Regsblad* 110

Frazer AD "Reconceiving labour law: the labour market regulation project" 2008 *Macquarie Law Journal* 21

Freedland M "Application of labour and employment Law beyond the contract of employment" 2007 *International Labour Review* 3

Fuller L "Positivism and fidelity to law – a reply to Prof Hart" 1958 *Harvard Law Review* 630

Fuller L "Thec of the Speluncean Explorers" 1949 *Harvard Law Review* 61

Gericke E "The regulation of successive fixed-term contracts: lessons to be gleamed from foreign and international law" 2016 *Tydskrif vir die Suid-Afrikaanse Reg* 94

Gould WB "The emergence of black unions in South Africa" 1987 *Journal of Law and Religion* 495

Govindjee A and Van der Walt A "Employment without rights? - *Discovery Health Limited v CCMA* 2008 7 BLLR 633 (LC); and *"Kylie" v CCMA* 2008 9 BLLR 870 (LC)" 2008 *Obiter* 542

Hart HLA "Positivism and the separation of law and morals" 1958 *Harvard Law Review* 593

Harpur P and James P "The shift in regulatory focus from employment to work relationships: critiquing reforms to Australian and UK occupational safety and health laws" 2014-2015 *Comparative Labour Law and Policy Journal* 111

Hepple BA "Is South African labour law fit for the global economy?" 2012 *Acta Juridica* 1

Hepple BA "The future of labour law" 1996 *Comparative Labour Law* 626

Hill TE "Humanity as an end in itself" 1980 *Ethics* 84

Hock C "Covenants in restraint of trade: do they survive the unlawful and unfair termination ofemployment by the employer?" 2003 *Industrial Law Journal* 1231

Hofman J "Comments on the South African Law Reform Commission's draft Interpretation of Legislation Bill" 2007 *South African Law Journal* 479

Hug W "The history of comparative law" 1931/1932 *Harvard Law Review* 1027

Jones RA "The changing structure of industrial relations in South Africa" 1985 *Managerial and Decision Economics* 217

Jones RA "The emergence of shop-floor trade union power in South Africa" 1985 *Managerial and Decision Economics* 160

Kahn-Freund O "Blackstone's neglected child: the contract of employment" 1977 Law Quarterly Review 508

Kahn-Freund O "Industrial relations and the law – retrospect and prospect" 1969 *British Journal of Industrial Relations* 301

Kahn-Freund O "Servants and independent contractors" 1951 *The Modern Law Review* 504

Klare K "Legal culture and transformative constitutionalism" 1998 *South African Journal of Human Rights* 146

Klare K "Self-realization, human rights and the separation of powers: a democracy-seeking approach" 2015 *Stellenbosch Law Review* 465

Kley-Struller A "Auslegung des liechtensteinischen Verwaltungsrechts" 1996 *LJZ* 74

Kozinski J "The Case of the Speluncean Explorers: Revisited" 1999 *Harvard Law Review* 1876

Kroetze IJ "Power play: a playful theory of interpretation" 2007 *Tydskrif vir die Suid-Afrikaanse Reg* 19

Kuznets S "Economic growth and income inequality" 1955 *The American Economic Review* 1

Labuschagne JMT "Die dinamiese aard van die wetgewingsproses en wetsuitleg" 1982 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 402

Labuschagne JMT "Die heilige oervader, regsevolusie en redematige administratiefregs-pleging" 1995 *SA Publiekreg/Public Law* 444

Labuschagne JMT "Die leemtebegrip by wetsuitleg as anachronisme: 'n regsantropologiese verklaring" 1999 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 300

Labuschagne JMT "Die leemtebegrip by wetsuitleg as anachronisme: 'n regsantropologiese verklaring" 1999 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 300

Labuschagne JMT "Die opkoms van die rasionele en van individualiserende geregtigheid by regsuitleg-en vorming: opmerkings oor die disintegrasie van refleks- en ikongeregtigheid" 2004 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 614

Labuschagne JMT "Die opkoms van die teleologiese benadering tot die uitleg van wette in Suid-Afrika" 1990 *South African Law Journal* 569

Labuschagne JMT "Gewone betekenis van 'n woord, woordeboeke en die organiese aard van wetsuitleg" 1998 *SA Publiekreg/Public Law* 145

Labuschagne JMT "Op die voetspoor van die wetgewingsproses: woord, punktuasie- en struktuurwysigende uitleg" 1986 *SA Publiekreg/Public Law* 58

Labuschagne JMT "Regsnormvorming: riglyn vir 'n nuwe benadering tot die tradisionele reëls van wetsuitleg" 1989 *SA Publiekreg/Public Law* 205

Landman AA "Fair labour practices: the Wiehahn legacy" 2004 *Industrial Law Journal* 805

Langdell CC "Dominant opinions in England during the nineteenth century in relation to legislation as illustrated by English legislation, or the absence of it, during that period" 1906 *Harvard Law Review* 151

Langille B "Imagining post 'Geneva Consensus' labor law for post-'Washington Consensus' Development" 2009-10 *Comparative Labour Law and Policy Journal* 523

Langille B "Labour law is not a commodity" 1998 *Industrial Law Journal* 1002

Langille B "Labour policy in Canada – new platform, new paradigm" 2002 *Canadian Public Policy* 134

Langille B "Core labour rights – the true story (reply to Alston)" 2005 *European Journal of International Law* 409

Laubscher T "Equal pay for work of equal value: a South African perspective" 2016 *Industrial Law Journal* 804

Le Roux PAK "Independent contractors and employees: some recent distinctions made by the courts" 2015 *Contemporary Labour Law* 1

Le Roux PAK "The Employment Equity Act amendments tested in practice" 2015 *Contemporary Labour Law* 13

Le Roux PAK "The Employment Equity Act: new amendments set problems and posers" 2014 *Contemporary Labour Law* 1

Le Roux R "Employment: a Dodo, or simply living dangerously?" 2014 *Industrial Law Journal* 30

Le Roux R "The evolution of the contract of employment in South Africa' 2010 *Industrial Law Journal* (UK) 139

Le Roux R "The meaning of 'worker' and the road towards diversification: reflecting on Discovery, Sita and 'Kylie'" 2009 *Industrial Law Journal* 49

Le Roux W "Directory provisions, section 39(2) of the Constitution and the ontology of statutory law *African Christian Democratic Party v Electoral Commission*" 2006 *SA Publiekreg/Public Law* 382

Le Roux W "Undoing the past through statutory interpretation: The Constitutional Court and the marriage laws of apartheid" 2005 *Obiter* 526

Lewin I "Employee or independent contractor? Twists and turns to determine employment relationship" 2014 *Contemporary Labour Law* 53

Liebenberg "The value of human dignity in interpreting socio-Economic rights" 2005 *South African Journal on Human Rights* 1

Maleka M and Nkhumise N "The interpretation and application of section 191(12) of the Labour Relations Act: *Bracks NO v Rand Water*" 2011 *South African Mercantile Law Journal* 504

Manamela ME "The interpretation and application of section 95(4) of the Labour Relations Act 66 of 1995" 2005 *South African Mercantile Law Journal* 348

Maree J "The emergence, struggles and achievements of black trade unions in South Africa from 1973 to 1984" 1985 *Labour, Capital and Society* 278

Marmor A "Textualism in context" 2012 *USC Law Legal Studies Paper No 12-13* 1

Marsh PA "Labour reform and security repression in South Africa: Botha's strategy for stabilizing racial domination in the 1980s" 1982 *Issue: A Journal of Opinion* 49

Maxeiner JR "Some realism about legal certainty in the globalization of the rule of law" 2008 *Houston Journal of International Law* 27

McGregor M "Is actual commencement of work a requirement to be an 'employee' for purposes of unfair dismissal? A purposive interpretation" 2004 *South African Mercantile Law Journal* 270

Mdumbe F "Has the literal/intentional/textual approach to statutory interpretation been dealt the coup de grace at last?" 2004 *SA Publiekreg/Public Law* 472

Merritt A "The historical role of law in the regulation of employment - abstentionist or interventionist?" 1982 *Australian Journal of Law and Society* 56

Michelman F "Expropriation, eviction and that gravity of common law" 2013 *Stellenbosch Law Review* 245

Michelman F "On the uses of interpretive charity: some notes from abroad on application, avoidance, equality and objective unconstitutionality" 2008 *Constitutional Court Review* 1

Michelman F "The Bill of Rights, the common law, and the freedom-friendly state" 2003 *University of Miami Law Review* 401

Mischke C "Getting a foot in the door: organisational rights and collective bargaining in terms of the LRA" 2004 *Contemporary Labour Law* 51

Mokoena K "Are uber drivers employees? A look at emerging business models and whether they can be accomodated by South African labour law" 2016 *ILJ* 1574

Mureinik E "The contract of service: an easy test for hard cases" 1980 *South African Law Journal* 246

Muswaka L "Sex workers and the right to fair labour practices: *Kylie v Commissioner for Conciliation Mediation and Arbitration*" 2011 *South African Mercantile Law Journal* 533

Nyenti MAT "Role of constitutional principles and values in the development of social protection in South Africa" 2016 *Global Social Policy* 201

Olivier M "Die belang van status en kontrak vir die diensverhouding" 1993 *Tydskrif vir die Suid-Afrikaanse Reg* 17

Olivier "Informality, employment contracts, and social insurance coverage: rights-based perspectives in a developing world context" 2011 *International Journal of Comparative Labour Law and Industrial Relations* 419

Patterson EW "Hans Kelsen and His *Pure Theory of Law*" 1952 *California Law Review* 5

Pernicka S "The evolution of union politics for atypical employees: a comparison between German and Austrian trade unions in the private service sector" 2005 *Economic and Industrial Democracy* 201

Phelan E "The contribution of the ILO to peace" 1949 *International Labour Review* 607

Pound R "Common law and legislation" 1908 *Harvard Law Review* 383

Phillips J "Why legal history matters" 2010 *Victoria University of Wellington Law Review* 293

Rautenbach IM "Requirements for affirmative action and requirements for the limitation of rights" 2015 *Tydskrif vir die Suid-Afrikaanse Reg* 431

Rautenbach IM "The right to choose and practice a trade, occupation or profession" 2005 *Tydskrif vir die Suid-Afrikaanse Reg* 851

Rautenbach IM and Fourie ES "The Constitution and recent amendments to the definition of unfair discrimination and the burden of proof in unfair discrimination disputes in the Employment Equity Act" 2016 *Tydskrif vir die Suid-Afrikaanse Reg* 110

Raz J "Authority, law and morality" 1985 *The Monist* 295

Raz J "The politics of the rule of law" 1990 *Indian Journal of Constitutional Law* 1

Ross DB "Interpretation theory and statutory construction: revisiting the issue in the light of constitutionalism" 2004 *Stellenbosch Law Review* 268

Roux T "Transformative constitutionalism and the best interpretation of the South African Constitution: distinction without a difference?" 2009 *Stellenbosch Law Review* 259

Rispel L and Blaauw D "The health system consequences of agency nursing and moonlighting in South Africa" 2015*Global Health Action* 1

Rubin N "International labour law and the new South Africa" 1998 *South African Law Journal* 685

Rycroft A and Le Roux R "Decolonising the labour law curriculum 2017 *Industrial Law Journal* 1473

Schauer F "Formalism" 1988 *Yale Law Review* 509

Shapiro DL "A cave drawing for the Ages" 1999 *Harvard Law Review* 1834 1839

Smit D and Du Plessis V "'Kylie' and the jurisdiction of the Commission for Conciliation, Mediation and Arbitration" 2011 *South African Mercantile Law Journal* 476

Smit N "Labour is not a commodity: social perspectives on flexibility and market requirements within a global world" 2006 *Tydskrif vir die Suid-Afrikaanse Reg* 152

Smit N "Towards social justice: an elusive and challenging endeavour" 2010 *Tydskrif vir die Suid-Afrikaanse Reg* 1

Smit N and Fourie ES "Extending protection to atypical workers, including workers in the informal economy, in developing countries" 2010 *The International Journal of Comparative Labour Law and Industrial Relations* 43

Smit N and Fourie ES "Perspectives on extending protection to atypical workers, including workers in the informal economy, in developing countries" 2009 *Tydskrif vir die Suid-Afrikaanse Reg* 516

Smit N and Mpedi G "Social protection for developing countries: can social insurance be more relevant for those working in the informal economy?" 2010 *Law Democracy and Development* 1 5

Smith CM "The right of revolution: black trade unions, workplace forums, and the struggle for democracy in South Africa" 2000 *Georgia Journal of International and Comparative Law* 595

Spigelman J "The poet's rich resource: issues in statutory interpretation" 2001 *Australian Bar Review* 224

Stack KM "The divergence of constitutional and statutory interpretation" 2004 *University of Colorado LR* 1

Sunstein C "Interpreting Statutes in the Regulatory State" 1989 *Harvard Law Review* 405

Theron J "The shift to services and triangular employment: implications for labour market reform" 2008 *Industrial Law Journal* 1

Theron J "Employment is not what it used to be" 2003 *Industrial Law Journal* 1247

Thompson C "The changing nature of employment" 2003 *Industrial Law Journal* 1793

Van der Linde and Van Staden "Judicial develoment (and activism) in insolvency law" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 414

Van der Walt A "A South African reading of Frank Michelman's theory of social justice" 2004 *SA Publiekreg/Public Law* 253

Van Eck BPS "Employment agencies: international norms and developments in South Africa" 2012 *The International Journal of Comparative Labour Law and Industrial Relations* 29

Van Eck BPS "In the name of 'workplace and majoritarianism': thou shalt not strike — *Association of Mineworkers & Construction Union & others v Chamber of Mines & others* (2017) 38 ILJ 831 (CC) and *National Union of Metalworkers of SA & others v Bader Bop (Pty) Ltd & another* (2003) 24 ILJ 305 (CC). (2017) 38 ILJ 1496" 2017 *Industrial Law Journal* 1496

Van Eck BPS "Regulating flexibility and the Labour Relationa Amendment Bill of 2012" 2013 *De Jure* 600

Van Eck BPS "Revisiting agency work in Namibia and South Africa: any lessons from the decent work agenda and the flexicurity approach?" 2014 *The International Journal of Comparative Labour Law and Industrial Relations* 49

Van Eck BPS and Snyman F "Social protection afforded to irregular migrant workers: thoughts on the Southern Africa Development Community (with emphasis on Botswana and South Africa) 2015 *Journal for African Law* 294

Van Jaarsveld J "Gedagtes oor die arbeidsregtelike posisie van predikante, pastore en priesters as werknemers van die kerk" 2015 *HTS Teleologiese Studies* http://www.hts.org.za/index.php/HTS/article/view/2946/html#FN0076_2946 (17-10-2017)

Van Marle K "Transformative constitutionalism as/ and critique" 2009 *Stellenbosch Law Review* 286

Van Niekerk A "Employees, independent contractors and intermediaries: the definition of an 'employee' revisited" 2005 *Contemporary Labour Law* 11

Van Niekerk A "In search of justification: the origins of the statutory protection of security of employment in South Africa" 2004 *Industrial Law Journal* 853

Van Niekerk A "Personal service companies and the definition of 'employee' - some thoughts on *Denel (Pty) Ltd v Gerber* (2005) 26 ILJ 1256 (LAC)" 2005 *Industrial Law Journal* 1904

Van Staden MJ "A comparative analysis of common-law presumptions of statutory interpretation" 2015 *Stellenbosch Law Review* 550

Van Staden MJ "The role of the judiciary in balancing flexibility and security" 2013 *De Jure* 470

Van Staden MJ "Towards a South African understandingof social justice: the International Labour Organisation perspective" 2012 *Tydskrif vir die Suid-Afrikaanse Reg* 91

Van Staden MJ and Smit N "The regulation of the employment relationship and the re-emergence of the contract of employment" 2010 *Tydskrif vir die Suid-Afrikaanse Reg* 702

Vettori S "The extension of labour legislation protection to illegal immigrants" 2009 *South African Mercantila Law Journal* 818

Waas B "Good faith in the law of the employment relationship: Germany" 2011 *Comparative Labour Law and Policy Journal* 603.

Waldron J "The dignity of legislation" 1995 *Maryland Law Review* 633

Wallis M "What's in a word? Interpretation through the eyes of ordinary readers" 2010 *South African Law Journal* 673

Wedderburn K "Labour law, corporate law and the worker" 1993 *Industrial Law Journal* 517

Wendel WB "Explanation in legal scholarship: the inferential structure of doctrinal analysis" 2011 *Cornell Law Review* 1035

Wilthagen T and Tros F "The concept of 'flexicurity': a new approach to regulating employment and labour markets" 2004 *Transfer: European Review of Labour and Research* 166

Woodward D "Wage rates and living standards in pre-industrial England" 1981 *Past and Present* 28

Woolman S "The amazing, vanishing Bill of Rights" 2007 *South African Law Journal* 262

Abley v Dale 1851 138 ER 519 525

ACE Insurance Ltd v Trifunovski 2011 FCA 1204 (Australia)

Administrator of the Transvaal v Traub 1989 10 ILJ 823 (A)

Advanced Workplace Solutions Pty Ltd v Fox and Kangan Batman TAFE 1999 AIRC 731 (Australia)

Affordable Medicines Trust v Minister of Health 2006 3 SA 247 (CC)

African Christian Democratic Party v Electoral Commission 2006 3 SA 305 (CC)

Air Tour (Israel) Ltd v Chair of the Council for Antitrust Oversight 39(1) PD 169 176 (Israel)

Amalgamated Packaging Industries v Hutt 1975 4 SA 943 (A)

AMAWU v Fodens (SA) (Pty) Ltd 1983 4 ILJ 212 (IC)

ARB Electrical Wholesalers v Hibbert 2015 36 ILJ 2989 (LAC)

Assign Services Pty Ltd and Krost Shelving & Racking Pty Ltd 2015 36 ILJ 2408 (CCMA)

Assign Services Pty Ltd v CCMA 2015 36 ILJ 2853 (LC)

Association of Mineworkers and Construction Union v Chamber of Mines of South Africa 2017 3 SA 242 (CC)

Association of Personal Injury Lawyers v Heath 2001 1 SA 883 (CC)

Association of Professional Teachers v Minister of Education 1995 16 ILJ 1048 (IC)

Ashwander v Tennessee Valley Authority [1936] USSC (United States)

Auf Der Heyde v University of Cape Town case no C603/98 (LC) (unreported)

Aviation Union of South Africa v South African Airways (Pty) Ltd 2012 1 SA 321 (CC)

AVBOB Mutual Assurance Society v Commission for Conciliation, Mediation and Arbitration, Bloemfontein 2003 24 ILJ 535 (LC)

Avon YB 33 & 35 Edw 1, 82 (Rolls Series) (England)

Bank voor Handel en Scheepvaarten v Slatford 1952 2 ALL ER 956 (CA) (England)

Bargaining Council for the Furniture Manufacturing Industry, KwaZulu Natal v UKD Marketing CC 2013 34 ILJ 96 (LAC)

Barkhuizen v Napier 2007 5 SA 323 (CC)

Bato Star Fishing (Pty) v Minister of Environmental Affairs 2004 4 SA 490 (CC)

Baudach v United Tobacco Co Ltd 2000 21 ILJ 2241 (SCA)

Bayat and Durban Institute of Technology 2006 27 ILJ 188 (CCMA)

Bel Porto school governing Body v Premier of the Western Cape Province 2002 3 SA 265 (CC)

Bernstein v Bester 1996 4 BCLR 449 (CC)

Bertie Van Zyl Pty Ltd v Minister for Safety and Security 2010 2 SA 181 (CC)

Bester v National Director of Public Prosecutions, In Re National Director of Public Prosecutions v Kleinhans 2012 2 All SA 453 (SCA)

Beya v General Public Service Sectoral Bargaining Council 2015 36 ILJ 1553 (LC)

Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG 1975 1 All ER 810 (HL) (England)

Bolton School v Evans 2006 EWCA (Civ) 1653

Bonitas Medical Fund v The Council for Medical Schemes 2016 4 All SA 684 (SCA)

Boxer Superstores Mthatha v Mbenya 2007 ILJ 2209 (SCA)

Braamfontein Food Centre v Blake 1982 3 SA 248 (T) 240

Brink v Kitshoff 1996 4 SA 197 (CC)

Brisley v Drotsky 2002 4 SA 1 (SCA)

Biggar v City of Johannesburg (Emergency Management Services) 2017 38 ILJ 1806 (LC)

Biyela v Sneller Enterprises (Pty) Ltd 1985 6 ILJ 33 (IC)

Buffalo Signs Co Ltd v De Castro 1999 20 ILJ 1501 (LAC)

Business South Africa v Congress of South African Trade Unions 1997 18 *ILJ* 474 (LAC)

Byers v Chinn 1928 AD 322

Bezer v Cruiser International CC 2003 24 ILJ 1372 (LAC)

SACWU v Sentrachem Ltd 1988 9 ILJ 410 (IC)

SACWU v Sentrachem Ltd 1989 10 ILJ 249 (W)

Carmichele v Minister of Safety and Security 2001 4 SA 938 (CC)

Caroluskraal Farms (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk; Red Head Boer Goat (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk; Sleutelfontein (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk 1994 3 SA 407 (A)

Carter v Bradbeer 1975 KL Cas 61

Chemical Energy Paper Printing Wood and Allied Workers Union v Print Tech (Pty) Ltd 2010 31 ILJ 1850 (LC)

Chetty v Raydee (Pty) Ltd 1988 9 ILJ 318 (IC)

Chickasaw Nation v United States 534 US 84 (2001) 93 (USA)

Chisom v Edwards 111 S. Ct. 2354 (1991) (USA)

City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal 2010 6 SA 182 (CC)

City of Tshwane Metropolitan Municipality v SA Local Government Bargaining Council 2012 33 ILJ 191 (LC)

City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd 2015 6 BCLR 660 (CC)

CMS Support Services v Briggs 1998 19 ILJ 271 (LAC)

Coin Security Group (Pty) Ltd v SA National Union for Security Officers 1998 1 SA 685 (C)

Collins v Volkskas Bank 1994 15 ILJ 1398 (IC)

Colonial Mutual Life Assurance Society Limited v Macdonald 1931 AD 413

Commissioner for Inland Revenue v Witwatersrand Association of Racing Clubs 1960 3 SA 291 (A) 302A-B

Commissioner, SA Revenue Service v Executor, Frith's Estate 2001 2 SA 261 (SCA)

Connolly v Rand Water 1997 18 ILJ 849 (CCMA)

Cool Ideas 1186 CC v Hubbard 2014 4 SA 474 (CC)

Corocraft v Pan-American Airways 1968 2 All ER 1059 (England)

Consolidated Workers' Union of South Africa v CCMA 2013 34 ILJ 1966 (LC)

Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng 2015 1 SA 1 (CC)

Crossroads Distributions (Pty) Ltd t/a Jowells Transport v Clover SA (Pty) Ltd 2008 6 BLLR 565 (LC)

Cubey and CSIR 2006 27 ILJ 2464 (CCMA)

Cutter v Eagle Star Insurance Co and Clarke v Kato 1998 4 All ER 417 (United Kingdom)

Dacas v Brook St Bureau 2004 ICR 1437 (United Kingdom)

Dadoo Ltd v Krugersdorp Municipal Council 1920 AD 530

Daniels v Campbell 2004 5 SA 331 (CC)

Daniels v Standard Bank of South Africa case no JS246/2011 (LC) (unreported)

Dawood v Minister of Home Affairs; Shalabi v Minister of Home; Thomas v Minister of Home Affairs 2000 3 SA 936 (CC) par 35

De Beer v Thompson and Son 1918 TPD 70

De Lange v Smuts 1998 3 SA 785 (CC)

De Paauw and Living Gold (Pty) Ltd 2006 27 ILJ 1077 (ARB)

De Villiers v Cape Divisional Council 1875 Buchanan 50

Dempsey v Home & Property 1995 16 ILJ 378 (LAC)

Denel Pty Ltd v Gerber 2005 26 ILJ 1256 (LAC)

Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd 2014 5 SA 138 (CC)

Dennis Edwards and Co v Lloyd 1919 TPD 291

Department of Health: Gauteng Provincial Government v National Education Health and Allied Workers Union case no J2864/16 (LC) (unreported)

Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd 2007 6 SA 199 (CC)

Director of Public Prosecutions: Cape of Good Hope v Robinson 2005 4 SA 1 (CC)

Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development 2009 4 SA 222 (CC)

Director of Public Prosecutions, Western Cape v Prins 2012 3 All SA 138 (WCC)

Discovery Health Ltd v Commission for Conciliation, Mediation and Arbitration 2008 29 ILJ 1480 (LC)

Doctors for Life International v Speaker of the National Assembly 2006 6 SA 416 (CC)

Dodd v Multilateral Motor Vehicle Accidents Fund 1997 2 SA 763 (A)

Du Plessis v De Klerk 1996 3 SA 850 (CC)

Du Toit v Minister for Safety and Security 2009 12 BCLR 1171 (CC)

Duport Steels Ltd v SIRS 1980 1 All ER 529 (HL) (England)

Dyokhwe v De Kock 2012 33 ILJ 2401 (LC)

Edward J DeBartolo Corp v Florida Gulf Coast Bldg & Constr Trades Council 485 US 568 (1988) (United States)

ER24 Holdings v Smith 2007 6 SA 147 (SCA)

ERGO v NUM 1989 10 ILJ 683 (LAC)

Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996 1996 4 SA 744 (CC)

Ex Parte Hathorn: In re OC, Durban Prison Command 1960 2 SA 767 (D)

Ex Parte Minister of Safety and Security: In re S v Walters 2002 4 SA 613 (CC)

Executive Council of the Western Cape v Minister for Provincial Affairs and Constitutional Development of the RSA; Executive Council of KwaZulu-Natal v President of the RSA 2000 1 SA 661 (CC)

Express and Echo Publications Ltd v Tanton 1999 IRLR 367 (CA) (United Kingdom)

Eyston v Studd 1574 2 Plowden, 450 465-467 (England)

Farrar's Estate v Commissioner for Inland Revenue 1926 TPD 501

FAWU v National Co-Operative Dairies Ltd (1) 1989 10 ILJ 483 (IC)

Federated Employers' Insurance Co Ltd v Magubane 1981 2 SA 710 (A)

Fedlife Assurance Ltd v Wolfaart 2001 ILJ 2407 (SCA)

Ferreira v Levin NO; Vryenhoek v Powell 1996 1 SA 984 (CC)

Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein 1985 4 SA 773 (A)

First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance 2002 4 SA 768 (CC)

Flynn v Torith Ltd 2003 All ER (D) (United Kingdom)

Food and Allied Workers Union v Pets Products (Pty) Ltd 2000 21 ILJ 1100 (LC)

Fothergill v Monarch Airlines Ltd 1980 2 All ER 696

Fraser v Children's Court, Pretoria North 1997 2 BCLR 153 (CC)

G v K 1988 9 ILJ 314 (IC)

George v Liberty Life of Africa 1996 17 ILJ 571 (IC)

Gcaba v Minister for Safety and Security 2010 1 SA 238 (CC)

Chamber of Mines v MWU 1989 10 ILJ 133 (IC)

Glen Anil Development Corp Ltd v Secretary for Inland Revenue 1975 4 SA 715 (A)

Glenister v President of the Republic of South Africa 2011 3 SA 347 (CC)

Goldberg v P J Joubert Ltd 1960 1 SA 521 (T)

Golden China TV Game Centre v Nintendo Co Ltd 1997 1 SA 405 (A)

Gov Ari Ltd v Netanya Local Planning and Construction Council 35(4) PD 764 (Israel)

Government of the Republic of South Africa v Grootboom 2001 1 SA 46 (CC)

Grey v Pearson 1843–60 All ER Rep 21 (HL) 36

Greyvenstein and Iliso Consulting Engineers 2004 25 ILJ 613 (CCMA)

H v Fetal Assessment Centre 2015 2 SA 193 (CC)

Harksen v Lane 1998 1 SA 300 (CC)

Harris v Minister of the Interior 1952 2 SA 428 (A)

Herbst v Elmar Motors 1999 20 ILJ 2465 (CCMA)

Heydon's Case (1584) 3 Co Rep 7a

HMBMP Properties Pty Ltd v King 1981 1 SA 906 (N)

Hoffmann v South African Airways 2001 1 SA 1 (CC)

Hollis v Vabu Pty Ltd (t/as Crisis Couriers) 2001 207 CLR 21 (Australia)

Holomisa v Argus Newspapers Ltd 1996 6 BCLR 836 (W) 863

Honeywill and Stein Ltd v Larkin Brothers Ltd [1934] 1 KB 191 (England)

Hunt v ICC CARE Importers Services Co (Pty) Ltd 1999 20 ILJ 364 (LC)

Hunter v Southam Inc 1984 2 SCR 145 (Canada)

Hydraulic Engineering Repair Services v Ntshona 2008 29 ILJ 163 (LC)

Imperial Cold Storage v Yeo 1927 CPD

Inco Europe v First Choice Distribution 2000 2 All ER 109

Independent Institute of Education Pty Ltd v Mbileni 2013 34 ILJ 1538 (LC)

Food and Allied Workers Union v Pets Products (Pty) Ltd 2000 21 ILJ 1100 (LC)

Islamic Unity Convention v Independent Broadcasting Authority 2002 4 SA 294 (CC)

Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd. In re: Hyundai Motor Distributors (Pty) Ltd v Smit 2001 1 SA 545 (CC)

J v M Ltd 1989 10 ILJ 755 (IC)

Jafta v Ezemvelo KZN Wildlife 2009 30 ILJ 131 (LC)

Jaga v Dönges; Bhana v Dönge 950 4 SA 653 (A)

Justice Alliance of South Africa v President of the Republic of South Africa 2011 5 SA 388 (CC)

K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd (1985) 157 CLR 309 (UK)

K v Minister of Safety and Security 2005 6 SA 419 (CC)

Kadiaka v Amalgamated Beverage Industries 1999 20 ILJ 373 (LC)

Kanhym Bpk v Oudtshoorn Munisipaliteit 1990 3 SA 252 (C)

Kaplan v Inc Law Society, Tvl 1981 2 SA 762 (T)

Kaunda v President of the Republic of South Africa 2005 4 SA 235 (CC)

SA Iron, Steel and Allied Industries Union v Chief Inspector, Department of Manpower 1987 8 ILJ 303 (IC)

Kebeni v Cementile Products (Ciskei) (Pty) Ltd 1987 8 ILJ 442 (IC)

Kelly Industrial Ltd v Commission for Conciliation, Mediation and Arbitration Commissioner Edwards 2015 36 ILJ 1877 (LC)

Khanyile v Telkom SA Ltd 1999 20 ILJ 2470 (CCMA)

Khosa v Minister of Social Development; Mahlaule v Minister of Social Development 2004 6 SA 505 (CC)

Khumalo v Holomisa 2002 (5) SA 401 (CC)

Kylie v Commission for Conciliation Mediation and Arbitration 2010 31 ILJ 1600 (LAC)

Lagadien v University of Cape Town 2000 21 ILJ 2469 (LC)

Landboukredietraad v Vrystaat Lewendehawe Koöperasie Bpk 1990 1 SA 106 (A)

Leibrandt v SA Railways 1941 AD 9

Lesbian and Gay Equality Project v Minister of Home Affairs 2006 1 SA 524 (CC)

Liberty Life Association of Africa Ltd v Niselow 1996 17 ILJ 673 (LAC)

Lichaba v Shield Versekeringsmaatskappy Beperk 1977 4 SA 623 (O)

Lokotfwako v Swaziland Television Broadcasting Corporation t/A Swazi TV 151/2007 (Swaziland)

Louw v Acting Chairman of the Board of Directors of the North West Housing Corporation 2000 21 ILJ 482 (NW)

Louw v Golden Arrow Bus Services (Pty) Ltd 2000 21 ILJ 188 (LC)

Lumka and Associates v Mancotywa case no JR 944/07 (LC) (unreported)

Lumka v Premier: Eastern Cape Province 2008 29 ILJ 783 (CCMA)

Maartens v Van Leer SA (Pty) Ltd 1998 19 ILJ 182 (CCMA)

Maas v Commision for Concilliation, Mediationa and Arbitration 1999 20 ILJ 1276 (LC)

Mabaso v Law Society, Northern Provinces 2005 2 SA 117 (CC)

Madlanya v Foster 1999 20 ILJ 2188 (ARB)

Magor and St Mellons v Newport Borough Council 1950 2 All ER 1226

Mahlangu v Amplats Development Centre 2002 23 ILJ 910 (LC)

Malindi v Commercial Union Insurance Co SA Ltd 1997 1 SA 327 (A)

Mansingh v General Council of the Bar 2014 2 SA 26 (CC)

Mankayi v AngloGold Ashanti Ltd 20113 SA 237 (CC)

Manyasha v Minister of Law and Order 1999 2 SA 179 (SCA)

Maphosa v Max Enterprises (Pty) Ltd 329/03 (Swaziland)

Maritz and Cash Towing CC 2002 23 ILJ 1083 (CCMA)

Matatiele Municipality v President of the Republic of South Africa 2007 1 BCLR 47 (CC)

Matiso v The Commanding Officer, Port Elizabeth Prison 1994 3 SA 592 (SE)

Mayfair South Townships Pty Ltd v Jhina 1980 1 SA 869 (T)

MAWU v Bonar Long NPC (SA) (Pty) Ltd 1987 8 ILJ 108 (IC)

MAWU v Siemens Ltd 1986 7 ILJ 547 (IC)

MAWU v Transvaal Pressed Nuts, Bolts and Rivets (Pty) Ltd 1986 7 ILJ 703 (IC)

Mazibuko v Mooi River Textiles Ltd 1989 10 ILJ 875 (IC)

Mbana v Shepstone Wylie 2015 6 BCLR 693 (CC)

MEC for Agriculture, Conservation, Environment and Land Affairs, Gauteng v Sasol Oil 2006 2 All SA 17 (SCA)

MEC for Education: KwaZulu Natal v Pillay 2008 1 SA 474 (CC)

MEC for the Department of Health, Eastern Cape v Odendaal 2009 5 BLLR 470 (LC)

Medical Association of South Africa v Minister of Health 1997 18 ILJ 528 (LC)

Melomed Hospital Holdings Ltd v Commission for Conciliation, Mediation and Arbitration 2013 34 ILJ 920 (LC)

Mercedes Benz Financial Services (South Africa) (Pty) Ltd v Dunga 2011 1 SA 374 (WCC)

Messenger of the Magistrate's Court, Durban v Pillay 1952 3 SA 678 (A)

Minister of Finance v Van Heerden 2004 6 SA 121 (CC)

Minister of Health v Treatment Action Campaign (2) 2002 5 SA 721 (CC)

Minister of the Interior v Machadodorp Investments (Pty) Ltd 1957 2 SA 395 (A)

Minister of Water Affairs and Forestry v Swissborough Diamond Mines Pty Ltd 1999 2 SA 345 (T)

Mkize v Tembisa Town Council 1987 8 ILJ 256 (W)

Molaudzi v S 2015 8 BCLR 904 (CC)

Montreal v Montreal Locomotive Works Ltd 1937 1 DLR 161 (PC)

Moses v Safika Holdings Pty Ltd 2001 22 ILJ 1261 (CCMA)

Motor Industry Bargaining Council v Mac-Rites Panel Beaters and Spray Painters Pty Ltd 2001 22 ILJ 1077 (N)

Mthembu v Claude Neon Light 1992 13 ILJ 422 (IC)

Mtshamba v Boland Houtnywerhede 1986 7 ILJ 563 (IC)

Mulder and Special Investigating Unit 2012 33 ILJ 1508 (CCMA)

Murray v Minister of Defence 2008 6 BLLR 513 (SCA)

MWASA v The Minister of Manpower; NUM v The Minister of Manpower 1987 8 ILJ 614 (IC)

Naboomspruit Munisipaliteit v Malati Park (Edms) Bpk 1982 2 SA 127 (T)

Nape v INTCS Corporate Solutions Pty Ltd 2010 31 ILJ 2120 (LC)

Nasionale Vervoerkommissie van Suid-Afrika v Salz Gossow Transport 1983 4 SA 344 (A)

Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 2 All SA 262 (SCA)

National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 2 SA 1 (CC)

National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 1 SA 6 (CC)

National Credit Regulator v Opperman 2013 2 SA 1 (CC)

National Education, Health and Allied Workers Union v Ramodise 2010 31 ILJ 695 (LC)

National Education Health and Allied Workers Union v University of Cape Town 2003 3 SA 1 (CC)

National Labor Relations Board v Hearst Publications 1944 322 US 111

National Union of Metalworkers of South Africa v Bader Bop Pty Ltd 2003 3 SA 513 (CC)

National Union of Metalworkers of South Africa v Lee Electronics Pty Ltd 2013 34 ILJ 569 (LAC)

Ndikumdavyi v Valkenberg Hospital 2012 33 ILJ 2648 (LC)

Ndudula s v Metrorail PRASA (Western Cape) 2017 7 BLLR 706 (LC)

Nel v Le Roux 1996 3 SA 562 (CC)

Niselow v Liberty Life Association of Africa 1998 4 SA 163 (SCA)

Nokes v Doncaster Amalgamated Collieries Ltd 1940 AC 1014 (England)

Notham v London Borough of Barnet 1978 1 All ER 1243 (England)

NUCCAWU v Transport Ltd t/a Portnet 2000 21 ILJ 2288 (LC)

NUM v Gold Fields of SA Ltd 1989 10 ILJ 86 (IC)

NUMSA v Assign Services 2017 38 ILJ 1978 (LAC)

NUMSA v Gabriels (Pty) Ltd 2002 23 ILJ 2088 (LC)

Nyembezi v Law Society Natal 1981 2 SA 752 (A)

Oak Industries SA (Pty) Ltd v John 1987 4 SA 702 (N)

Oertel v Direkteur van Plaaslike Bestuur 1983 1 SA 354 (A)

Old Dutch Foods Ltd v Teamsters Local Union No 213 2006 BCJ No 3127 (BCCA)

Old Mutual Life Assurance Co SA Ltd v Gumbi 2007 8 BLLR 699 (SCA)

Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB 1976 4 SA 446 (A)

Oosthuizen v CAN Mining and Engineering Supplies 1999 20 ILJ 910 (LC)

Ovenstone v Secretary for Inland Revenue 1980 2 SA 721 (A)

Padayachee v Ideal Motor Transport 1974 2 SA 565 (N)

Pam Golding Properties (Pty) Ltd v Erasmus 2010 31 *ILJ* 1460 (LC)

Paulsen v Slip Knot Investments 777 (Pty) Limited 2015 3 SA 479 (CC)

PE Pack 4100 CC v Sanders 2013 4 BLLR 348 (LAC)

Pepper (Inspector of Taxes) v Hart 1992 UKHL 3

Performing Rights Society v Mitchell and Booker 1924 1 KB 672

Phaka v Bracks 2015 36 ILJ 1541 (LAC)

Phaka v Commissioner Ronnie Bracks 2015 36 *ILJ* 1541 (LAC)

Phera v Education Labour Relations Council 2012 33 ILJ 2839 (LAC)

Phillips v Situpa 1915 EDL 289

Pioneeer Foods (Pty) Ltd v Workers Against Regression 2016 37 ILJ 2872 (LC)

Pointe-Claire (City) v Quebec (Labour Court) 1997 1 SCR 1015 (Canada)

POPCRU v Ledwaba 2013 11 BLLR 1137 (LC)

Port Elizabeth Municipality v Various Occupiers 2005 1 SA 217 (CC)

Poswa v Member of the Executive Council for Economic Affairs, Environment and Tourism, Eastern Cape 2001 3 SA 582 (SCA)

Potgieter v Kilian 1995 11 BCLR 1498 (N)

President of the Methodist Conference v Preston 2013 UKSC 29 (SC) (UK)

President of the Republic of South Africa v Hugo 1997 4 SA 1 (CC)

President of the Republic of South Africa v Modderklip Boerdery Pty Ltd 2005 5 SA 3 (CC)

Pretorius and Prime Product Manufacturing (Pty) Ltd (2014) 35 ILJ 305 (CCMA)

Principal Immigration Officer v Hawabu 1936 AD 26

Prinsloo v Van der Linde 1997 3 SA 1012 (CC)

Protect a Partner Pty Ltd v Machaba-Abiodun 2013 34 ILJ 392 (LC)

Public Carriers Association & Others v Toll Road Concessionaries (Pty) Ltd 1990 1 SA 925 (A)

Qozoleni v Minister of Law and Order 1994 3 SA 625 (E)

R v Abdurahman 1950 3 SA 136 (A)

R v AMCA Services 1959 4 SA 207 (A)

R v Big M Drug Mart Ltd (1985) 13 C.R.R. 64 (Canada)

R v Brown; Ex parte Amalgamated Metal Workers and Shipwrights; Union 1980 144 CLR 426 475 (Australia)

R v Caplin 1931 OPD 172

R v Correia 1958 1 SA 533 (A)

R v Feun 1954 1 SA 58 (T)

R v Harrison and Dryburgh 1922 AD 320

R v Pickering 1911 TPD 1054

R v Sopete 1950 3 SA 769 (EC)

R v SOS for the Environment ex parte Spath Holme 2001 1 All ER 195

Raad van Mynvakbonde v Minister van Mannekrag 1983 4 ILJ 202 (T)

Raats Röntgen and Vermeulen (Pty) Ltd v Administrator Cape 1991 1 SA 827 (C)

Randburg Town Council v Kerksay Investments (Pty) Ltd 1998 1 SA 98 (SCA)

Ready Mix Concrete (South East) v Minister of Pensions and National Insurance 1968 2 QB 497 (England)

Regering van die RSA v Disotto 1998 1 SA 728 (SCA)

Reynolds Bros Ltd v Chairman, Local Transportation Board, Johannesburg 1984 2 SA 826 (W)

Rodgers and Assist-U-Drive 2006 27 ILJ 847 (CCMA)

Rossouw v Sachs 1964 2 SA 551 (A)

Rumbles v Kwa Bat Marketing (Pty) Ltd 2003 24 ILJ 1587 (LC)

Rustenberg Platinum Mines v CCMA 2007 1 SA 576 (SCA)

S v Caroto 1981 3 SA 17 (A)

S v Conifer (Pty) Ltd 1974 1 SA 651 (A)

S v De Castro 1979 2 SA 1 (A)

S v De Wet 1978 (2) SA 515 (T)

S v Dlamini; S v Dladla; S v Joubert; S v Schietekat 1999 7 BCLR 771 (CC)

S v Du Plessis 1981 3 SA 382 (A)

S v Fiddian-Green 1979 2 SA 451 (W)

S v Gampel Bros and Barnett Pty Ltd 1978 3 SA 772 (A)

S v Henckert 1981 3 SA 445 (A)

S v Jordan 2002 6 SA 642 (CC)

S v Makwanyane 1995 3 SA 391 (CC)

S v Mamabolo 2001 3 SA 409 (CC)

S v Masina 1990 4 SA 709 (A)

S v Mhlungu 1995 3 SA 867 (CC)

S v Moroney 1978 4 SA 389 (A)

S v Motshari 2001 2 All SA 207 (NC)

S v Ngwenya 1979 2 SA 96 (A)

S v Posel 1977 4 SA 476 (N)

S v Sikwane 1980 4 SA 257 (B)

S v Toms; S v Bruce 1990 2 SA 802 (A)

S v Twala (Human Rights Commission Intervening) 2000 1 SA 879 (CC)

S v Weinberg 1979 3 SA 89 (A)

S v Yolelo 1981 1 SA 1002 (A)

S v Zuma 1995 4 BCLR 401 (CC)

SAA (Pty) Ltd v GJVV 2014 8 BLLR 748 (LAC)

SA Iron, Steel and Allied Industries Union v Chief Inspector, Department of Manpower 1987 8 ILJ 303 (IC)

Sali v National Commissioner of the South African Police Service 2014 9 BLLR 827 (CC)

Samuel Thomas Myers v Pretrius 1944 OPD 144

Sanlam Life Insurance Ltd v Commission for Conciliation, Mediation and Arbitration 2009 30 ILJ 2903 (LAC)

SANTAM Versekeringsmaatskappy Bpk v Roux 1978 2 SA 856 (A)

SAPS v Solidarity obo RM Barnard 2014 6 SA 123 (CC)

Sarrahwitz v Martiz 2015 4 SA 491 (CC)

Sasol Oil (Pty) Ltd v Metcalfe 2004 5 SA 161 (W)

Saveia and Zami Nkululeko Building 2014 35 ILJ 2313 (CCMA)

Savoi v National Director of Public Prosecutions 2014 5 SA 317 (CC)

Schermbrucker v Klindt 1965 4 SA 606 (A)

Schoeman v Longgrain CC 2006 27 ILJ 2496 (CCMA)

Seate and SA Security Forces Union 2011 32 ILJ 492 (CCMA)

Secretary for Inland Revenue v Brey 1980 1 SA 472 (A)

Sefalana Employee Benefits Organisation v Haslam 2000 2 SA 415 (SCA)

Seluka v Suskin and Salkow 1912 TPD 258

Seti and Nelson Mandela Metropolitan University 2009 30 ILJ 1199 (CCMA)

Shah v Barnet LBC 1983 1 All ER 226

Shell SA Pty Ltd v National Bargaining Council for the Chemical Industry 2013 34 ILJ 1490 (LAC)

Shenker v Levy 1997 18 ILJ 93 (W)

Shezi v Gees Shoes CC 2001 22 ILJ 1707 (CCMA)

Sibiya v Amalgamated Beverages Ltd 2001 22 ILJ 961 (LC)

Sidumo v Rustenburg Platinum Mines 2008 2 SA 24 (CC)

Sleutelfontein (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk 1994 3 SA 407 (A)

Smit v Workmen's Compensation Commissioner 1979 1 SA 51 (A)

Snyders v S 1997 4 All SA 80 (C)

Soobramoney v Minister of Health, KwaZulu-Natal 1998 1 SA 765 (CC)

South African Airways Pty Ltd v Aviation Union of South Africa 2011 3 SA 148 (SCA)

South African Airways Pty Ltd v GJVV 2014 8 BLLR 748 (LAC)

South African Association of Personal Injury Lawyers v Heath 2001 1 SA 883 (CC)

South African Broadcasting Corporation v McKenzie 1999 20 ILJ 585 (LAC)

South African Maritime Safety Authority v McKenzie 2010 3 SA 601 (SCA)

South African Municipal Workers' Union v Rand Airport Management Co Ltd 2005 3 BLLR 241 (LAC)

South African National Defence Union v Minister of Defence 1999 4 SA 469 (CC)

South African National Defence Union v Minister of Defence 2003 3 SA 239 (T)

South African National Defence Union v Minister of Defence 2004 4 SA 10 (T)

South African National Defence Union v Minister of Defence 2007 5 SA 400 (CC)

South African Police Service v Solidarity obo Barnard 2014 6 SA 123 (CC)

South African Post Office v Commissioner Nowosenetz No 2013 2 BBLR 216 (LC)

South African Society of Bank Officials v Standard Bank of SA Ltd 1994 15 ILJ 332 (IC)

St Clair v CFS Aviation CC t/a Corporate Flight Services 2010 31 ILJ 486 (CCMA)

State Information Technology Agency v CCMA 2008 7 BLLR 611 (LAC)

State Information Technology Agency (Pty) Ltd v Swanevelder 2009 30 ILJ 2786 (LC)

Steenkamp v Edcon Ltd 2016 37 ILJ 564 (CC)

Stellenbosch Farmers' Winery Ltd v Distillers Corp (SA) Ltd 1962 1 SA 458 (A)

Stevenson, Jordan and Harrison Ltd v McDonald and Evans 1952 1 TLR 101 (England)

Stopforth v Minister of Justice; Veenendaal v Minister of Justice 2000 1 SA 113 (SCA)

Storm v Durban Municipality 1925 AD 49

Suliman v Minister of Community Development 1981 1 SA 1108 (A)

Sussex Peerage Case 1844 8 ER 1034 (England)

Taljaard and Basil Real Estate 2006 27 ILJ 861 (CCMA)

Tamasa Trading 208 CC v Cardoso case no 8985/07 (GPHC) (unreported)

Transnet SOC Ltd v National Transport Movement 2014 1 BLLR 98 (LC)

Transport Fleet Maintenance (Pty) Ltd v National Union of Metalworkers of South Africa 2004 25 ILJ 104 (LAC)

Total SA Pty Ltd v National Bargaining Council for the Chemical Industry 2013 34 ILJ 1006 (LC)

Townsend v Honkey Municipality 1920 EDL 226

Uber South Africa Technological Services (Pty) Ltd and NUPSAW and SATAWU case no WECT12537-16 (CCMA) (unreported)

Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers case no c449/17 (LC) (unreported)

Union Government v Lombard 1926 CPD 150

Union Government (Minister of Finance) v Mack 1917 AD 731

Union of Refugee Women v Director: Private Security Industry Regulatory Authority 2007 4 SA 395 (CC)

United States ex rel. Attorney General v Deleware & Hudson Co 213 US 366 (1909) (United States)

Universal Church of the Kingdom of God v Myeni 2015 36 ILJ 2832 (LAC)

Van Deventer and Venture SA (Pty) Ltd 2007 28 ILJ 268 (CCMA)

Van Heerden v Joubert 1994 4 SA 793 (A)

Van Rooyen v The State 2002 5 SA 246 (CC)

Van Zyl and WCPA (Department of Transport and Public Works) 2004 25 ILJ 2066 (CCMA)

Venter v R 1907 TS 910

Vermooten v Department of Public Enterprises case no JA91/2015 (LAC) (unreported)

Von Backstrom v Independent Electoral Commission 2000 21 ILJ 267 (CCMA)

Wary Holdings Pty Ltd v Stalwo Pty Ltd 2009 1 SA 337 (CC)

West Rand Estates Ltd v New Zealand Insurance Co Ltd 1925 AD 245 2

White v Pan Palladium SA (Pty) Ltd 2006 27 ILJ 2721 (LC)

Wiebe Door Services Ltd v Canada (Minister of National Revenue) 1986 3 FC 553 (SC) (Canada)

WL Ochse Webb and Pretorius v Vermeulen 1997 ILJ 361 (LAC)

Workmen of Nilgiri Coop Mkt Society Ltd v State of Tamil Nadu 2004 (101) FLR 137 (India)

Wyeth SA (Pty) Ltd v Manqele 2005 26 ILJ 749 (LAC)

Yewens v Noakes (1880) 6 QBD 530 (England)

Ynuico Ltd v Minister of Trade and Industry 1995 11 BCLR 1453 (T)

Z v Commissioner for the South African Revenue Service case no 13472/14 (TC) (unreported)

Zikhethele Trade (Pty) Ltd v COSAWU 2008 2 BLLR 163 (LAC)

67112 Ontario Ltd v Sagaz Industries Canada Inc 2001 2 SCR 1983 (SC) (Canada)

Bantu Labour Relations Regulation Act 48 of 1953

Bantu Labour (Settlement of Disputes) Act 48 of 1953

Basic Conditions of Employment Act 75 of 1997

Basic Conditions of Employment Amendment Act 20 of 2013

Betriebsverfassungsgesetz (Germany)

Black Labour Relations Regulation Act 48 of 1953

Broad Based Black Economic Empowerment Act 53 of 2003

Bürgerliches Gesetzbuch (Germany)

Burgerlijk Wetboek (The Netherlands)

Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value GN 448 *GG* 38837 of 1 June 2015

Code of Good Practice: Who is an Employee GN 1774 in *GG* 29445 of 1 December 2006

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Compensation for Occupational Injuries and Diseases Amendment Act 61 of 1997

Constitution of the Republic of South Africa Act 200 of 1993

Constitution of the Republic of South Africa, 1996

Conspiracy and Protection of Property Act, 1875 (England)

Employers and Workmen Act, 1875 (England)

Employment Act 5 of 1980

Employment and Labour Relations Act 6 of 2004 (Tanzania)

Employment Equity Act 55 of 1998

Employment Equity Amendment Act 47 of 2013

Employment of Educators Act 76 of 1998

Employment Protection (Consolidation) Act, 1978 (United Kingdom)

Employment Relations Act, 1999 (United Kingdom)

Employment Rights Act, 1996 (United Kingdom)

Employment Services Act 4 of 2014

Employment Tax Incentive Act 26 of 2013

Environment Conservation Act 73 of 1989

Fair Work Act 28 of 2009 (Australia)

General Law Amendment Act 94 of 1974

Grundgesetz für die Bundesrepublik Deutschland (Germany)

Handelsgesetzbuch (Germany)

Immigration Act 13 of 2002

Independent Contractors Act 162 of 2006 (Australia)

Industrial Conciliation Act 11 of 1924

Industrial Conciliation Act 36 of 1937

Industrial Conciliation Amendment Act 94 of 1979

Industrial Disputes Act 14 of 1947 (India)

Industrial Relations Act 1 of 2000 (Swaziland)

Industrial Conciliation Act 28 of 1956

Industrial Relations Amendment Act 95 of 1982

Intelligence Services Act 65 of 2002

Kündigungsschutzgesetz

Labour Act 11 of 2007 (Namibia)

Labour Act 7 of 2005 (Zimbabwe)

Labour Act 17 of 2002 (Zimbabwe)

Labour Code, 2004 (Morocco)

Labour Relations Act 16 of 1985 (Zimbabwe)

Labour Relations Act 66 of 1995

Labour Relations Amendment Act 6 of 2014

Labour Relations Amendment Act 9 of 1991

Labour Relations Act 28 of 1956

Labour Relations Amendment Act 83 of 1988

Labour Relations (Domestic Workers) Employment Regulations 377 of 1992 (Zimbabwe)

Magna Carta, 1215

Master and Servant Act, 1867 (England)

Medical Schemes Act 131 of 1998

Mine Health and Safety Act 29 of 1996

Mines and Works Act 12 of 1911

Mineral and Petroleum Resources Development Act 28 of 2002

National Economic, Development and Labour Council Act 35 of 1994

National Insurance Act, 1946 (United Kingdom)

Native Labour (Settlement of Disputes) Act 48 of 1953

Occupational Diseases in Mines and Works Act 78 of 1973

Occupational Health and Safety Act 85 of 1993

Ontario Labour Relations Act, 1995 (Canada)

Payment of Gratuity Act 39 of 1972 (India)

Pension Funds Act 24 of 1956

Poor Law Act, 1601 (England)

Prevention and Combating of Corrupt Activities Act 12 of 2004

Promotion of Administrative Justice Act 3 of 2000

Protected Dosclosures Act 26 of 2000

Skills Development Act 97 of 1998

Skills Development Levies Act 9 of 1999

Social Assistance Act 13 of 2004

Sozialgesetzbuch (Germany)

Statute of Artificers, 1563 (England)

Statute of Laborers, 1349 (England)

Superior Courts Act 10 of 2013

Suppression of Communism Act 44 of 1950

Trespass Act 6 of 1959

Unemployment Insurance Act 63 of 2001

Unemployment Insurance Amendment Act 10 of 2016

Unemployment Insurance Contributions Act 4 of 2002

United Kingdom Human Rights Act, 1998

Voluntary Disclosure Programme and Taxation Laws Second Amendment Act 8 of 2010

Wage Act 27 of 1925

Wet op Arbeidsverhoudinge 66 of 1995

Wet op Basiese Diensvoorwaardes 75 of 1997

Wet op Beroepsgesondheid en Veiligheid 85 of 1993

Wet op Vergoeding vir Beroepsbeserings en –siektes 130 of 1993

Workmen's Compensation Act 25 of 1914

Workmen's Compensation Act 59 of 1934

Workmen's Compensation Act 30 of 1941

Workplace Relations Amendment (Independent Contractors) Act 163 of 2006 (Australia)

Abolition of Forced Labour Convention, 1957

Collective Agreements Recommendation, 1951

Collective Bargaining Convention, 1981

Collective Bargaining Recommendation, 1981

Declaration concerning the Policy of "Apartheid" of the Republic of South Africa, 1964

Declaration of Philadelphia, 1944

Declaration on Equality of Opportunity and Treatment for Women Workers, 1975

Declaration on Fundamental Principles and Rights at Work, 1998

Declaration on Social Justice for a Fair Globalisation, 2008

Discrimination (Employment and Occupation) Convention, 1958

Discrimination (Employment and Occupation) Recommendation, 1958

Domestic Workers Convention, 2011

Employment Relations Recommendation, 2006

Equal Remuneration Convention, 1951

Forced Labour Convention, 1930

Freedom of Association and Protection of the Right to Organise Convention, 1948

Home Work Convention, 1996

International Labour Organisation Constitution, 1919 (Part XIII of the Treaty of Versailles)

Maternity Protection Convention, 2000

Minimum Age Convention, 1973

Part-time Work Convention, 1994

Protection of Wages Convention, 1949

Protection of Workers; Claims (Employer's Insolvency) Recommendation, 1992

Protection of Workers' Claims (Employer's Insolvency) Convention, 1992

Private Employment Agencies Convention, 1997

Recommendation 182: Part-time Work Recommendation, 1994

Recommendation 184: Home Work Recommendation, 1996

Right to Organise and Collective Bargaining Convention, 1949

Rural Workers' Organisation Convention, 1975

Safety and Health in Mines Convention, 1995

Safety and Health in Mines Recommendation, 1995

Social Security (Minimum Standards) Convention, 1952

Termination of Employment Convention, 1982

Termination of Employment Recommendation, 1982

Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration), 2006

Voluntary Conciliation and Arbitration Recommendation, 1951

Work Health and Safety Convention, 1981

Workers' Representatives Convention, 1971

Workers' Representatives Recommendation, 1971

Workers with Family Responsibility Convention, 1981

Worst Forms of Child Labour Convention, 1999

6 *Other (including internet sources, papers, reports and theses)*

Aletter CJ *Protection of Agency Workers in South Africa: An Appraisal of Compliance with ILO and EU Norms* (2016 thesis University of Pretoria)

Boshoff A *Die Interpretasie van Fundamentele Aansprake in 'n Heterogene Samelewing* (2000 thesis Rand Afrikaans University)

Botha CJ *Waarde-aktiverende Grondwetuitleg: Vergestalting van die Materiële Regstaat* (1996 thesis UNISA)

Botha MM *Employee participation and voice in companies: A legal perspective* (2015 thesis North-West University)

Cheadle Commission "Explanatory Memorandum prepared by the Ministerial Task Team" 1995 ILJ 278

Code of Good Practice: Who is an Employee? 2007 28 ILJ 96

Constitution of the International Labour Organization, 1919 (Part XIII of the Treaty of Versailles)

EU "Regulations, directives and other acts" http://europa.eu/eu-law/decision-making/legal-acts/index_en.htm (03-03-2015)

Hussmanns R "Defining and measuring informal employment" http://www.ilo.org/public/english/ bureau/stat/ download/papers/meas.pdf (31-03-2010)

ILC *Equal Remuneration: General Survey of the Reports on the Equal Remuneration Convention (No. 100) and Recommendation (No. 90), 1951* ILO Geneva (1986)

ILC *Freedom of Association and Collective Bargaining, ILO General Survey of the Reports on the Freedom of Association and Right to Organise Convention 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention 1949 (No. 98)* ILO Geneva (1994)

ILC *General Survey of the Reports Concerning the Protection of Wages Convention (No. 95) and the Protection of Wages Recommendation (No. 85), 1949* ILO Geneva (1994)

ILC *Giving Globalization a human face - General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* ILO Geneva (2012)

ILO "Conclusions of the Meeting of Experts on Non-Standard Forms of Employment" GB 323/POL/3 http://www.ilo.org/gb/GBSessions/GB323/pol/WCMS_354090/lang--en/index.htm (22-06-2017)

ILO "Conventions and recommendations" http://ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm (11-04-2017)

ILO "Decent work and the informal economy" Report VI 90th session International Labour Conference (2002)

ILO "Employment relationship" http://ilo.org/ifpdial/areas-of-work/labour-law/WCMS_CON_TXT_IFPDIAL_EMPREL_EN/lang--en/index.htm (12-10-2017)

ILO "Employment security" http://www.ilo.org/global/topics/employment-security/lang--en/index.htm (12-07-2017).

ILO *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* ILO Geneva (1996)

ILO *Introduction to Social Security* ILO Geneva (1984)

ILO *Meeting of Experts on Workers in Need of Protection: Basic Technical Document* ILO Geneva (2000)

ILO "National labour law profile: South Africa" http://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158919/lang--en/index.htm (04-07-2017)

ILO *Non-standard emplyment Around the World: Understanding Challenges, Shaping Prospects* International Labour Office Geneva (2016)

ILO *Organizing for Social Justice – Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* International Labour Office Geneva (2004)

ILO *Principles of Social Security* International Labour Office Geneva (1998)

ILO "Ratifications for South Africa" http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102888 (11-04-2017)

ILO "Report of the committee on the employment relationship" Provisional record no 21 91st session International Labour Conference (2003)

ILO "Report of the Meeting of Experts on Workers in Situations Needing Protection" Conclusions adopted by the 279the session Governing Body (2000)

ILO "Resolution concerning decent work and the informal economy" Conclusions adopted by the 90th session International Labour Conference (2002)

ILO *The ILO DW for SDGs Notes Series: Social Protection* International Labour Office Geneva (2017)

ILO "Trade unions and the informal sector: towards a comprehensive strategy" 1999 Background paper for the International Symposium on Trade Unions and the Informal Sector, Geneva

ILO *World Labour Report: Income Security and Social Protection in a Changing World* International Labour Office Geneva (2000)

Kasuso TG *The Definition of an "Employee" under Labour Legislation: An Elusive Concept* (2015 thesis University of South Africa)

Kenny S "Constitutional role of the judge: statutory interpretation" 2013 Paper presented at the Judicial College of Victoria and the Melbourne Law School, The University Of Melbourne http://www.fedcourt.gov.au/publications/judges-speeches/justice-kenny/kenny-j-20130315 (06-04-2015)

Le Roux R *The Regulation of Work: Whither the contract of Employment? An Analysis of the Suitability of the Contract of Employment to Regulate the Different Forms of Labour Market Participation by Individual Workers* (2008 thesis University of Cape Town)

Memorandum on the Objects of Employment Equity Amendment Bill, 2012

Memorandum on the Objects of the Labour Relations Amendment Bill, 2012

Merriam-Webster "Employee" https://www.merriam-webster.com/dictionary/employee (13-06-2017)

Mundia KF *Ronald Dworkin and the Supreme Court of Namibia* (2014 thesis University of Pretoria)

New Zealand Human Rights Commission "Submission on the Employment Relations Bill" http:// www. hrc.co.nz/index.php?p=13681&id=13709 (23-01-2016)

Novak M "Defining social justice" 2000 First Things https://www.firstthings.com/article/2000/12/defining-social-justice (05-07-2017)

Saith A *Social Protection, Decent Work and Development* International Institute for Labour Studies Geneva (2004)

Schregle J "Labour law" in *Encyclopædia Britannica* http://www.britannica.com/topic/labour-law (31-01-2016).

Schwab K (ed) *World Economic Forum The Global Competitiveness Report 2016–2017* (2016)

Schwab K and World Economic Forum "The Fourth Industrial Revolution: what it means, how to respond" http://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond (23-01-2016)

Smit N *Labour Law Implications of a Transfer of Undertaking* (2001 thesis Rand Afrikaans University)

Solum L "Holism" in *Legal Theory Lexicon* https://web.archive.org/web/20051214130028/http://legaltheorylexicon.blogspot.com/2004_04_01_legaltheorylexicon_archive.html (13-06-2017)

South African Law Reform Commission "Report of the Wiehahn Commission of Enquiry into Labour Legislation" *Revision of Labour Legislation Workpiece* 47, Project 27 (1981)

Statistics South Africa *Quarterly Labour Force Survey Quarter 1: 2017* Statistics South Africa Pretoria (2017)

Van Niekerk A *Regulating Flexibility and Small Business: Revisiting the LRA and BCEA – A Response to Halton Cheadle's Concept Paper* DPRU Working Paper Sandton (2007)

Vettori MS *Alternative Means to Regulate the Employment Relationship in the Changing World of Work* (2005 thesis University of Pretoria)

Weiss M "The future of labour law in the context of global challenges" 2015 Paper presented at the 17th ILERA World Congress, Cape Town http://www.ilera2015.com/dynamic/full/Manfred_Weiss_keynote.pdf (15-01-2016)

Wiehahn Commission *The Complete Wiehahn Report with Notes by Prof NE Wiehahn* Lex Patria Johannesburg (1982)