LABOUR BROKING IN NAMIBIA AND SOUTH AFRICA COMPARED, USING THE INTERNATIONAL LABOUR ORGANISATION AGENCY WORK REGULATION AS A BENCHMARK

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DEDICATION

To

My Children

&

For your unwavering faith & support

DECLARATION

I hereby declare that this thesis for the degree of Doctor of Philosophy in Law (Ph.D. in Law) at the University of Namibia, hereby submitted, has not been previously submitted for a degree at this or any other University, and that it is my own original work, in design and execution, and all the materials contained herein have been duly acknowledged.

Fritz Sackeus Nghiishililwa

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Date

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ABSTRACT

Nowadays, the global economy is characterised by ever-increasing competition following trade liberalisation, mobility of capital and the introduction of microelectronic technology in the workplace. These developments have, in turn, seen a decrease in the demand for unskilled and semi-skilled workers in Namibia's fragile labour market. Employers have expressed their unwillingness to employ unskilled and semi-skilled workers on a permanent basis in an attempt to evade the high financial ramifications implicit in the employment of workers on a permanent basis. The global economy has also witnessed the emergence of temporary services by labour brokers, which has become a common phenomenon in the labour market. In view of these developments, it seems that the hiring of workers on a temporary basis to satisfy the current labour-market needs will persist unabated for a considerable period of time. In essence, labour broking involves the provision of workers to third parties in return for a financial consideration who, in turn, take full control and supervision of these workers. The problem with an arrangement of this nature is that the third party takes full control and supervision of the workers despite that the employment contract only exists between the third party and the labour broker.

The primary objective of this thesis is to determine whether the law regulating labour broking in Namibia is the most appropriate in addressing labour inadequacies in the employment sector. It investigates whether the existing legislation regulating labour broking in Namibia and South Africa conforms to the standards set by the International Labour Organisation (ILO) Convention 181, which regulates private employment agencies (PEAs or labour brokers). The ILO Convention 181 has thus been set as a benchmark for determining the desirability and suitability of the labour-broking laws in Namibia and South Africa. In answering this question, the thesis also compares labour-broking legislation in those two countries. The underlying reason behind the selection of South Africa as a country of comparison is premised on the similarities between the two countries' legal systems and socio-economic history, which date back to the period Namibia was a mandated territory administered by the South African government.

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LIST OF ACRONYMS

AFCOR	Africa Corporation
ALS	Africa Labour Services
BCEA	Basic Conditions Employment Act
CDM	Consolidated Diamond Mines
COSATU	Congress of the South African Trade Union
EPS	Elite Personnel Services
EPSN	Employee Placement Services Namibia
ESA	Employment Service Act
EU	European Union
ILO	International Labour Organisation
IT	Information Technology
LA	Labour Act
LaRRI	Labour Resource Centre and Research Institute
LBI	Labour Broking Industry
LHC	Labour Hires Companies

LRA	Labour Relations Act
NEF	Namibia Employers Federation
NES	Namibia Employment Services
NLO	Northern Labour Organisation
NUNW	National Union of Namibian Workers
PEAs	Private Employment Agencies
SADC	Southern Africa Development Community
NSC	Namibia Supreme Court
SLO	Southern Labour Organization
SWA	South West Africa
SWANLA	South West Africa Native Labour Association
SWAPO	South West Africa People's Organisation
TES	Temporary employment services
TU	Trade union
TUC	Trades Union Congress
UF	Union Federation
UK	United Kingdom

WENELA	Witwatersrand Native Labour Association
WES	Welwitchia Employment Services
COIDA	Compensation for Occupational Injuries and Diseases Act
SCA	Supreme Court of Appeal
NEDLAC	National Economic Development and Labour Council
NACTU	National Council of Trade Unions
NHC	Namibian High Court

CHAPTER 1: INTRODUCTION

1 Background

Labour broking has become a subject of intense debate globally.[1] The early labour broking mode in Namibia was facilitated by the then colonial administration of South Africa through the infamous contract labour system. Under this contract labour system, workers were recruited by an agent or agency and were required to enter into a fixed-term contract which would require them to work in their own residential areas. This was necessary to effectuate an effective monitoring system for the workers to facilitate their smooth return to their homelands once their contract of employment had lapsed. In this manner, this strategy acted as a cost-effective approach to the exploitation of a cheap labour force necessary for the capitalist industries.[2]

Given the recent unprecedented upsurge in labour broking over the past two decades, it is of no surprise that this form of professional occupation has sparked and attracted

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1 The debate concerns the precarious nature of the industry and how best to regulate it. In the context of Namibia Jauch provides the historical background of the industry and the challenges posed. See Jauch, H. 2002. "Labour Hire in Namibia: New Flexibility or new form of slavery." Windhoek. See also Jauch, H. 2007. "From Migrant Labour to Labour Hire: Namibia's Flexible Workers." Windhoek. Labour Resource and Research Institute (LaRRI). Windhoek; Labour Resource and Research Institute.(2006). 'Labour Hire in Namibia: Current practices and effects." Windhoek. LaRRI. See Theron, J and Godfrey, S. 2006. "The rise of labour broking and its implications." *Development Law Monographs Series* 1/2005. University of Cape Town: Institute of Development and Labour Law, at 28-29. Elsewhere, see Storrie, D. 2002. "Temporary agency works in the European Union." *European Foundation for the Improvement of Living and Working Conditions*, at 5-9.

2 Hishongwa, N. 1992. The contract labour system and its effects on social life in Namibia. Windhoek: Gamsberg Macmillan, pp 15-30.

enormous interest across the entire spectrum.[3] Labour broking has been classified as a non-standard form of employment relationship, as opposed to the standard form of an employment relationship. The distinction between the aforementioned forms of employment relationship lies in the fact that the latter involves work arrangements which are on a full-time basis, indefinite and premised on a bilateral relationship between an employer and an employee, whilst the former encompases work arrangements which are of a temporary nature. Labour broking can, thus, be defined as a situation whereby an individual is supplied by an intermediary, called a labour broker, to a client (or user enterprise) who pays a fee for the service to the broker, who then pays the worker.[4] It is one form of sub-contracting, whereby the labour broker is not involved in the supervision and control of the workers and leaving such responsibility to be carried out by the user enterprise or the client.[5] To sum up, an employment relationship of this nature comprises three parties, namely a broker, a worker(s) and a client.[6]

The ramifications associated with labour broking stem from the fact that the labourers provided by labour brokers to third parties are not legally entitled to benefit from labour laws protecting other workers because they are not regarded as employees in terms of the existing legislations and common law.[7] In reality, a labour broker does not provide work at his or her workplace, but the work is performed at the premises of a user

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3 Raday, F. 1999. "The Insider Politics of Labour – Only Contracting." *Compara.tive Labour Law & Policy Journal.* 20 (1) at 413.

4 Le Roux, R. 2008. Unpublished PhD Thesis. "The regulation of work: Wither the contract of employment?: An analysis of the suitability of the contract of employment to regulate the different forms of labour market participation by individuals." University of Cape Town, p 131.

5 Kenny, D & Bezuidenhout, F. 1999. "Fighting Sub-contracting." *SALB*. Vol. 23, p 41.

6 (ibid.).

7 The term 'employee' only applies to those workers who are employed full-time or for an indefinite period. See section 1 of the Labour Act (No11 of 2007); Section 1 of the Labour Relations Act 66 of 1995 (SA).

enterprise under whose supervision and control of the workers rests.[8] In practice, the user enterprise pays a fee to the broker, who pays the workers' remuneration as well as any other associated costs, and earns a profit.[9]

The services provided by labour brokers are mostly relevant in a situation where a business decides to outsource some of its functions to third parties. A company may outsource work to an enterprise which provides these goods or services, or it may outsource to a broker who supplies the workers needed.[10] The process by which work can be outsourced through an intermediary is known as externalisation, or can be referred to as casualisation of employment. The former can occur on hiring where a new business elects to rely on outside contractors rather than to employ directly, while the latter concerns the growth of a second group of part-timers and temporary workers who perform functions formerly associated with permanent employment.[11]

Godfrey argues that labour broking has proliferated mainly due to the changes in labour market patterns, in particular, the decrease in the over-concentration of workers confined to the workplace.[12] The other cause is the concept of globalisation, which is characterised by increased competition from trade liberalisation, mobility of capital, the

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8 Theron, J. 2005. "Employment Is Not What It Used To Be." *Industrial Law Journal.* Vol. 34, pp 1251-1252.

9 Stewart, A. 2002. "Redefining Employment? Meeting the Challenge of Contract and Agency Labour."*Australian Journal of Labour Law,* pp 235-251.

10 Theron, J. and Godfrey, S. 2000. "Protecting workers on the periphery." *Development and Labour Monographs* 1/2000. University of Cape Town: Institute of Development and Labour Law, pp 29-30.

11 Theron and Godfrey (2006:11-20).

12 Godfrey, SD. 2013. *A study of changes and continuities in the organisation and regulation of work with an empirical examination of the South African and Lesotho clothing retail value chain*. A Thesis presented for the Degree of Doctor of Philosophy in the Department of Sociology, Faculty of Humanities. University of Cape Town, pp 15-30.

introduction of microelectronic technology at the workplace as well as the need for economic integration amongst states.[13]

This has resulted in an increase in non-traditional modes of employment, in line with the notion of 'labour market flexibility.'[14] According to a pervasive neo-liberal orthodoxy, success in the global economy demands greater market 'flexibility', which suggests that interference by the state should be minimal in regulating employment relationships. This would be necessary in order to allow employers to acquire sufficient power over their workers and deploy them as they deem fit.[15]

At the international level, the services provided by labour brokers or private employment agencies (PEAs), as they are commonly known, are recognised and properly regulated.[16] It is interesting to note that the current international legal instrument which regulates the practice is a revised version of an earlier ILO Convention which formed the legal basis of the ILO's tenet that "labour is not a commodity."[17] However, the ILO Convention 181 of 1997 which regulates PEAs allows labour brokers to engage in the recruitment and supply of workers to user enterprises for a fee. The European Union

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13 (ibid.).

14 Barnard, C. Deankin, S and Morris, G. (Eds). 2004. *The Future of Labour Law*. Hart Publishing Portland, p 291.

15 Hiroki, S. 2001. "Atypical Employment: A Source of Flexible Work Opportunities?" *Social Science Japan Journal.* Vol. (2), p 174.

16 International Labour Organisation Convention 181 of 1997 allows profit-making employment agencies.

17 This Convention is known as the Convention Concerning Fee-Charging Employmnt Agencies 1935. See Matthew *et al*. 2001. "An introduction to the Regulation of Leasing and Employment Agencies." *Comp. Labour Law & Pol'y Journal.* Vol. 23(1), pp 3-4.

regional economic block has adopted most, if not all, of the provisions of Convention 181.[18]

TPEAs have been mushrooming lately, a development which has concomitantly caused the exploitation of agency workers and prompted trade unions and some governments to impose an embargo on the operation of PEAs.[19] This thesis finds that the approach adopted in Namibia differs from the prevailing situation in South Africa.

2 Pre – independence labour laws governing labour relations in Namibia

The years preceding the attainment of Namibian independence saw the application of apartheid labour laws directly from South Africa owing to the fact that Namibia was a colony of the former; and being a colony then, the latter did not have its own labour laws to regulate its labour-related matters. Consequently, apartheid-era labour laws were applied in Namibia selectively as it aimed at facilitating and promoting discriminatory practices in favour of the White minority at the expense of the Black majority.[20] The contract labour system through which Black Namibians were recruited to offer cheap labour on the mines and factories owned by white settlers dominated the labour market and as such influenced the labour relations during the Apartheid colonial rule by South Africa.[21] Blacks were hired on a contractual basis only for a specified task and fixed period of time, subject to harsh criminal penalties, and were compelled to work within

[18] See Storrie, D. 2002. "Temporary agency works in the European Union." *European Foundation for the Improvement of Living and Working Conditions,* pp 5-9.

[19] See Ndjebela, T. 16 December 2010. "Government acts on labour hire." *New Era*, p 4.

[20] Fenwick, C. 2005. "Labour Law in Namibia: Towards an 'Indigenous Solution'?" *Centre for Employment and Labour Relations Law.* Working Paper No. 35, pp 1-6.

[21] South Africa ruled Namibia from 1915 to 1990.

strictly confined parameters.[22] The abusive nature of the contract labour system and its effects on the Namibian society, as well as its perceived role as being the forerunner of the contemporary labour broking in Namibia, will be discussed in detail in Chapter 3.

Jauch points out that before the independence of Namibia, labour relations were characterised by open hostilities and conflicts. Both domestic and foreign companies in colonial Namibia loathed the idea of workers' trade unions since they were considered harmful to the imperialists' ill-gotten economic domination. In order to effectively decimate possible resistance against this White-minority domination, security personnel were often called to suppress and descend on workers engaging in an industrial action. This sort of intervention ultimately saw a considerable number of notable figures being incarcerated, whilst others fled into exile to avoid an impending death trap.[23] A wide range of labour legislations which affected industrial relations in Namibia included South Africa's Industrial Conciliation Act of 1924, which entrenched racial discrimination and categorisation in labour legislation.[24] The primary focus of this Act was to protect the interests of skilled White workers and exclude Black workers from the ambit of labour legislation.[25] The other piece of legislation which regulated labour in Namibia was South Africa's Wage and Industrial Conciliation Ordinance, which excluded domestic, farm and

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22 See the Native (Urban Areas) Proclamation 1915; Theron and Godfrey. (2006: 2).

23 Jauch, H. 6 March 2010. "Namibia's changing labour relations." *New Era*, p 5.

24 Basson, A.C. *et al*. (Eds). 2009. *Essential Labour Law*. Cape Town: Labour Law Publications, pp 4-5.

25 This means that Black workers did not enjoy the benefits of centralised collective bargaining in the form of industrial council. See Basson *et al.* (2009: 5).

public service workers from its application.[26] Other apartheid-based labour laws were used to deny 'natives' job opportunities.[27]

The concept of labour broking was formally introduced in South Africa in 1983 by virtue of the amendment of the Labour Relations Act.[28] This amendment too, without exception, saw its application in Namibia, the consequence of which was to incorporate the employee into a tri-partite employment relationship, although it lacked the basic essential protection and certainty on who constituted the employees' employer.[29] The Act[30] caused further polarisation in that it excluded all 'Bantu' (including Black African women), prohibited the further registration of racially mixed trade unions, placed restrictions on the registration of already mixed trade unions and provided that such unions could not have mixed executives.[31]

In Namibia, it was only in 1978 when Black workers were included within the framework of the labour legislation and were allowed to form trade unions for the first time.[32] However, various colonial legislations made it very difficult for workers to organise, form trade unions or challenge the autonomy and prerogative of management. While in theory the right to lawful strike existed, striking workers had no protection against

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26 Wage and Industrial Conciliation Ordinane No. 35 of 1952.

27 For example, the Native Administrative Proclamation of 1922 provided the administration with the power to declare native reserves and tightly restricted the recruitment of workers from them. Whilst the Native (Urban Areas) Proclamation of 1951 empowered the Native Commissioner to remove an African –and their- family – from an urban area for a wide variety of reasons, including refusal to accept employment and unlawful breach of an employment contract.

28 This was done by way of amending the Labour Relations Act, (No 28 of 1956). See the Labour Relations Amendment Act, No 2 of 1983); See also Brassey, M & Chadle, H. 1983. "Labour Relations Amendment Act 2 of 1983." ILJ. Vol. 4, p 34.

29 See section 1 of the Labour Relations Act, (No 28 of 1956) as amended by the Labour Relations Act, No 2 of 1983).

30 The Labour Relations Act, (No 28 of 1956).

31 Bendix, S. (Eds). 2010. *Industrial Relations in South Africa*. Cape Town. Juta and Co. Ltd, p 69.

32 Jauch (2010: 19).

dismissal and no right to picket at employer's premises.[33] A range of matters concerning basic conditions of employment were covered by the Conditions of Employment Act.[34]

According to van Rooyen, labour law in pre-independence Namibia affected labour relations in so many significant ways, such as controlling the number of registered trade unions as well as the prevalence and nature of industrial action to be taken. This predicament in the labour market unearthed a political crisis that saw the formation of politically affiliated groups taking up arms for their independence, with the South West African People's Organisation (SWAPO) spearheading this political turnaround.[35]

2.1 Post-independence labour laws and labour broking in Namibia

The aftermath of the colonial struggle saw the promulgation of new labour laws forming part of the statutory instruments for a new Namibia. This new legislation was centred on improving the working conditions of the workers and to repeal the oppressive, discriminatory and outdated labour legislation which had been in force during the colonial times. This was mainly achieved by the advent of the Namibian Constitution in 1990.[36] The Namibian Constitution guarantees fundamental freedoms, including freedom of association, to form and join trade unions.[37] With the promulgation of the Labour Act of 1992,[38] a new era emerged in which basic rights of all Namibian workers were protected regardless of race, colour and ethnicity. The Act changed the country's

33 (ibid.:12).
34 No 12 of 1986 (SA).
35 Van Rooyen, J. 1996. *Portfolio of Partnership – An analysis of labour relations in a transition society – Namibia*. Windhoek: Gamsberg Macmillan Publishers, pp 233-234.
36 Article 10 of the Namibian Constitution prohibits discrimination of workers based on the colour of their skin or economic status.
37 Article 21(1) (f).
38 No 6 of 1992.

labour relations by domesticating most of the international labour standards set by the International Labour Organisation (ILO).[39] According to Fenwick, the 1992 Act represented an unprecedented victory for the indigenous population of Namibia as it led to evolution and development of the Namibian labour law. In addition, the Act explicitly acknowledged that policy considerations are imperative in maintaining sound labour relations as a stepping stone to the achievement of national peace and economic stability.[40] Most notably, the Act introduced, amongst others, a system of collective bargaining, trade union rights, and protection against unfair labour practices. It was hailed as a document of compromise between the conflicting interests of capital and labour.[41]

A serious omission in the 1992 Act was the absence of a provision regulating labour broking activities, which had been on the increase by the time of its entry into force. In order to remedy this situation, the Labour Act of 2007[42] was promulgated, which not only addressed the issue of labour broking, but also introduced a new labour dispute settlement system.[43] The Act has played a pivotal role in the reduction of worker militancy by placing more emphasis on negotiations between union leaders and employers in an attempt to eliminate trade union militancy in a post-Independence Namibia.[44]

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39 For example Convention 98 of 1948 concerning the right to organise and bargain collectively and ILO Convention prohibiting discrimination at the workplace.

40 Fenwick (2005: 13).

41 Jauch (2010: 4).

42 No 11 of 2007.

43 See sections 74-92 of the *Labour Act, 2007 (No. 11 of 2007).*

44 Jauch (2010: 4).

Preliminary discussions in Namibia on the use of the services offered by labour brokers eventually led to a heated debate around the 1990s. This stalemate was mainly attributable to the worrisome and ever increasing levels of unemployment following the government's failure to dispense with the issue in an expeditious manner.[45] Jauch suggests that labour broking activities could be seen as one of the crucial measures which should be adopted in addressing the acute shortage in employment opportunities, partly due to the government's inability to promptly react to the creation of sufficient job opportunities for the unemployed youths.[46]

One of the criticisms which have been levelled against labour broking practices is that this sort of an employment arrangement manifest in the deprivation of the workers' entitlement to benefit from the protection afforded to them by the Labour Act.[47] Given the fact that a labour broker is a fictitious employer who is not directly involved in the supervision and control of the workers providing the services to the user enterprise,[48] such arrangement contradicts common law principles relating to the structure of an employment relationship, which only recognises two parties to an employment relationship. In this respect, it appears correct to argue that unless the scope of labour law is stretched to include workers supplied by labour brokers to user enterprises, a number of deserving workers are likely to remain out of the scope of labour law.

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45 Namibia is regarded worldwide as a country in which there is the largest disparity between the rich and the poor which has been attributed to the introduction of the policies of apartheid during South Africa's colonial rule whereby indigenous population were forcefully disposed of their land and livestock. See Jauch, H. 2012. "Labour Hire in Namibia; The right to do business versus workers' rights." Available at Vivaworkers.org/wp-content/uploads/2013/01/Labour-Hire-in-Namiba-2012pdf. [Accessed on 20/09/2013].

46 Jauch, H. Edwards, L. & Cupido, B. 2009. "A Rich Country with Poor People: Inequality in Namibia" *Labour Resource and Research Institute* (LaRRI) p 31-32.

47 Le Roux (2008: 153).

48 Kenny & Bezuidenhout (1999: 41).

Theron and Godfrey are the exponents of the dominant proposition that the careful regulation of the employment sector should remain the major yardstick in determining the economic prosperity in civilised societies, putting in mind that on the one hand there are the employers of labour and on the other hand there are the employed, the self-employed and the unemployed.[49] The regulation of employment referred to is not only in a situation where employees were employed on permanent basis but also where they were employed for a short period of time.[50] Steward criticises any employment legislation which provides preferential treatment in favour of employees employed on permanent basis over their counterpart, temporary employees, arguing that such principle amounts to discrimination.[51] Le Roux argues that while those employed by temporary employment agencies seem to enjoy the protection of the labour legislation on face value, the protection is more apparent than real. Despite being at least structurally part of the client's enterprise, such an arrangement creates what Theron *et al* call "an underclass in the formal workplace."[52]

Notwithstanding the criticisms levelled against the labour broking industry, in particularly by trade unions (TU), it is believed that this industry in fact benefits both employers and employees.[53] Complementing cost reduction, agency work helps companies to face

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49 Theron and Godfrey (2006: 2).

50 (ibid.: 2006:4).

51 Stewart (2002: 235-251).

52 Theron & Godfrey (2000-5-27). Quoted in Le Roux, R. 2008. "The Regulation of Work: Wither 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." AThesis Presented for the Degree of Doctor of philosophy in the Department of Commercial Law. University of Cape Town, p 155.

53 Belous, R. 1989." How human resource systems adjust to the shift towards contingent workers." *Monthly Labour Review.* Vol. 109, p 712. See also Amuedo, C. – Dorantes *et al* (Ed.). 2008. *The Role of Temporary Help Agency Employment on Temp-to-Perm Transitions*. Vol. 29, pp 138-62.

global competition pressure by allowing them to adjust their cost base and staffing needs.[54]

The labour broker as an instrumental intermediary in the labour market can wholly be appreciated in the wider context of restructuring processes and regulations at a particular time and place.[55] The mediation role played by the employment agency between the user enterprise, on one hand, and the agency worker, on the other hand, effectuates the circumvention by employers of labour protection legislation which insulates permanent employees from the competitive pressure on the globalised labour market.[56] It seems to follow that the well known full-time employment is undergoing a universal massive transformation phase, thereby paving the way for the non-standard employment which has begun to gather momentum in the recent years.[57] Chapter 3 of this thesis provides an in-depth discussion concerning the extent to which modern labour broking has been linked to the outdated contract labour system and dissimilarity between the two systems, particulary their practical aspects.

2.2 Justification for the use of labour brokers

Various factors explain the use of labour brokers. Casale notes that the rationale behind the increased demand for labour brokers over the past decade has resulted from the unprecedented changes in the nature of work. He ascribed such an upsurge to the

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54 Burmeister, S. 2011. *Banning labour brokers could damage economy.* Sandton Convention Centre, available at<http://www.hrfuture.net/recruitment/banning-labour-brokers--could-damage-economy> (Accessed on 8 November 2011).

55 Klerk, G. 2009. "Rise of the temporary industry in Namibia: A regulatory 'fix." *Journal of Contemporary African Studies*. Vol. 27 (1), pp 85-103.

56 (ibid.).

57 Fourie, ES. 2008. "*Non-standard Workers: The South African Context, International Law and Regulation by the European Union*." *PER.* Vol. 4, p 2.

notion of globalisation, which has been characterised by economic integration among countries, driven by liberalisation of trade, investments and capital flow as well as rapid technological change.[58] These developments made the global market more competitive, which led employers to demand deregulation, whilst circumventing labour regulations by outsourcing.[59] Theron argues that outsourcing is usually achieved by retrenching existing employees whose duties are perceived to be extraneous to the core business of the employer thereby benefiting from a competitive advantage.[60]

Some commentators argue that the challenge aligned with this new form of employment has been the alteration of the traditional employment relationship, which comprises only the employer and the employee.[61] However, Godfrey offers a diferrent view on this point by arguing that many types of non-standard employment are not new, but rather a continuity of earlier working arrangements which have re-emerged in slightly different forms, mainly in an attempt to avoid the standard employment.[62] He further argues that the standard employment became prevalent first in Western Europe during the industrialisation period. During this period of industrial revolution in Europe, the labour market was marked by a high concentration of workers which ultimately led to the need for a hierarchical management to monitor work performance and organisation.[63]

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58 Casale, G. 2008. "The Employment Relationship: A compara.tive overview." *International Labour Organisation*, p 1.

59 Bercusson, B. & Estland, C. 2008. "Regulating Labour in the Wake of Globalisation, New Challenges, New Institutions." *Oxford and Portland, Oregon*, p 3.

60 Theron (2005: 1252).

61 Raday, F. 1999. "The Insider Politics of Labour–Only Contracting." *Compara.tive Labour Law & Policy Journal.* Vol. 20 (1), p 413.

62 Shane, SD. 2013. "A study of changes and continuities in the organization and regulation of work with an empirical examination of the South African and Lesotho clothing/retail value chain." *A Thesis presented for the Degree of Doctor of Philosophy in the Department of Sociology, Faculty of Humanities*. University of Cape Town, pp 19-20.

63 Godfrey (2006: 15-17).

The labour market has undergone an intensive transformation phase such that the demand for non-standard employment relationships has witnessed a sudden and remarkable global upsurge.[64] Rubery argues that the rise of employment relationships comprising three parties or triangular employment relationships is the flip-side of this trend. To this end, there has been an explosion in the numbers of workers who are excluded from the protection offered by the labour_laws.[65] Employers hire casual workers who are incapable of invoking the legal protection granted by the labour laws.[66]

The aforegoing seems to suggest that the standard employment relationship is on the decline.[67] The traditional model of an employment relationship entails workers employed for a wage, under a single employer, on a full-time basis, indefinitely and within the premises of the employer. Another criticism levelled against labour broking activities has been its structural complexity, which denies workers of their social security benefits. Le Roux points out that, apart from avoiding the risks associated with rights and procedures for protecting employees, the non-standard work arrangement is employed by managers as a mechanism to swiftly respond to changes in the labour market,

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64 Countouris, N. 2007. *The Changing Law of the Employment Relationship: Compara.tive Analysis in the European Context.* Ashgate, pp 95-136.

65 Rubery, J. 1989. "Precarious forms of work in the United Kingdom." In Gerry, H. & Rodgers, J. 1989. *Precarious jobs in Labour market regulation: The growth of atypical employment in Western Europe.* International Labour Organisation. International Institute for Labour Studies, p 49.

66 Klerk, G. 2003. "Labour Market Regulation and the Casualisation of Employment in Namibia." *South African Journal of Labour Relations,* p 64.

67 Vosko, F. 1997. "Legitimising the triangular employment relationship: Emerging international labour standard from a compara.tive perspective." *Compara.tive Labour Law Policy Journal*. Vol. 19 (1), p 43.

thereby increasing business productivity. The bad side of such a development is that labour standards could be compromised or eroded altogether.[68]

In a situation where a new company elects to outsource work through externalization, i.e., by relying on outside contractors rather than to employ permanent workers, the contracted workers would fall outside the scope of the labour legislation. Suppose further that if the same company decides to rely on temporary workers, this would create a group of part-timers and temporary workers which is commonly referred to as the casualisation of work.[69] The consequence is that the rights of employees would be undermined leading to the erosion of labour standards caused by the loopholes in the labour laws (and the changing employment arrangements) in an attempt to circumvent labour regulation.[70]

3 Problem statement

The challenge is that modern labour law assumes that employment relationships conform to the paradigm of the standard employment relationship.[71]

The lack of job security is another problem experienced by workers in this form of triangular relationship.[72] The latter's exclusion from legal protection is particularly true when it comes to wages and social security benefits, notwithstanding the fact that the

68 Le Roux, R. 2009. *The World of Work: forms of engagement in South Africa*. Cape Town: Institute of Development and Labour Law, pp 19-20.
69 Theron and Godfrey (2000: 11-20).
70 (ibid.).
71 Theron, J. 2002. "The erosion of workers' rights and the presumption as to who is an employee." Law *Democracy and Development,* pp 22-42.
72 Theron (2005: 1251-1252).

type of work they are engaging in might be comparable with the one perfomed by full-time employees.[73] The other aspect which renders the practice of labour broking to be regarded as being anomalous is that the duration of the employment contract as well as the conditions of employment are determined by the user enterprise and the labour broker.[74] The worker is not privy to the contract between the labour broker and the user enterprise in spite of the fact that the worker is the provider of the labour. Put differently, if the user enterprise has opted for the termination of the contract with the labour broker, such action will bear an equal force on the employment relationship between the broker and the workers.[75] This has been demonstrated by situations where the workers have been re-assigned elsewhere whereby the user enterprise does not have to communicate the instruction to the workers, but to the labour broker. The line of communication in a triangular employment relationship is confusing not only as far as workers are concerned, but also posed the same problem in the courts when they are enjoined to decide who the employee is in a particular arrangement.[76] Chapter 2 of this thesis provides a lengthy discussion on the various types of employment relationships and the demand for temporary employees including workers supplied by labour brokers.

So far the discussion has been centred on the exclusion of workers employed under labour broking arrangements from the labour laws' protection and the replacement of

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73 LaRRI (2006:10-13).

74 Theron & Godfrey (2006: 28-29).

75 Theron, J. & Godfrey, S. 2000. "Protecting workers on the periphery." *Development and Labour* Monograph. Cape Town: Institute of Development and Labour Law. Vol. 1, pp 25-27.

76 See, for example, *Building Workers Industrial Union of Australia v Odco Pty Ltd (1991)* 29 FCR 104. In the absence of any contract between the worker and the client, the court held that the worker cannot be regarded as an employee of the client even where the client exercised considerable degree of control over the worker.

employment relationships with commercial contracts.[77] Some argue that the practice of labour broking enables companies to avoid risks associated with employing workers on a full-time basis.[78] Others have raised concerns about the precariousness of work performed on a temporary basis, which leads to an acute lack of job security.[79] On the other hand, various sources of scholastic literature have held that the persistent use of labour brokers is the consequence of globalisation. This is a situation whereby the externalisation of non-essential work forms part of the modern company structure in which the casualisation of work is the end result. This obviously threatens the standard employment relationship, which has been the subject of regulation by the state, thus guaranteeing protection of workers' rights.

However, with the advent of technological advancements, new forms of employment relationships have emerged which have made it difficult for the state to effectively regulate work relationships.[80] The driving force behind such employment arrangements has been linked to a global labour market in which economic integration among countries has formed the general trend of conducting business transactions. These developments have made the global labour market more competitive, which has led employers to intensify the demand for deregulation, whilst gaining the practical ability in many sectors to circumvent or escape regulation by outsourcing.[81]

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77 Godfrey (2013: 112).

78 Le Roux (2009: 19-20).

79 Fudge, J. & Owens, R. (Eds). 2006. *Precarious Work, Women and the New Economy*: *The Challenges to Legal Norms*. Oxford: Hart Publishing, pp 5 -15.

80 Casale, G. 2008. "The Employment Relationship: A compara.tive overview." *International Labour Organisation*, p 1. See also Bercusson & Estland, p 3.

81 (ibid.).

The strategy used by employers to minimise costs associated with employment has been to employ workers for a short or a fixed period of time.[82] It is this casual nature of work in which workers experience a higher degree of uncertainty, lack of job security and vulnerability.[83] Furthermore, the reluctance which has been exhibited by trade unions to lobby for the rights of workers employed under non-standard employment relationship, coupled with an inadequate and an appropriate regulatory framework, has culminated in the precariousness of such employment relationships.[84]

The standard employment relationship is characterised by an indefinite, full-time, bilateral relationship where the employee is vertically integrated into the structure of the employing enterprise.[85] Bamu argues that labour law continues to focus on the standard employment relationship and is yet to develop the appropriate conceptual tools to address the challenges which non-standard forms of work present for regulation.[86] Other scholars have suggested that new employment arrangements have been motivated by the search for flexibility in the labour market which allows employers to compete globally.[87]

The shortcomings inherent in labour broking raise pertinent issues which this thesis endevours to answer, namely whether the current legal ban on labour broking in Namibia is appropriate and realistic. Secondly, this thesis sets out an investigation into whether South Africa's legal framework regulating the operation of temporary

82 Theron & Godfrey (2000: 9-10).

83 Klerk, G. 2003. "Labour market regulation and the casualisation of employment in Namibia." *Winter South African Journal of Labour Relations.* Vol. 63, p 65.

84 Fudge & Owens (2006: 5-15).

85 Bamu, PH. and Godfrey, S. 2009. "Exploring Labour Broking in the South African Construction Industry." *Report Commissioned by Labour and Enterprise Policy Research Group.* University of Cape Town, pp 28-33.

86 Bamu (2001: 1).

87 World Bank. 2010. *Doing Business 2005*. Washington DC: Oxford University Press, p 31.

employment services (TESs) can offer a better option. In answering the above questions, the thesis focuses on the ILO Convention 181 as an international benchmark laying down the guiding principles and regulations for the operation of temporary employment agencies.[88] It is argued that labour broking arrangements are strategically skewed cost-reduction mechanisms which facilitate the evasion of legal requirements for a standard employment relationship.[89]

4 Aims and significance of this study

This study mainly focuses on the challenges posed by labour broking arrangements, in particular, the regulatory framework for employment relationships in the globalised labour market. The study further explores the utilisation of the services provided by labour brokers and the challenges involved in regulating such employment arrangements. The study is aimed at ascertaining whether an employment relationship entered through a labour broker could be effectively regulated to such an extent that the rights of the workers involved are effectively protected, whilst simultaneously allowing labour brokers to carry on a trade or business of their choice. In the same vein, an analytical exposition will be provided as to why companies employ the services of

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88 These standards are provided in article 1 - 12 of the ILO Convention 181 of 1997. Article 1 of this Convention provides the definition of what entity is classified as a 'private employment agency' (PEA) It states that the latter is defines as any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services:

a) Services for marching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom;
b) Services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person (referred to below as a "user enterprise") which assigns their tasks and supervises the execution of these tasks.

89 Bamu (2001: 1).

labour brokers and their consequential impact on workers' rights. The study_further underscores the importance of the labour broking industry by adducing sufficient evidence to illustrate its significance, and the urgent need to address the plight of these "marginalised workers."[90]

Lastly but not least, the study compares the legislation regulating the labour broking industries in Namibia and South Africa, with a view to determining whether Namibia can learn some lessons from its neighbor and to find out which of the two countries complies with standards set by the ILO Convention 181. In answering the above research questions, this study makes a_comprehensive comparison between Namibia and South Africa's legislations governing labour broking industries by making reference to the ILO Convention 181, as a yardstick.

The reason behind the selection of South Africa as an ideal country of comparison is premised on the fact that the two countries share a long colonial history.[91] Moreover, the post-Independence era in Namibia has continued to expose an economic similarity between the two nations because of close economic, legal and cultural ties. A case in point is the Namibian currency: The Namibian dollar has been pegged to the South African Rand.[92] Greater focus has shifted to labour broking activities since it has recently been subjected to heated political debates in both countries. As a consequence, South Africa revised her regulatory framework governing the activities of

90 Collins, H. 1990. "Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws." *Oxford Journal of Legal Studies.* Vol. 10, pp 354-355.

91 On 17 December 1920 the Council of the League of Nations entrusted the administration of South West Africa (now Namibia) as a C-mandate territory to South Africa. See M Wiechers, M. 2010. "The Namibian Constitution: Reconciling legality and legitimacy." In Bosle A. Horn, N. & du Pisani, A. 2010. *Constitutiona*l *democracy in Namibia: A critical analysis after two decades.* Konrad Adenauer Stiftung, p 48.

92 The World Bank. "Namibian economy overview." Available at: www.worldbank.org/en/country/namibia/overview. Accessed on 11 July 2015.

labour brokers and formulated a harmonious legal framework which balances the rights of agency workers and those of employers or companies seeking to maximise productivity levels. In addition, this exercise provides some insights into the challenges which labour law faces in addressing various non-standard employment arrangements.

5 Conceptual definitions

Certain key terms are often encountered in this thesis. It is necessary to define these terms and words with reference to the context in which they are used in this study. From the outset, it is imperative to pinpoint that the term *private employment agency* is used interchangeably with the term *labour broking* and has the same defitional meaning provided by the ILO Convention 181, which is the supply of labour to a client by a labour broker or a private employment agency who pay an all-inclusive fee for the services to the broker who, in turn, pays the worker.[93] The broker may also arrange placements for employees, self-employed contractors, trainees and apprentices.[94]

Other terms referred to in this study include *casual worker,* which is defined as a worker who are in an employment relationship in the strict sense, but who is not in standard employment.[95] Casaul workers do not work full time or, if they do work full time, they work on a fixed-term contract.[96] The concept *externalisation* involves the provision of services or goods in terms of a commercial contract instead of employment relationship. Under this arrangement, the user of the services is not responsible for the risk

[93] (ibid.: 154).
[94] Laplagne, P. Glover, M. & Fry, T. 2005. "The Growth of Labour Hire Employment in Australia: Productivity Commission Staff Working Paper." Melbourne, p 89.
[95] (ibid.: 2005:99).
[96] Le Roux. (2006: 42).

associated with the employment relationship.[97] The other concept is *outsourcing,* which concerns a decision by a business to restructure its internal operations, by agreeing that third parties perform certain functions in different forms which may include sub-contracting.[98] The purpose of using sub-contractors is to reduce costs and increase productivity.[99] Amongst the reasons given for utilising contract workers are that contract workers are not unionised and do not receive wages or other benefits negotiated between unions and employers.[100]

Vertically integrated employing organizations refers to those organisations in which large numbers of full-time workers are hierarchically organised, in one location engaging in the mass production of goods, or the rendering of services.[101] This approach is characterised by modern processes of "flexible specialisation" with their short-run and more customised production.[102] In other words, the traditional system of employment which has been dominated by full-time male workers, with the benefit of secured job tenure, has undergone tremendous changes to a certain degree. This new development has emerged owing to the fact that there is an increasing mobility of capital as well as the growing international competition which has manifested in the availability of transnational investments.[103] Transnational corporations have a globalised market for the production of a variety of goods and services, mainly through foreign

97 Theron & Godfrey (2000: 60).
98 (ibid.: 24); See also Theron (2000: 60).
99 Theron, J. 1999. "Indecent employment: What is to be done about labour broking?" *SALB*. Vol. 33(2), p 7; See also Kenny, D & Bezuidenhout, A. 1999. "Complexity and Control: Subcontracting in the Minining Industry." *Economic Monitor*: *Indicator SA*. Vol. 16, pp 33-34.
100 (ibid.: 34).
101 Conaghan, J. *et al*. 2005. *Labour Law in an Era of Globalization: Transformative Practices and Possibilities.* Oxford University Press, p 76.
102 (ibid.:196).
103 (ibid.: 421).

direct investments in search of cheap labour. At this juncture, it is important to point out that labour mobility has taken the form of rural-urban migration. This also extends to an influx of migrants caused by the availability of push and pull factors in developed and developing countries, respectively.[104]

6 Literature review

Theron argues that to regard the workers as employees of the labour broker is misleading. Instead, he propounds that the workers are the rightful employees of the client or user enterprise who dictates of the terms on which the service is to be provided. In the same vein, this sort of employment relationship seems to characterise the client as a third party and does not offer a satisfactory answer regarding the party in control of the employment relationship. However, such characterisation runs counter to economic reality as evidenced by the fact that the client or user enterprise is solely the economically dominant party.[105]

Although there has been literature on labour broking activities, a perusal of some scholastic work by eminent authors offers an insightful glance into the emergence, growth and operation of labour broking activities. In this regard, Theron and Godfrey discussed at length the emergence of labour broking activities and their implications.[106] They offer an all-inclusive analysis of the operations of the industry and argue that the rationale behind labour broking activities is to outsource a company's responsibilities to

104 (ibid.: 421).
105 Theron (2006: 16).
106 Theron & Godfrey (2006: 28-29).

outsiders.[107] They further emphasise the underlying reasons for the continued operation of labour brokers by revealing it is a strategy to evade the involvement of trade unions and increase productivity levels.[108]

Jauch has provided a thorough exposition on the emergence and obstacles hampering labour hire, as it commonly known in Namibia, and points out those employers generally make use of labour brokers in order to cope with escalating demand whilst offering great flexibility in their firms.[109] He notes that the operations of labour hire in Namibia became questionable around the 1990s and highlighted some of the labour hire companies at the centre of the debate.[110] In its report, LaRRI indicates that the reason behind outsourcing to third parties is aimed at the reduction of industrial actions as well as the avoidance of disciplinary procedures in the workplace.[111]

Endresen discusses at length the international trend which has developed as far as labour broking is concerned and attributes it to labour market flexibility,[112] whilst West provides an estimate of the number of workers employed by the industry in selected countries.[113] However, it is sad to note that not much has been said about benefits of labour broking. For instance, Amuedo-Dorantes argues that since agency work involves the performance of various assignments by workers whilst they are stationed at different

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107 (ibid.: 24). See alsoTheron (2000: 60).

108 Theron (1999: 33-34).

109 Jauch (2002: 78). See also LaRRI (2006: 56).

110 These companies include: *Africa Personnel Services* (APS); *EduLetu Consultants (Pty) Ltd; Welwitchia Employmnet Services (WES); Namibia Employment Services (NES); Employee Placement Services (EPSN* and *Elite Personnel Services.* See LaRRI (2006: 16-18).

111 (ibid.: 22).

112 Endresen, S. 2000. *Labour hire in Namibia: new flexibility or new form of slavery*? Windhoek: Gamsberg, p 8.

113 In South Africa, temporary employees services (TESs) has created around 500 000 jobs. See West, E. 2009. 'Controversy over labour broking." *The Weekender (South Africa*), p 1. Available at <http://www.lexinexis.com/us/lnacademic/frame.do?tokenKey=rsh-20.839183.497773> (accessed 6 May 2009).

workplaces, it is easier for them to "shape" their careers through a "quick match of workers and firms."[114] Since ethical values are the main determinants employers take into account before agreeing to an employment contract, Houseman considers labour broking an ideal platform on which to identify those individuals with strong ethical values.[115]

Hutchinson and Le Roux attacked the suitability of the phrase "temporary employee services" on the grounds that it is misleading and sometimes confusing.[116] They argue that it is not clear whether the phrase "temporary employee services" implies the temporary nature of the work to be performed, or whether it is concerned with the temporary existence of the labour broker as an entity.[117] In this respect, Theron states that, at times, labour brokers could have been contracted to provide work for an indefinite period, but the use of the phrase "temporary employee services" overshadows the nature of the outsourced work which requires the employment of workers on full-time basis.[118] In his article entitled "Indecent employment: What is to be done about labour broking?," Theron provides an in-depth analysis on the reasons behind the use of the services provided by labour brokers and concludes that cost reduction mechanisms and the avoidance of trade unions are the main considerations.[119]

Theron querries the purpose of a triangular employment relationship whether it serves to support the fiction that workers in non-standard employment relationships have the

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114 Amuedo-Dorantes *et al* (2008: 141*).*

115 Houseman, *et al* (2001: 141).

116 Hutchinson & Le Roux. (2000: 51). See also section 198 of the Labour Relation Act (No 66 of 1995).

117 *Vice v M D Engineering & Contracting Services and Air-cooled Systems (Pty) Ltd* CCMA GA 95434/11/97.

118 Theron (2005: 620).

119 Theron (2009: 7). See also Kenny & Bezuidenhout (1999: 33-34).

same organisational rights as those in standard employment relationships, or whether it merely serves as an evasive mechanism designed by employers to circumvent compliance with labour legislation.[120] In addition, Theron admits that agency workers have been subjected to inferior treatment and classification when compared with their counter-parts, permanent employees.[121] However, Steward attempts to explain the reasons as to why agency workers were discriminated against attributing it to the narrow definition of the term "employee.[122] Katsara does not openly critises the legislation regulating the labour broking industry, but rather cautions on the ramifications of such legislation which he described as unproductive and detrimental to economic prosperity.[123] Echoing similar sentiment is Power who expresses her concern regarding the difficulties involved in regulating labour broking activities when compared with conventional employment relationship.[124] However, she adds that the practice could be effectively regulated through a tailor made legal regime.[125] In this connection, there is evidence to illustrate that agency work can be successfully be regulated and contribute to economic development.[126]

Kalula and Fewick offer an exposition on the relationship between the modern labour broking system and the contract labour system which existed prior to the attainment of

120 Theron (2008: 14).

121 See Theron (2005: 625).

122 Stewart, A. 1992. "Atypical' Employment and the Failure of Labour Law." *Australian Bulletin of Labour Law.* Vol. 23, p 221.

123 Katswara, T. 14 July 2006. "Revised Labour Act to be tabled soon. " *The Namibian,* p 1.

124 See Power, C. 2002. "Labour hire: the new industrial law frontier." *Law Institute Journal*. Vol. 76(6), p 64. See also Hall, R. 2002. *Labour Hire in Australia: Motivation, Dynamics and prospects.* Working Paper 76. University of Sidney, p 3.

125 Power (2002:4).

126 For example in the European Union context, agency workers are entitled to the same basic conditions of employment enjoyed by permnet employees. See Storrie (2002: 45). See also Article 5 of Directive 2008/104/EC.

democracy in Southern Africa.[127] They profoundly state that during the transitional period, a rigorous system of legislation was introduced to make it impossible. In this respect, Bamu tackles the various mechanisms at the disposal of firms seeking to reduce their workforce, one of which is the employment of temporary workers through what is referred to as "casualisation."[128] According to her, the underlying concern is the imminent change in the labour market which has hampered the effective regulation of labour and the management of private firms which has, thus, been attributed to the quest for labour market flexibility.[129] Steward raises a pertinent issue here regarding the use of intermediaries to perform the core functions of companies to evade compliance with labour law requirements.[130] Similarly, Rodgers contends that the practice of supplying workers to user enterprises is one of the non-standard forms of employment where the risk of job loss is relatively high.[131] This is done by outsourcing the functions and responsibilities of the user enterprise through contract work or by engaging the services of a temporary employment agency.[132] Interestingly, Raday notes that the use of labour recruitment agencies de facto makes them ongoing employers, rather than mere intermediaries.[133] Mhone brings to the fore some policy considerations emanating from the utilisation of labour brokers. He asks whether labour broking can effectively be banned or promoted, given the fact that there are some dominant forms of work which

127 Kalula & Fewick (2004: 10).
128 Bamu & Godfrey (2009: 8).
129 (ibid.).
130 Stewart (2002: 251).
131 Rodgers (1989: 3).
132 Rubery, J. 1989. "Precarious forms of work in the United Kingdom." In Rodgers, G. 1*. Precarious jobs in Labour market regulation: The growth of typical employment in Western Europe: International Labour Organisation.* International Institute for Labour Studies, p 49.
133 Raday (1999: 413).

are desirable but simultaneously precarious in nature.[134] This has further blurred this situation in light of the difficulties our courts face in determining whether a worker is an employee of the labour broker or of the user enterprise.[135]

Godfrey discusses the period of industrialisation and the relationship between employment and capitalism. He contends that Fordism saw the consolidation of the standard employment relationship and entrenched a comprehensive system of labour regulations in the developed countries.[136] Benjamin offers a comprehensive overview of the legal framework regulating the labour market and points out that labour market regulations have far reaching consequences rather than the regulation of prevailing employment relationships for which they are designed.[137] In this respect, workers provided by labour brokers to a user enterprise fall flat and square within the ambit of these labour market regulations.[138] This can be imputed to the globalisation of the labour market and the advancement of information communication technology (ICT).[139] Benjamin goes further to extensively discuss the effectiveness of labour regulations by arguing that its original purpose of protecting workers has lost momentum which has called for a need to create a flexible system of control and supervision of workers.[140] Rodger offers an examination on the growth of the non-standard form of work which has been characterised by flexible working hours and non-adherence to labour

134 Mhone, GCZ. 1998."A typical Form of Work and Employment and Their Policy Implications." *Industrial Law Journal. Industrial Law Journal.* Vol. 19(2), p 198.

135 *Building Workers' Industrial Union of Australia v Odco Pty Ltd* (1999) 74 SASR 438 at 443.

136 Godfrey (2013:14-18).

137 Benjamin (2005:3).

138 (ibid.).

139 Limited state intervention could be justified where the social security system in a particular country takes care of the unemployed. Today such systems are mostly found in the West and not in developing countries.

140 Benjamin AC (2005: 3).

legislations.[141] Unfortunately, the consequences are quite devastating as it leads to the violation of rights of workers who are in a non-standard form of employment relationship.[142]

Analysing the decision of the High Court in *Africa Personnel Services* (APS,[143] Grogan questions the decisions of the court *a quo* which declared labour broking activities as being unconstitutional, particularly considering modern work arrangement which is dominated by contract workers of which labour broking play a vital role. At the international level the utilization of the services provided by labour brokers is recognised and there are standards set for benchmarking purposes.[144]

7 Methodology

This study adopts a theoretical approach, coupled with deductive reasoning, in answering the questions raised above. However, the study does not embark on an empirical inquiry to capture the views of active participants in the labour broking industry owing to some complexities in the process. To this end, this study comprises of a desk-based comprehensive analysis of the existing literature on the subject matter. It adopts a "law in context" approach which broadly recognises the true character of law that it does not operate in a vacuum, but should be considered within the context in which it

141 Rodgers, G. 1989."Precarious work in Western Europe: The stare of the debate." in Gerry and Janine. *Precarious jobs in labour market regulation: The growth of atypical employment in Western Europe.* International Institute for Labour Studies, p 1.

142 Davies, ACL. 2004. *Perspectives on Labour Law*. Cambridge University Press, p 17.

143 *African Personnel Services v Government of Namibia and Others* (Case No.: A 4/ 2008) [2008] NAHC 148.

144 The ILO emphasise that Private Employment Agency (PEA) bring with it different working arrangements, which makes it difficult to distinguish who is actually an employer or employee. See ILO Convention 181 of 1997.

operates. It relies on primary and secondary theoretical sources and has employed the use of various legal sources such as statutes, court decisions, international legal instruments and law commentaries, to tackle the issues raised. The study, thus, has consulted both sociological and socio-legal literature to closely examine how the labour market has effectively introduced labour broking as a form of non-standard employment relationship. Although the study heavily centres on the Namibian jurisdiction, a comparative analysis has been adopted by offering a South Africa perspective on how the issues surrounding temporary employment services have been dispensed with. In addition, the study acknowledges the unabated efforts of non-state institutions such as trade unions, enterprises and the relevant ILO Conventions as strategies to put the labour broking industry under scrutiny. Moreover, it reflects on comments made by eminent legal scholars from other jurisdictions to offer conceptualised framework within which to regulate the challenges which may arise.

8 Outline of the thesis

This thesis is divided into seven chapters. The present chapter, offers some introductory remarks which identify the nature of problems presented as well as an outline of the approach adopted. It also sets out the methodology and the delimitation of the study.

Chapter two is aimed at providing the requisite background information for an in depth understanding of the main forms of employment contracts namely, standard and non-standard employment relationships. The latter form of employment contract is achieved through the process of casualisation and externalisation by intermediation which has

hampered the introduction of an effective regulatory framework on employers and their workforce. The chapter, to add, launches an extensive investigation into the hindrances slowing down the smooth regulation of labour broking activities. Firstly, it begins by examining the line of demarcation between employees and independent contractors. Secondly, it considers the various tests employed by the courts to distinguish between an employer and an employee and observes that some jurisdictions have begun to recognise the existence of agency workers by affording them limited labour protection. It acknowledges that despite the problems inherent in labour broking activities, the industry has increasingly become vital in today's economies evidenced by a rapid upsurge in outsourcing. Finally, the chapter concludes by arguing that standard employment relationships have metamorphosed owing to some socio-economic and political transformation, thus, paving the way for the recognition of some non-standard forms of employment.

Chapter three gives a historical overview of the labour broking system in Namibia and shows how it was regarded as a precursor to the colonial contract labour system orchestrated by the South Africa apartheid regime. The extent to which Black workers were subjected to a host of discriminatory laws and the ultimate formation of the South West Africa People's organization (SWAPO) spearhead the liberation of Namibia will also be presented in this chapter.

An analysis will be provided of the recent court encounter between *Africa Personnel Services*, a dominant labour broking company, and the government of Namibia in which the former challenged the legal ban on labour broking activities in Namibia. The chapter will then conclude by analysing the amended legislation to determine if it has

harmoniously solved the multifaceted issues surrounding the labour broking industry in Namibia.

Chapter four offers an examination of the South African legal framework regulating temporary employment services (TESs) to ascertain whether it offers adequate protection against the exploitation of agency workers. Moreover, it offers a determination of whether the South African regulatory framework can offer an effective solution in respect of pertinent social issues prevailing in that country.

Chapter five considers the regulation of private employment agencies (PEAs) by the ILO through its legal instrument, Convention 181. The examination is significant because ILO sets out international standards which should be domesticated by all member states. In the same vein, the chapter briefly touches on the regulatory framework governing agency work in the European Union as countries of comparison considering their level of development in this area.

Chapter six scrutinises and compares the regulatory framework applicable to labour broking activities both in Namibia and South Africa. It provides a determination of whether any of the two jurisdictions' approach is in conformity with the standards set by ILO' Convention 181 and accounts for the distinct approaches the two countries have adopted in solving similar issues.

Chapter seven concludes this thesis.

CHAPTER 2: FORMS OF EMPLOYMENT RELATIONSHIPS AND CHALLENGES OF THEIR REGULATION

2.1 INTRODUCTION

Chapter one of this thesis has outlined the scope of the study and identified the issues sought to analyse. It outlined that labour broking is an activity which enables employers to outsource work outside the ambit and protective scope of the labour legislation. It sets out the methodology of the study and outlined the structure of the thesis.

This chapter provides an account of various forms of employment relationships and the complexities inherent in the regulatory framework. It analyses different forms of work arrangements which may be classified as either standard or non-standard employment relationships. It moves on to discuss the significance of the contract of employment by defining who exactly is an employee and the concept of globalisation as the driving force behind modern labour arrangements.

2.1.1 The contract of employment: An entry point to employment relationship

The entry point into an employment relationship is through a contract of employment.[145] The common law contract of employment applicable in most of the commonwealth countries can be traced to the Roman law species of *locatio conductio rei* (hiring of a thing), *locatio conductio operarum* (the hiring of services) and *locatio conductio operis*

[145] Le Roux, PAK and Strydom, S. (2009). *Essential Labour Law* Labour Law Publicatons, p 22 -23.

(hiring a piece of work).[146] The ordinary contract of employment involves the rendering of labour or services by the employee to his employer for remuneration, while the employee subjects himself to the supervision and control of the employer.[147] The moral rule that one is bound by one's promises (*pacta sunt servanda*) became a legal rule in the thirteen century. Medieval merchants accepted consent as the basis for legally binding obligations for both moral and economic reasons. *Pacta sunt servanda* as the basis for legally binding contracts was, thus, received into the law of merchants and the legal systems of Western Europe.[148] During the late eighteenth and early nineteenth centuries, most employees in Europe were domestic workers to which English jurist Blackstone assigned the contract of employment.

The first Master and Servant Act of 1747[149] regulated the behaviour of workmen in their employment. The same laws were used to enforce contractual relationships in terms of which workmen were not allowed to leave their respective services before the terms of their contracts were fulfilled. Criminal law was used to enforce contracts and breaches of contract by servants. Subsequent laws which were passed made "a manual worker and his employer" equal contracting parties.[150] Under common law, a contract of employment is defined as "a contract between two persons, the master (employer) and the servant (employee), for the letting and hiring of the latter's services for a reward, the

146 Common wealth countries refer to those countries which were colonized by Great Britain, including Namiba and South Africa. Swanepoel, JPA. 1993. (Eds) *Introduction to Labour Law.* Lexicon Publishers, p 1.

147 Du Plessis, JV. *et al.* 2001. *A Practical Guide to Labour Law* LexisNexis. Durban: Butterworths, p 9.

148 Vetori, S. 2007. *The Employment Contract and the Changed World of Work*. Ashgate Publishing Limited, p 3.

149 Atiyah, P. 1979. *The Rise and Fall of Freedom of Contract*. Oxford: Clarendon Press, p 444.

150 Le Roux (2009: 14).

master being able to supervise and control the servant's work.[151] This definition reflects the subordinate position the employee occupies in relation to the employer.[152]

Le Roux argues that the dichotomy between the employee and the self-employed is a product of the social divide entrenched in the Master and Servant laws.[153] With the introduction and development of social welfare legislation, workers were classified under different status. It was in that context that the control test[154] was introduced by the courts in an effort to limit the application of social legislation whereby casual and seasonal workers were excluded.[155] After the repeal of the Masters and Servants Act, its legal influence left far-reaching consequences, for example, the duty of obedience imposed on the worker and the powers of the employer to discipline the worker has spilled over into the common law.[156]

The Master and Servant Act has, to a large extent, influenced the common law thereby complicating the process. Howe *et al* questioned the degree to which the Master and Servant legislations were of continuing relevance to the evolution of the contract of employment.[157] Describing who a master was, Creighton explains that a master is "a man in a position of authority" or ''boss" and a servant is a person who serves

151 (ibid.: 15).

152 For example in South Africa such definition is based on the 1974 Master Servants Act which was repealed and paved the way for the passing of the Labour Relations Act, (No 28 of 1956) which later became the Labour Relations Act, (No 66 of 1995).

153 Le Roux (2009: 25-30).

154 The test has been used at distinguishing between an employee and independent contractor and also to identify the employer for purposes of vicarious liability in tort. E*ast London Municipality v Murray* (1894) 9 EDC 55. *Addis v Schiller Lighting and Plumbing* Co. (1906) TH 210.

155 See Le Roux (2009: 41).

156 The Master and Servant Act of 1875 laid down the duties of the Servant as well the powers of the Master. Amongst the powers of the Master (employer) is the power to issue instructions to the Servant (employee), obligation of subordination on the part of the employee, to act in good faith and to be obedient.

157 Howe, J. & Mitchell, R. 1999. "The Evolution of the Contract of Employment in Australia: A Discussion," *Australian Journal of Labour Law*. Vol. 12, p 117.

somebody else, for example, household tasks or a personal attendant.[158] There is no doubt that the provisions of the Master and Servant Act discussed above negates the principle that parties to a contract of employment are regarded as equals. The truth is, they are not, and will never be, unless the present employment law is overhauled.[159]

Deakin concedes that in the mid-twentieth century, the contract of employment was, as a category, useful and effective.[160] It had, firstly, been "socially progressive" because it assisted in the removal from the law of archaic distinctions between blue collar and white-collar workers. It was, secondly, factually accurate for a period when employment relations appeared to be converging on a "Fordist" model of secure employment within the framework of an indeterminate relationship. Thirdly, it was doctrinally coherent, in the sense of fitting in with wider developments in employment protection legislation and in the common law.[161] In his work, Deakin discusses the evolution of the contract of employment and its negative implications for the social fabric of a system of industrial enterprises which appeared to be entrenching inequality.[162] He argues that early forms of collective bargaining and labour legislation were being undermined by technological innovation and changes in the structure of firms, hence the emergence of the modern "welfare" or "social" state.[163] In describing the originality of the contract of employment, he points out that the contract of employment had its roots in the process of

158 Creighton, B & A Steward, A. (Eds). 2005. *Labour Law*. The Federation Press, p35.

159 (ibid.: 307).

160 Deakin, S. 2007. "Does the 'Personal Employment Contract' provide a Basis for the Reunification of Employment Law." *ILJ*. Vol. 36. United Kingdom. P 69.

161 (ibid: 69).

162 Banard, S, Deakin & G Morris. (Eds). 2005. *The Future of Labour Law:Liber Amicorum Bob Hepple QC.* Oxford and Portland Oregon, p189.

163 A detailed historical study on the conditions accompanied the emergence of the modern employment relationship and institutions of the welfare state in UK and other European countries.

industrialisation; however, its development has been shaped by State intervention through social legislation and for the related development of collective bargaining.[164]

Donald questions the extent to which the employment relationship can be applied to regulate new forms of labour relationships.[165] In light of this question, Fudge admits that the rapid shift in employment relations over the past 20 years has shaken the foundations of the legal architecture of the employment relationship, which common law countries have conceptualised as a personal and bilateral contract.[166] Coupled with vertical disintegration, the emergence of the flexible firm and corporate networks undermine one of the pillars supporting the standard employment relationship, that is, the large vertical integrated firm. In addition, the fragmentation of the enterprise and the decline of hierarchically organised internal labour markets have led to more complex employment relationships that do not fit within the conception of employment as a bilateral and personal contract.[167]

Stone points out that as a result of the transformation of work, the current regulatory regime is seriously out of alignment with the reality of today's workplace. Stated differently, an employment relationship nowadays implicitly creates job security for the workers. In addition, many employers, explicitly or implicitly, promise to give employees not job security, but "employability security" which simply means the creation of an opportunity to develop their human capital so they can prosper in the external labour

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164 Le Roux. (2009: 352).

165 Donald, A. 2001. "Immigrant Labour in Australia: Regulatory Framework." *Australia Journal of Labour Law.* Vol. 14, p242.

166 Fudge. (2006: 295). See also Freedland, M. 2003. *The Personal Employment Contract*. Oxford: Oxford University Press, p36.

167 (ibid.).

market.[168] Rideout argues that the concept of individual contract is irrelevant to the modern employment situation. The principal justification dates back to the industrial revolution and the nineteenth-century *laissez fairen* doctrine which originated from the Western world. Considering that the conditions which prevailed during that time have ceased to exist, this piece of work argues that the contract of employment is still an important legal instrument through which individuals can participate in the labour market.

A better understanding of the Western society could help to appreciate the deferent phases through which the contract of employment evolved. Kalberg points out that the sociological perspective of the Western industrial societies has been a subject of critical analysis by famous sociologists such as Emile Durkheim and Karl Max. Max is perhaps best known for his attempts to define the uniqueness of the modern West and to provide rigorous causal explanation for its specific historical development. However, far from offering a justification for the Western industrial societies, his sociological and political writings evidence a profound ambivalence towards them.[169] Although impressed by their capacity to sustain high standards of living, Weber feared that many of the prominent elements opposed values and ideals he held dear; ethical action, the individual autonomy, the personality unified by reference to a constellation of noble values and universal ideas of compassion.

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168 Stone, K.V.W. 2006. "Rethinking Labour Law: Employment Protection for Boundaryless Worker." in G Davidov & B, Langille. (Eds). *Boundaries and Frontiers of Labour Law; Goals and Means in the Regulation of Work.* International Institute for Labour Studies. Oxford and Portland Oregon, p161.

169 Kalberg, S. 2011. "Max Weber." In Ritzer, G & Jefrey Stepnisky, S. *The Wiley – Blackwell company to: Major Social Theorists: Classic Social Theorists*. Vol. 1. Blackwell Publishing Ltd, p305.

The modern Western industrial societies' employment protection systems are based on the 20th century notion of "standard employment relationship" which has acquired international recognition and presently used as a benchmark against which work relationship is measured.[170] A number of changes which have taken place in the last thirty years or so, have modified the traditional notions of the employment relationship. This has been demonstrated by the economies of the industrialised nations which underwent a number of deep changes. These changes can be seen through their production capacities as well as industrial organisations in terms of the acquisition of labour resources to boost the economy.[171]

2.1.2 Standard employment relationship

The standard employment relationship is associated with a specific employment form, that is, full-time, permanent wage work, and entails a bilateral relationship where the employee worked on the premises controlled by the employer.[172] This section briefly outlines the basic features of the standard employment relationship and its significance to any work arrangement. However, it is not within the scope of this thesis to discuss in detail the political and economic evolution of the concept in scrutiny. It serves to point out that standard employment relationship emerged and became accepted as the norm for employment relations during the economic recovery period, but was accelerated by

170 Countouris. N. 2009. *The Changing Law of the Employment Relationship: Compara.tive Analysis in the European Context.* Ashgate, p1.

171 (ibid.).

172 Bamu. (1999: 55-6).

pressure from workers and employers, with the former demanding greater security and the latter driven by concerns about productivity.[173]

It was during the period of the welfare state capitalism whereby state intervention in the labour market through legislation was forceful. Moreover, the mass production of goods during this era required the concentration of many employees in one enterprise.[174] This has resulted in the growth of various financial security and other social programmes which benefitted millions of workers.[175]

As noted above, the entry point to employment relationship has been through a contract of employment which could be defined as that relationship[176] between people who work and those for whom they work. It is created when a potential employee approaches an employer with the intention of being employed. Once the relationship is created between the two, the employer can be held vicariously liable to third parties for a breach of contract, provided that the claimant proves that s/he is an employee of the latter. This requirement is controversial and is still troubling courts today.[177]

A contract of employment is fundamental to any work relationship.[178] Anthony argues that the employment relationship is the primary vehicle through which the state could

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173 Kalleberg, A. 2000. "Nonstandard employment relations: part-time, temporary and contract work." *Annual Review of Sociology*. Vol. 26, pp341-342; See also J, Stanford & L, Vosko. (Eds) 2004. *Challenging the Market: The Struggle to Regulate Work and Income*. Montreal & Kingston: McGill Queen's University Press, pp3-30, 7.

174 Vetori. (2007: 8).

175 (ibid.).

176 Honeyball, S & Bowers, J. 2004. *Text on Labour Law.* Oxford University Press, p18. See also Anderman, S. 1998. *Labour Law: Management Decisions and Workers' Rights*. London: Butterworths, pp33-34.

177 Bowers, J & Honeyball, S.1998. *Labour law.* Blackstone Press Limited, p12.

178 Hepple, B.1998. *Employment law*. London*, Sweet & Maxwell*, p122.

rectify the power imbalance between capital and labour.[179] Under common law, parties to a contract of employment are governed by the terms and conditions stipulated in the contract.[180] The inherent inequalities in the bargaining power are that the employer is the owner of the means of production, whilst an employee is entirely dependent on the financial stability of the employer which puts the employee at the mercy of the employer.

The standard employment relationship gave the employer discretionary powers to formulate rules of engagement determine the terms and conditions of employment and manage the affairs of the enterprise based on sound business principles.[181] This may include instructing employees to work longer hours in order to increase profits, enforce discipline at the workplace, including dismissal of employees who may violate the rules and regulations of the firm.[182] Managerial prerogative and flexibility allowed the employer to re-organise and restructure their companies in order to maximise profit. However, such powers need to be balanced against the rights of employees.[183]

Employment protection rights such as the right to claim unfair dismissal or redundancy payment, typically vest only in employees whose job fit into the complementary paradigm form of employment in vertically integrated production, that is to say, employment which is full-time, stable and for an indefinite duration. The recent trend

179 O'Donnell, A 2001. "Immigrant Labour in Australia: The Regulatory Framework." Australia *Journal of Labour Law.* Vol.14, p242.
180 J, Grogan. (Ed). 2003. "Workplace Law." *Juta Law*, p4.
181 Deakin. (2001: 73).
182 (ibid.:45).
183 (ibid.:60).

towards vertical disintegration of production places many workers outside this paradigm and therefore beyond the range of employment protection laws.[184]

The strategy to counter discretionary powers of employers rests with trade unions.[185] Workers can organise into trade unions and by bargaining with employers provide a measure of countervailing power to the powers of management.[186] The notion of freedom of contract as fundamental to the employment relationship illustrates the failure of common law to address the inequality of the parties to the contract of employment and indirectly legitimises the inequality that inherently exists in the employment relationship.[187]

Parties to a contract of employment are free to agree on the terms and conditions governing their employment relationship and are presumed to be equal as far as the contract is concern. However, this can be somewhat misleading. The employee often knowingly chooses to work with an employer and the employer often engages the employee after a selection procedure, however, rudimentary. Also, to a large extent the reciprocal rights and obligations in the contract of employment are pre-established for most employees.[188]

Work relationship is not free from conflict. This is the case particularly in large companies where many workers find themselves working for one employer who may

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184 Collins. (2001: 353).
185 Basson, *et al*. (2009: 253).
186 Anderman. (2008: 79).
187 Rideout, R.W. 1966. "The Contract of Employment." *Current Legal Problems* (1966). Vol. 19, p112.
188 Anderman. (2008: 35).

engage in mass production of goods or providing services for a number of clients.[189] The conflict stems not only from the inherent inequality but also from the way profit is divided between the parties. Employment relationship is, thus, naturally antagonistic, hence, the need for an organised workforce.[190]

Vetori argues that the contract of employment is as much a social relationship as it is an economic one. Since "the only claim of law to authority is its delivery of justice," the ultimate goal should be to achieve both justice and economic efficiency.[191] In addition, globalisation of the world economy is a consequence of the operation of the universal laws of the market and the law cannot alter these realities. Labour law reacts to the prevalent socio-economic forces that exist at the time. Its function is to formalise market forces which affect the relationship between employers and employees for the benefit of the economy.[192] In this context, labour law could be used as a tool for economic development.

Discussing the labour regulatory framework in the wake of globalisation, Bercusson *et al* point out that the emergence of massive cross-border financial flows, coupled with trade liberalisation and expanded foreign investment, made the global market more competitive by creating the necessary conditions for onset of globalisation.[193] In this context, it is necessary that labour law is revisited to facility a speedy response to new changes which promote economic developments.

189 (ibid.:37).
190 (ibid.).
191 Vetori. (2007: 1).
192 (ibid.).
193 Bercusson & Estlund. (2008: 3).

As technology has changed the world of work over centuries, the adaptation of laws regulating work relationships have usually served the interests of those in a position to wield economic and social power.[194] These interests could range from increased flexibility on the part of employers, unenforceability of social legislation and exclusion of some categories of workers from legal protection.[195] This, in turn, has caused workers to find ways of addressing their interests at the workplace. Despite the fact that working conditions have changed over a period of time, principles underlying labour law remain unchanged.[196] These principles may include procedures for handling industrial conflicts, promotion of peace at the workplace and enforcing the rights of workers. This calls for 'the institutionalisation of the conflict by way of collective representation, collective bargaining, joint regulation and legislative constraint."[197]

Trade unions and employers or employer organisations developed rules of engagement between them. Such rules are the basis on which the legislation regulating labour relation has developed.[198] Both parties are entitled to benefit equally from any arrangement agreed upon. However, the problem lies with the contract of employment, for example, in the case where an employer decides to dismiss an employee for whatever reason; the employment contract is the determining factor and not the collective agreement.[199] In this respect, trade unions are unable to assist such an

194 Vetori. (2007: 2).

195 This is particularly the case in respect of those persons who are partly employed or the so-called underclass of the unemployed who are falling under what is known as 'social exclusion. See also Hepple, B. 1995. "The future of labour law." *Industrial Law Journal (*1995). Vol. 24, p303.

196 Davies, P.L. 1987. "Labour Law: From here to Autonomy?" *The Industrial Law Journal*. Vol. 16, pp1-3.

197 Bendix, S. 2001. *Industrial Relations in South Africa* Juta & Co Ltd, p3.

198 Theron. 2008: 3).

199 Rideout. 1966: 110-112).

employee, and at the same time, employers seem to welcome the limitation of labour law.[200]

2.1.3 Non-standard employment relationships

Non-standard forms of employment relationships are the type of work which deviates from the standard employment relationship. These include, part-time work, temporary work, casual work, seasonal work, work performed by independent contractors, subcontracting and the use of temporary employment services which is at the center of this thesis. Epstein *et al* refer to temporary employment services as "labour-only contracting" which they argue is different from contracting out of work, or job contracting. In this case, the object of the contract is the supply of goods or services and the contractor undertaking to supply the goods or services is an established firm, large or small, with its own premises, tools, equipment and supervisors.[201]

The categorisation of the different forms of work depends on the processes used to contract work out of a specific job. Bamu refers to these processes as externalisation through the communication of the employment relationship, or externalisation through the use of intermediaries and the casualisation of work.[202] According to Le Roux, non-standard employment can be examined by focusing on the two broad processes associated with it, namely casualisation and externalisation. She argues that

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200 This concept refers to industrial relations in which large industrial enterprises engage in mass production based on narrow specialization of tasks and skills and on a pyramidal organization of work.

201 Epstein, E & Monat, J. 1973. "Labour contracting and its Regulation." *International Labour Review.* Vol. 107, p 451.

202 Bamu. (2011.103).

casualisation is concerned with those workers, who are in an employment relationship in the strict sense, in other words, those workers who are not in a standard employment relationship. The concept of non-standard employment relationship refers to a process which lacks a precise definition, although it essentially involves the provision of goods and services in terms of a commercial contract instead of an employment relationship, thus, placing a "legal distance" between the user of the services and the risk associated with the employment relationship.[203]

Rodgers points out that precarious forms of work have rarely been absent from systems of wage employment. He argues that the contemporary problems are most acute in developing countries, where a large fraction of jobs are insecure, low paid and vulnerable to many forms of abuse.[204] Over the last decade or two, there has been an increasing awareness of the persistence and often growth of "atypical" or "non-standard forms of work. [205] The latter is regarded as being unstable and those workers poorly paid. Initially identified with household labour in small family enterprises in the developing countries, the informal sector has grown across the world as firms pursue flexible forms of labour such as casual labour, contract labour, outsourcing, home working and other forms of subcontracting which offer the prospect of minimising fixed non-wages costs.[206] Davidov refers to this process as the informalisation of employment, claiming that although the dichotomy of formal and informal sectors have always been misleading, a growing proportion of jobs possess what may be called

[203] Le Roux. (2009: 18-20).
[204] Rodgers. (1989: 1).
[205] (ibid.).
[206] Fudge. (2006: 295).

informal characteristics, that is, without regular wages, benefits, employment protection and so on.[207]

Hyde explains that the problem lies with the concept of employment itself which by its narrow definition does not recognise workers in the informal sector. He claims that these workers may not be employed in the legal sense, but fall outside the effective regulatory framework.[208] The employment relationship as a legal basis for a legal framework ought to be inclusive. However, its exclusion of some categories of workers affects the most vulnerable workers who might benefit from legal protection. This anomaly creates a situation whereby some workers in a precarious employment relationship will be disadvantaged, for example, by not joining trade unions and not being the beneficiaries of various social legislations. Furthermore, workers contracted in precarious employment relationships experience increased job insecurity and remain at the periphery of the job market. If a form of employment relationship excludes many from social benefits associated with it, then it runs counter to the spirit of creating social equality and job security.[209]

It is impossible to try to deliver equality through work, whilst knowing that the workplace relationship is based on the concept of subordination.[210] In this light, the law ought to promote equality between persons in the same category. Labour law can achieve socially beneficial outcomes in the labour markets through the authorisation of

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207 (ibid.).

208 (ibid.: 46).

209 Employers are particularly refraining from employing individuals for long terms that attract secure retirement and other social security benefits. See Perulli. 2011. "Surbordinate, Autonomous and Economically Dependent Work: A Compara.tive Analysis of Selected European Countries." In G, Casale. (Ed). *The Employment Relationship: A compara.tive Overview*. Geneva: ILO, p138.

210 Hyde (2006: 47.).

individuals to form organisations such as trade unions or employers' organisations because these can conclude binding agreements.

Nowadays workers are frequently changing jobs, whilst employers have embarked on a massive restructuring process which has resulted in the retrenchment of workers in order to increase productivity levels. Thus, this has seen an explosion in the use of atypical workers such as temporary workers, on-call workers, leased workers, and independent contractors.[211] Furthermore, "regular" full-time employment neither offers an employee the presumption of a long-term employment contract, nor does it offer an automatic promotion or wage increase. Employees have expressed unwillingness to work for the same employer for prolonged periods and have opted to frequently change their occupation, whilst employers similarly change their workforce from time to time. They encourage employees to manage their own careers to avoid the misguided expectation of a long term job security. Indeed, the very concepts of the workplace as a place, and the concept of employment as involving an employer, are becoming outdated.[212]

Suppose that a user enterprise has hired the services of a labour broker heavily dependent on the user enterprise for a financial reward, the user enterprise can at will issue directives to the labour broker for the expulsion of a particular worker without following the necessary procedures for a fair dismissal. The unfairly dismissed worker cannot have recourse to law since there is no contractual relationship with the user enterprise. Furthermore, it is highly unlikely that a worker contracted by a financially

211 Elsewhere such workers have been mostly assigned to perform, for example, seasonal or casual work or being new in the job or were recruited for emergency undertakings at low cost. See Caire. (1989: 70).

212 (ibid.: 155).

weak labour broker would possess the ability to provide favourable working conditions for the employee. This instance serves to illustrate the extent to which agency workers can easily fall victim to various precarious situations. Thus, Rodgers correctly points out that precarious jobs are those with a short term horizon in which the risk of job loss is high.[213]

2.1.4 Nature of labour broking arrangements

Labour broking is a form of employment relationship between three parties in which the worker is not privy to such contract.[214] If the user enterprise decides to terminate the contract, such action will equally terminate the employment contract between the broker and the worker. The contract between the labour broker and the user enterprise normally stipulates that the client may dispense with the worker's services either whenever they wish, or in certain defined circumstances. In other words, the worker may be "dismissed" at will and at the user enterprise's request.[215] Whether the worker can be reassigned a new position elsewhere following such a "dismissal" depends on the existing contract between labour broker and the worker. These ramifications would unearth pertinent legal issues concerning who the employer is. This form of employment relationship is not only confusing as far as workers are concerned, but courts also have courts wary in distinguishing between an employer and an employee under such a

213 Rodgers. (1989: 3).
214 Stewart. (2002: 251).
215 Theron & Godfrey. (2000: 25-27).

triangular employment relationship.[216]Le Roux claims that agency workers on face value seem to be enjoying the protection of labour legislation, the protection is more apparent than real. In spite of the fact that workers in a triangular employment relationship are structurally integrated into the user enterprise's workforce, such an arrangement creates what Theron calls "an under-class at the formal workplace."[217]

Agency workers are mandated to perform a specific task at the user enterprise's workplace for a limited period of time. Other jurisdictions have introduced a minimum period for a fixed temporary work which ranges from six to twelve months.[218] Not only has Namibia been immersed in legal uncertainties regarding the labour broking industry, but other jurisdictions, too, have offered diverging views on the same issue. In spite of the distinct socio-political historical backgrounds between states, similar issues arise from the continued activities of the labour broking industry.[219] Making reference to the situation which prevailed in France during the 1950s and 1970s, Vigneau claims that the labour broking industry served to avert the acute shortage of workers. The existence of such employment relationships was closely interlinked with the labour market conditions which provided the much needed employment flexibility.[220]

On the other hand, Amuedo-Dorantes correctly puts it that given the fact that agency workers perform various assignments at different workplaces; it is much easier for them

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216 See, for example, *Building Workers Industrial Union of Australia v Odco Pty Ltd (1991)* 29 FCR 104. In the absence of any contract between the worker and the client, the court held that the worker cannot be regarded as an employee of the client even where the client exercised considerable degree of control over the worker.

217 Theron & Godfrey. (2000: 155).

218 This was the case in Belgium, Spain, Luxembourg, France, and Germany. See Raday. (1999: 7).

219 Theron, J Godfrey, S Lewis. 2006. "The Rise of Labour Broking and its Policy implications." *Institute of Development and Labour Law*. University of Cape Town, pp4-11. In Namibia, see LaRRI. (2000: 18).

220 See C., Vigneau, 2001. "Temporary agency work in France." *Compara.tive Labour Law & Policy Journal.* Vol. 23(7), p 45.

to “shape their careers.”[221] This could be done by means of a “quick match of workers and firms” thus, allows for a continued accumulation of diversified human capital via short-term assignments. In practice most, if not all, employers are ready to conclude employment contracts with workers exhibiting a remarkable work ethics. Despite that agency workers are given scant protection of labour legislation and that they are lowly paid than their permanently employed counterparts,[222] banning the industry will yield no meaningful results than creating a legal framework to regulate it. Stiglitz reinforces this position by stating that when adopting macro-economic policies of such a nature, it is imperative to bear in mind the overriding objectives of such policies which include employment, growth and better living standards. In this regard, labour regulations should, therefore, be designed to promote conditions conducive to the creation of employment opportunities and the betterment of the society as a whole as reflected by Theron above.[223]

Amongst the most notable benefits interlinked with the labour broking industry is its potential to provide flexible employment opportunities for organisations by allowing them to adjust their workforce to suit their current needs and demands. This is a crucial aspect of the labour broking industry because labour brokers can, too, benefit from the increasing demand for workers at peak moments which normally run for a short period of time.[224] In some jurisdictions, the industry is mainly focused on white collar jobs, whereas[225] skilled workers find jobs in the manufacturing sector such as engineering.[226]

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221 Houseman *et al*. (2008 : 35).
222 (ibid.).
223 Theron. (2008: 4).
224 (ibid.).
225 Theron, Godfrey & Lewis. (2006: 4-11).

With particular reference to the position in South Africa, Theron pinpoints at particular trades which have witnessed a sudden upsurge in the demand for agency work and these include painting, joinery, and installation of ceilings, carpets, air conditioning and electrical fittings.[227] In addition, he claims that the practice of recruiting or supplying skilled workers through brokers or agencies is long established, particularly in the metal and engineering where skills are in short supply.[228]

However, since it is the user enterprise which determines the ground rules at the workplace, it goes without saying that the user enterprise benefits the most out of this triangular employment relationship. As the law provides a "legal distance" between workers and the user enterprise[229] the negative implications of such a triangular employment relationship is that it exonerates the user enterprise from the common law legal duty to provide safe working conditions i.e. the user enterprise is not regarded in law as the employer.[230]

The matter is more complicated, although in the sense that the worker performs services at the user enterprise's premises which contradicts the foundation of the principles of employment contract as traditionally known.[231] Generally, the person who controls and supervises the worker is deemed to be the employer by the worker. In accordance with the contractual terms of employment, the user enterprise is entitled to have the worker "dismissed," although the actual action of dismissal is performed by the

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226 This refers to Norway where in section 26 Employment Promotion Act of 1947 of Norway embodied a ban on private employment exchange agencies. The ban was lifted in year 2000.
227 Theron & Godfrey. (2000: 24-28).
228 (ibid.: 28).
229 (ibid.).
230 (ibid.:27). See also Theron. (2008: 6).
231 Sykes & Yerbury. (1980: 8).

labour broker. Suppose that an enterprise has opted to outsource some of its functions, it may do so to a business entity which provides the subject matter of outsourcing. Theron argues that the main motivation for utilising labour brokers is the avoidance of labour legislation and cost reduction. By outsourcing non-core functions, companies create an opportunity to adjust their business activities to become more profitable.[232]

Triangular employment relationships unearth inherent issues concerning the rights of workers to participate in collective bargaining. It should be noted that the right of a worker to belong to a trade union is the forerunner to the creation of an employment relationship. Conversely, the rights of trade unions to bargain on behalf of its members should similarly be exercised at the workplace. However, it is sad to note that there is no clarity regarding the enforcement of the workers' rights when the user enterprise is located at different workplaces.[233] It is beyond contention that a labour broker can assign workers to one or more companies for the performance of some temporary work, or it can be that the user enterprise is engaged in various businesses. Collective rights and collective bargaining requires that workers on whose behalf trade unions are negotiating are working for the same industry or firm, and not at fragmented places.[234] If an amendment is to be effected to the existing labour legislation in Namibia, regard should be had to the unique social issues prevailing at the time. Although Namibia has amended its existing legislation regulating private employment agencies, it will be shown later in chapter 3 that the Amendment is inadequate.[235] A closer examination into

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232 Theron. (2009: 1247).

233 Blanpain, R. 1990. *Compara.tive labour law and Industrial relations in Industrialised Market Economies.* The Netherlands: Kluwer Law & Taxation Publishers, p58.

234 Theron (2009: 14).

235 See *Africa Labour Services (Pty) Ltd v Minister of Labour and Social Welfare* (A 163/2012) [2013] NAHCMD.

agency work reveals that its activities are similar to those of employment placement services, thereby comprising the labour industry in the process.[236] However, it is assumed that when an employment placement agency secures some piece of work for a worker the relationship between the two is terminated. With reference to labour broking, the triangular employment relationship i.e. between host, agency and worker, continue to exist until the subject matter of the contract has been performed.[237]

Interestingly, the duration of the assignment is determined by the nature of work to be carried out. However, the user enterprise has the discretion to choose who the work can be subcontracted to. In most instances, this may take different forms, namely outsourcing to labour brokers or subcontracting with external contractors. In this context, labour broking forms part of the process of externalisation. This activity involves the provision of goods and services whereby the risks associated with an employment contract are shifted, which differs from the traditional employment relationship.[238] Klerk points out that a number of temporary employment agencies have become large multinational corporations with an expanding presence in many developed and developing countries. The industry is also becoming increasingly organised, which demonstrates the level of its growth.[239]

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236 O'Neil, S. 2004. "Labour hire: issues and responses." *Economics, Commerce and Industrial Relations Group*. Available at. <http://www.aph.gov.au/library/pubs/rp/2003-04rp09.htm]accessed>(accessed on 25/01/2009). See also Hall, R. 2002. *Labour Hire in Australia: Motivation, Dynamics and Prospects: Working paper 76*. University of Sydney. p4.

237 This suggests that the person who performs the work is kept in the dark by not knowing when is his/her contract is going to end.

238 Theron. (2009: 23).

239 (ibid.).

Instead of retaining the services of workers directly, firms can resort to various categories of intermediaries in order to have work performed efficiently.[240] The result is a decrease in the number of workers directly employed in companies, with a corresponding increase in the number of workers finding themselves in a triangular employment relationship. This new form of dependence is normally implemented through "externalisation" which involves a restructuring process which may result the retrenchment of workers.[241] This entails that goods and services required by the enterprise are obtained through third parties which could be another enterprise, contractor or other forms of intermediaries.

As hinted earlier on in this chapter, the supplying of labour to user enterprises is a commercial activity. According to Theron and Godfrey, such a triangular arrangement demonstrates how organisations have organised themselves which has resulted in the transformation and polarisation of employment relations.[242] They argue that at the high end of the spectrum are the knowledge workers, who are associated with the rise of "new economy" and networked organisations.[243]

Theron *et al* point out that the managers of enterprises believe in the myth of service sector employment which is characterised by low skills, low wages, and low stability. They further argue that this contradicts the current trend in the growth of labour broking activities which is of particular symbolic importance to the formal workplace as part of

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240 Fudge. (2006: 301-302).

241 Esselaar, J. *The debate over outsourcing in South Africa: Evidence from a case study* Division of Economics. Durban: University of Natal, p.3. Available at http://www.commerce.uct.ac.za/Research Units/DPRU/Conf2002pdf/Esselaar.pdf (accessed 2002).

242 (ibid.).

243 Theron (2009: 21)

overall economy. In addition, since agency workers, who are also referred to as "the underclass workers" are involved in employment relationships based on a triangular employment relationship, they find themselves falling outside the protection of labour law and, thus, considered not typically in need of legal protection.[244]

The nature of the triangular employment relationship can take various forms. It is possible that the worker (employee) working for the broker could be a permanent employee of the broker. Such an employee could move from one assignment to another, rendering services to or working for, a number of the broker's clients. It is also possible that the employee could be employed on a temporary basis by the broker for the rendering of services or for the performance of work for a specific client. The broker and the prospective employee may enter into a form of "general agreement" whereby the latter would be available to the labour broker whenever needed. Moreover, the employee not only performs work for a single assignment, but for future several assignments.[245] .

It should be pointed out that the purpose of engaging in some sort of work is to generate an income for a livelihood. It is a well known fact that poverty is a direct consequence of the lack of employment and which is the only source of income available to the poor. The most crucial concern which can arise in the wake of high unemployment rates is not whether the workers' rights will be protected in a particular employment relationship, but whether there is an opportunity to get a job for a sustainable lifestyle. In fact, the user enterprise actually contracts with a labour broker offering the cheapest services in

244 (ibid.).
245 (ibid.).

comparison with other labour brokers.[246] The contract of employment concluded between the labour broker and the user enterprise is often made subject to the condition that the agreement continues for as long as the user enterprise requires the services of the employees.[247]

As if the above stated challenges are not enough as far as the labour broking industry is concerned, workers supplied to a user enterprise perform specific work only for a limited period of time, as opposed to an indefinite period which contradicts the conventional employment practice. These workers could then be assigned by the user enterprise to companies which may engage them in various businesses activities. An arrangement of this nature defeats the whole purpose of an efficient collective bargaining system by the workers and their trade unions.[248] One way to carefully dispense with the above stated problems is through the introduction of a tailor made regime for the effective regulation of the labour broking industry. Theron suggests that being an "atypical" form of employment, as opposed to bilateral forms of employment, a triangular employment arrangement demands special considerations when creating the legal framework within which it is to operate.[249]

In support of the labour broking industry, Hutchinson claims that the practice provides employers with numerous advantages in terms of deployment, utilisation and the control

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246 Van Eck, B.P.S. 2010. "Temporary Employment Services (Labour Brokers) in South Africa and Namibia." *PELJ.* Vol. 13(2), p108.

247 See Theron. (2009: 45).

248 See ILO Convention 87of 1948. In terms of Article 2 and 3 of this Convention, workers and employers have the right to join organisations of their own choosing without previous authorization and to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administrations and activities and to formulate their programmes.

249 Theron. (2009: 9).

of labour.[250] Moreover, especially from the user enterprise's perspective, the key advantage is that it enables the employer to introduce an element of flexibility into the composition of the workforce. Additionally, the coverage of collective agreements can be circumscribed and the costs associated with training, health and safety can be reduced. Further to that is that employers can avoid missing deadlines during peak times or paying idle permanent workers during slack times.[251] Illustrating the use of temporary employment agencies at global level, Klerk notes that a number of temporary employment agencies have developed into powerful multinational corporations with an ever-expanding presence in both developed and developing countries. Similarly, the industry has also become increasingly organised which demonstrates the level of its growth.[252]

Regarding the low wages earned by agency workers, Bamu propounds despite the stiff competition encountered by labour brokers to lower their service fees in an effort to outbid their competitors, it is most unlikely that labour brokers will be unable to pay their workers decent financial packages.[253] In extension, the full-time employees have security of employment which guaranteed by various labour regulations, whilst the agency workers do not enjoy the same entitlements. For instance, agency workers and labour brokers, too, are not afforded an opportunity to participate in negotiations

250 Hutchinson, W & Le Roux, P, and A.K. "Temporary employment services and the LRA: Labour Brokers, their clients and the dismissal of employees." Vol. 9(6), p52.
251 (ibid.: 88).
252 (ibid.:87).
253 (ibid.).

preceding the conclusion of the contract with the user enterprise as far as the assignment to be performed is concerned.[254]

2.3 DOES LABOUR LAW APPLY TO NON-STANDARD EMPLOYMENT RELATIONSHIPS?

Traditionally, labour law focuses on the unequal relationship between an employer and an employee with a view to countervail the inequality of bargaining power between the parties which is inherent in the employment relationship.[255] The introduction of labour regulations has been regarded as means to level the unequal bargaining power between the two parties to the employment relationship. In other words it is seen as a means to an end. In essence, mechanisms aimed at eliminating this power imbalance between the two parties should be implemented by setting up effective collective bargaining systems to amicably resolve issues regarding the workers' working conditions.[256] Job security facilitates an effective collective bargaining system. However where workers have to frequently change their workstations, necessitated by changing the user enterprise from time to time; unionism becomes superfluous due to the presence of labour mobility.[257] This is precisely the situation hampering the provision of an effective regulatory framework on agency workers as trade unions disregard the existence of agency workers as a contingent of workers capable of being organised for the purposes of collective bargaining. Hutchinson points out that most of the benefits

254 (ibid.).
255 (ibid.: 5).
256 (ibid.).
257 Hutchinson, W.J. (2007: 92).

and work rules union negotiated rewarded long-term employment and was thus consistent with the implicit lifetime employment commitment. He further explains that wages, vacations and sick leave policies in collective bargaining agreements are usually based on the length of service.[258]

The question raised in respect of triangular employment relationships is whether it does serve any meaningful purpose than to maintain essentially a fiction, namely that workers in this employment relationship were also entitled to employment rights like their counter-part, the full –time employees. In essence, it is actually the user enterprise which has total control and supervision of the workforce and wields the power to determine the employer's capacity to pay.[259]

Despite the recognition of the existence of an imbalance between parties to an employment contract, there is a legal presumption to the effect that parties to an employment contract have agreed to be bound to the terms and conditions thereof, which validates the requirement for consensus.[260] The question as to whether the worker (who might be illiterate) understood the meaning of the terms of the contract he or she has entered into is immaterial.

Given the fact employment relationships have undergone extensive changes over the years, so, too, should labour laws be transformed accordingly to meet current and future societal needs? Historically, labour laws were enacted to address the social evils created by certain production arrangements during that period. Each era has unique

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258 (ibid.: 162-163).

259 Theron. (2008: 14).

260 J, du Plessis, M Fouche & M van Wyk. (Eds). 2001. *A Practical Guide to Labour Law.* (5th Ed). LexisNexis Butterworths, p9.

forms of employment arrangements which can attract distinct forms of vulnerabilities to the society. The importance of taking into account the changing patterns in the labour market is of significance in determining whether or not to maintain the only contracts which were adopted from the industrial model. This is so considering that workers on the international plane are still in support of these forms of employment contract. Employment practices have always varied widely, and the industrial model has never been universal. Yet it was with reference to that model which caused western countries' labour law to be developed. To a large extent, the same holds true of international labour law as embodied in the standards of International Labour Organisation, in particular. The question, therefore, is to determine the extent to which the reference model underpinning the conceptualisation of employment relationship is currently shifting.[261]

Davies *et al* states correctly that the primary purpose of law is the regulation of social power which undoubtedly involves the harmonisation of conflicting expectations. In addition, the law has put in place rules to be followed in the harmonisation process of these conflicting expectations, which rules are backed up by sanctions to be imposed lest they be disobeyed.[262] Conflicting expectations in employment relationships emanate from the unequal economic power relations between the employer and the employee with the former controlling and supervising the latter. It is argued that labour law is currently undergoing a serious transitional process as its core concepts have

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261 (ibid.).

262 Davies, P. & M, Freedland, P.(Eds). 1983. *Kahn-Freund's Labour Law*. Lonon Stevens & Sons, p58.

ceased to effectively deal with the emerging employment relationships.[263] One dimensional effect of these tragic changes in employment relationships is the exposure of agency workers to unfair labour practices as evidenced by empirical studies on the topic. Due to the rapid expansion and increasing competition on the global market, employers have embarked on a shift from the traditional contract of employment, to a more flexible employment relationship which accommodates the fluctuating needs of the organisation. The market flexibility which employers will enjoy by these employment relationships relates to the methods of production, product design and product mixes.[264] Benjamin points out that the continued application of the *Smith* decision, has resulted in a situation in which the boundaries of labour laws are poorly defined, as a consequence an increased number of workers are denied the protection of labour law.[265] Labour laws often apply only to certain sectors of the economy or in defined cases, to what are interpreted judicially as an "industry" thus determining minimum levels of employment as necessary conditions for their applicability thereby excluding the vast majority of firms which operate on a small scale.[266] This in itself, coupled with definition of workers based on the functional or remunerative criteria, excludes workers doing menial jobs like domestic work, which results in limiting the scope of application of labour law.[267] In this respect, Benjamin argues that whenever courts are dealing with the interpretation of

263 (ibid.).

264 (ibid.).

265 Benjamin, P. (2004). *An Accident of History: Who Is (and Who Should Be) An Employee under the South African Labour Law*, p788. The case of *Smith v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) dealt with the issue whether an insurance agent was an employee or not for purposes of benefitting from the Workmen's Compensation Act 1941 after an injury, using the degree of 'supervision and control' of the employee. See also an earlier decision in *Colonial Mutual Life Assurance Society Ltd v MacDonald* 1931 AD 412 by De Villiers CJ in which the evolution of 'tests' to distinguish between the 'supervision and control' was postulated.

266 (ibid:).

267 (ibid.).

a statute where the term “employee” is involved, they should adopt the canons of purposive interpretation.[268]

2.3.1 The purpose of labour legislations

The purpose of labour legislations is not only to protect employees against unfair labour practice, but also to prevent the exploitation of workers.[269] This is particularly true with reference to unskilled workers who tend to be easily subjected to unfair treatment by their employers. If the regulatory framework on employment relationships fails to protect workers in both standard and non-standard employment relationships, then the continued application of the labour legislation becomes superfluous.[270] Some authors argue that it is important that labour law should not only pre-occupy itself with the protection of the rights and interest of workers, but also of those of employers.[271]

Collins further claims that the vertical integration of production has been replaced by small businesses linked to commercial contracts, which pose challenges to labour law.[272] Managers of large firms have exhibited a greater interest in disintegration by arranging aspects of production through subcontracting, franchising, concessions and outsourcing.[273] Legal regulations on employment relationship have hitherto matured alongside the growth in vertical integration of production. This coincidence explains, in

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268 Benjamin. (2004: 788).

269 Labour Act (No, 11 of 2007).

270 Creghton, B & Stewart, A. (Eds). 2005. *Labour law.* The Federation Press, p5.

271 Von Prondzynski, F. 2009. “Labour law as a business facilitator.”’ In H, Collins, P Davies and R Rideout. (Eds). *The Legal Regulation of the Employment Relation*.London: Kluwer House, pp100-111.

272 Collins, H. 1990. “Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws.” *Oxford Journal of Legal Studies.* Vol. 10, pp353-380.

273 (ibid.).

part, the limited scope of the legal protection of employees. If there are shortfalls in the existing labour legislation which manifest in the exclusion of certain categories of workers from its protection, surely such legal framework needs to be revised to cover all aspects of the employment relationship.[274] It is, thus, argued that the word "worker" be incorporated in the constitution in order to bring more workers within the protective net of labour laws. Such an approach will facilitate the reformation and development of a crisp legal framework which regulates all employment contracts.[275]

Le Roux argues that labour law is based on the concept of employment relationships which is hierarchic and that the contract of employment is conceived of primarily in terms of the "master-servant relationship" which is established between the worker and the person using his/her services.[276] In the context of industrial relations, it is illustrated by an enterprise which is conceptualised as a community in which workers of various trades are brought together around a common economic activity and under the management of a single employer.[277] Supiot defines the concept "enterprise" as one which involves the conglomeration or amalgamation of workers into a specialised enterprise engaging in mass production and based on a pyramidal organisation of work.[278] However, such work structure is inherently exploitative and antagonistic in character which results from the inequality in bargaining power between management

274 Le Roux, R. 2006. "The Worker: Towards Labour Law's new vocabulary." *The South African Law Journal*. Vol. 124, pp40-50.

275 (ibid.).

276 Le Roux. (2008: 14).

277 (ibid.).

278 See Supiot A. 1999. "The transformation of work and the future of labour law in Europe: A multidisciplinary perspective." *International Labour Review.* Vol. 138, p33.

and workers. Such inequality would help to mould a hostile environment in which workers will be at the receiving end.[279]

Supiot claims that if the latter is to maintain its fundamental functions of providing a basis for social cohesion and the continuation of carrying out this task, labour law should keep abreast of changes in the organisation of work in contemporary societies, adapting to market changes and must not remain narrowly focused on those forms of work organisations from which it originally derived and which are now on the decline.[280] Sankaran states clearly that the application of labour statutes has been confined to the workplace.[281] As a result, any work relation which falls on the "margin" of the employment category because it involves work at a distance from the workplace, has always posed a problem in terms of classification. In addition he observes that it might be correct to argue that the contract of employment is an "artificial" model imposed on a more complex "reality" of labour relations.[282]

According to Sankara, the historical development of the contract of employment reflects the context in which the mid-twentieth century compromise between labour and capital was struck and this was based on the assumption that the employing entity is a large, vertically integrated enterprise and characterised by a unified management. He further explains that the employing entity or the enterprise was complimented by an internal labour market which is based on bureaucratic control, for which the regulation of workplace relations through collective bargaining is well suited. Under such system,

279 Fredland, M. 2003. "The Personal Employment Contract". *Oxford University*. Vol. 138, p155.
280 Supiot. (1999: 35).
281 Sankaran. (2005:.205).
282 (ibid.).

male workers were the breadwinners with their female counter part confined to the margins of the economy.[283]

Antonio, whose work has been influenced by Max's ideology, the common law conception of an employment relationship puts the employee in a subordinate position to the employer who is "fictitiously" regarded as an employer's equal. Consequently, it would make little sense, if any at all, to assume that employees enjoy a levelled bargaining power with their employers.[284] Whether or not the employment relationship is categorised as standard or "atypical," the issue regarding the existence of inequality remains unchanged.

2.3.2 Does the definition of an "employee" include agency workers?

For decades, Courts in many common law jurisdictions sought a single definitive legal basis to identify the employment relationship. Following English Courts, the South African Courts regarded the employer's right of supervision and control over the employee as the defining element.[285] In the famous South African case of Smit *v Workmen's Compensation Commissioner*[286] which deals with the distinction between an employee and an independent contractor, the court was confronted with the question of whether an insurance agent in terms of the Workmen's Compensation Act of 1994, is an employee.

283 (Ibid.: 94).
284 (ibid.).
285 (ibid: 791).
286 1979 (1) SA 51 (A).

In this case, Smith had been injured whilst procuring policies. The Court a *quo* held that the right of the employer to supervise and control the employee is not the sole *indicium,* but merely one of the *indicia*. Smith appealed to the High Court and thereafter to the Appellate Division (AD), after which both Courts upheld the Commissioner's decision. The AD argued that the concept of employee is vague and indefinable[287] and that the respondent was not an employee for the purpose of the Labour Relations Act.[288] With reference to a contract of employment which comprises of more than one party, it was stated in this case that the court should not only look at the labels of such a contract, but it must have regard to realities of the relationship between the three parties.[289]

Courts have developed a number of tests to categorise the different employment relationships which one can argue that they have been applied somewhat inconsistently. This inconsistency is perhaps partly due to considerations of matters concerning public and economic policies reflected in Court decisions. In a Namibian case, the Court rejected the application by the applicant to be classified as an employee for purposes of allowing the applicant to benefits from State funds.[290] The applicant was appointed as an Acting Judge of the High Court and since he was a foreign national, he was provided with Free State accommodation, including his water and electricity bills. After a year as a judge, the government approached him to accept a permanent appointment. The Judge accepted on condition that he would continue to enjoy the same benefits. The respondent, being the government, raised a point *in limine*

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287 See *Denel (Pty) Ltd v Gerber* (2005) 26 *ILJ* 1256 (LAC).
288 Labour Relations Act 66 of 1995.
289 Sankaran. (2005: 205).
290 *Hanna v Government of Namibia*

contending that the applicant is not an employee within the definition of the Labour Act.[291]

In terms of the Namibian Constitution, Courts are independent[292] and Judges are performing their functions without control or supervision by the executive. Based on this reasoning, the applicant's request was not accepted because of the nature of work he is performing he could not be classified as an employee. The decision of the Court appears to be consistent with the common law notion that the subordination of the employee to the power of the employer is said to be the hallmark of the employment relationship.[293]

Under common law tests used to determine who an employee depend on depend on the nature of the employment relationship entered into by the parties. The task of distinguishing between an employee and an independent contractor has not been easy for the Courts. The latter tend to define words in terms of their ordinary meanings as the case in a *Dempsey* v H*ome Property.*[294] The definition provided in the legislation, as far as an employee is concerned, can be traced back to the common law position as reflected in various Court decision.[295]

Le Roux points out that a considerable measure of supervision and control tend to indicate a master and servant relationship which has been the benchmark in determining whether a conract of employment exist particularly during the 19th century

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291 Labour Act 6 of 1992.

292 See article 78(3) of the Constitution of Namibia of 1990.

293 Theron, J. 1995. "From workers to entrepreneurs: A tale of two enterprises." An occasional paper of the Labour Law Unit. University of Cape Town, p14.

294 (1995) ILJ 378 (LAC).

295 Section 213 of the Labour Relations Act 66 of 1995.

industrial relations structure.[296] However, the control test as applied in *Smitth*[297] has its own limitations and Courts have opted to adopt another test, namely the "organisational or integration" test.[298] This approach is aimed at determining whether an employee is someone who is part of the employer's business. It can be seen that the "dominant impression" test replaced the "control" and the "organizational" tests as it was applied in SA *Broadcasting Corporation v McKenzie,*[299] However, this test was also criticised on the grounds that it fails to address the legal nature of the contract of employment and gives no assistance in *border line cases* i.e. between employment and self-employment.[300] The uncertainty created by the "dominant impression" test was criticised in *Medical Association of SA & other v Minister of Heath & Another.*[301] This demonstrates the difficulties faced by the Courts in finding a definite solution to the problem. The factors identified in *Smith's* case to distinguish between an employee and an independent contractor, [302] which are the most important legal characteristics of the contract of service and the contract of employment, are very narrow which produces devastating consequences in the labour market.

Davidov argues that when one is repeatedly confronted with a difficult question such as who an employee is, it is worth pondering once in a while whether there is still a point in asking it.[303] It is important to examine whether the continued use of the distinction

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296 Le Roux, PAK *et al*. 2009 Essentil *Labour Law.* Labour Law Publicatios*. p. 4-5.*

297 *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A).

298 (ibid.: 791).

299 (1999) 20 ILJ 585 (LAC).

300 Benjamin. (2005: 792).

301 (1997) 18 ILJ 528 (LC) at 535D-E.

302 These factors can be summarised as follows: In a contract of service, the object is to render services and performed personally, employer choose when to make use of services of employee, lawful instructions must be obeyed and the contract may terminate on death of employee or expiry of period of contract. In a contract of work, it is the opposite.

303 Davidov (2006: 133-134).

between an employee and an independent contractor in law is justified, and whether the concept of an employee is still viable and if it can play a useful role. He points out that there could be many other reasons for distinguishing between an employee from an independent contractor. However, the main reason for the distinction between the two concepts purports to separate those who require protection under a specific employer. This refers to those employees who can and should take responsibility for their wellbeing, from those who can (presumably) take care of themselves in the market environment.[304]

The concept "employee" is utilised for the purpose of defining the group of workers which should be included within the scope of protective regulation. However, the line between an "employee" and an "independent contractor" is often difficult to determine which has culminated in the development of various definitions and tests to define the legal concepts."[305] Benjamin argues that confining the definition of an "employee" to full-time employees excludes workers who are referred to as "atypical."[306] In support of his argument, he submits that the current labour market has many forms of employment relationships which 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, usually described as non-standard or atypical. Referring to the vulnerability of these employees, he argues that most workers are particularly vulnerable to exploitation because they are unskilled or work in sectors with little, if any,

304 (ibid.).
305 (ibid.: 5).
306 (ibid.: 790).

coverage by trade unions for purposes of collective bargaining.[307] Le Roux doubts the relevance of the continued use of the employee/independent contractor distinction particularly that even the ability of the contract of employment itself to regulate employment relationship appears to be weakening.[308] However there is a claim that the modern contract of employment is an invention of the late nineteenth and early twentieth century which is associated with the rise of the integrated enterprises and the beginning of the welfare or social state.[309] It is argued that distinct conceptions of the employment relationship took shape in different systems, reflecting variations in economic conditions and in legal cultures which represent divergences of societies. It is in this context that the development of law should be viewed.

As a balancing measure against the powers of employers, it was found necessary that States enact social legislation which shaped the employment relationship coupled with related development of collective bargaining operating as the main social constraint on managerial discretion in labour relations.[310] Employment protection legislation and specific labour institutions played important functions of ensuring reasonable protection of workers and occupational groups such as professionals and managerial workers. This, to a large extent, has contributed to the stabilisation of the employment relationship in the labour market. Employers, being the investors, have dominant interest in maximising the return on their investment such that they exercise "control" over semployees. The control is built within the relationship between an employer and

307 (ibid.). These concepts have been associated with precarious work which is characterised by job insecurity on the part of the workers. Casual workers for example, are usually engaged in short – term jobs, income insecurity, unpredictable wages or very low wages.

308 See Brasely, M. 1990. "The Nature of Employment." *ILJ.* Vol. 11, p896.

309 Deakins. (2006: 98).

310 (ibid.: 791).

an employee. It, thus, empowers and legitimises employers to manage the operations of the enterprise as they deem appropriate.[311]

The interest of employers requires a capacity to maintain continuity of production or to contract the workforce, depending on the operational needs of the enterprise. This also entails the capacity to increase production as market forces require and to limit production if necessary. The achievement of the goals of the enterprise depends on a number of factors of which control of the workforce is one which reinforces the argument at hand that the relationship is inherently one of subordination.[312] The nature of the relationship suggests that employers have the right to issue orders and determine how and when the work is to be done.

The employee/independent contractor distinction does not concern the different treatment of those employed and those who are self-employed, but rather focuses on those excluded from the inquiry altogether. Such exclusion seems to confirm the assumption that independent contractors are those workers who can (broadly speaking) take care of themselves.[313] This assumption is not entirely correct. Most workers who are classified as independent contractors depend on the support received from companies which benefit from the services they provide.[314] In reality, employers provide tools and equipments as well as protective clothing for health and safety.[315] A good example is in the charcoal industry where employers provide tools, protective clothing

311 (ibid.).
312 (ibid.: 11).
313 See *SA Master Dental Technicians' Association v Dental Association of SA* 1970 (3) SA 733 (A). In this case found that dental mechanics operated as independent contractors and therefore did not fall under the LRA.
314 (ibid.).
315 (ibid.: 619).

and accommodation. The categorisation concerning who is and who should be an employee has been labelled as "an accident of history."[316]

2.4 Globalisation and its influence on modern work arrangements

A range of developments, often grouped under the rubric "globalisation," have resulted in the intensification of international economic integration which to a large extent has influenced the nature and charcter of contemporary work arrangemnets. Stone argues that trade liberalisation enormously increases international currency transaction, and the dominance of multi-national enterprises (MNEs) has influenced the world of work.[317] These changes could be attributed to technological innovations which led to the creation of employment opportunities which did not exist before, and are consistent with the manner in which work is being done nowadays.[318] Similar sentiments have been echoed by Klerk saying that "success in global economy demands greater market flexibility", meaning that interference by the state should be minimal in regulating employment relationship and that employers should be permitted to deploy their workers according to the needs of the business.[319]

According to Stone, under the new model of working arrangement, employers prefer short term employment relationship departing from the traditional long term employment relationship between the worker and a single employer.[320] He points out that the

316 Benjamin. (2006: 787).
317 Klarke. (2006: 159).
318 Stone. (2006: 159).
319 Klerk, G. 2003. "Labour Market Regulation and the Casualisation of Employment in Namibia." *South African Journal of Labour Relations*, p.64.
320 Stone. (2006: 154-155).

workplace is changing to such an extent that employment laws should change as well because the changing nature of work not only creates new opportunities for workers, but also new types of vulnerabilities.[321]

Benjamin criticized the concept of globalisation arguing that the latter has been the main cause of diminishing the relevance of the contract of employment. He claims that factors such as globalisation, deregulation and technological changes have combined greatly to increase the variety of forms of employment.[322] As a result, many employers have adopted strategies to disguise employment. Furthermore, he points out that it is possible that the idea of a unitary category for all wage-dependent workers, embodied in the contract of employment, was false, even from the outset. Thus, the development of the debate about labour market flexibility, coupled with the emergence of "post-industrial" forms of employment, has certainly undermined its relevance from the late 1970s onwards.[323]

Endresen admits that globalisation has played an important role in the process of transformation of the market which led to the growth of various forms of employment and thus the growth of labour broking has been attributed to the global trend towards labour market flexibility.[324] This view has been supported by Standing, who states that from the 1970s onwards, a factor undermining the era of statutory regulation was the changing international division of labour, or what was in the late 1990s to be called

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321 Stone, G & Katherine V.W. 2006. "Legal Protections of Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers." *Berkeley Journal of Employment and Labour Law.* Vol. 27 (2), pp2-3.

322 Benjamin, P. 2005. "Who Needs Labour Law? Defining the Scope of Labour Protection." In Joanne Conaghan *et al*. *Labour Law in an Era of Globalization: Transformative Practices and Possibilities.* Oxford University Press, p76.

323 (ibid.).

324 Endresen, S. 2000. *Labour hire in Namibia: new flexibility or new form of slavery?* Windhoek, p8.

"globalisation."[325] According to Standing the process began with the increasing open nature of industrialised economies, with the rising contribution of exports to industrial growth.[326] Thompson puts it differently, saying that the future of work is carried out in the shadow of that larger social and economic phenomenon known as globalisation. The shape of work has, of course, always been changing but things are a little different now. The sheer volume and mobility of financial capital, the relative mobility of labour and enabling capacities of information technology mean that forces of change are driving convergent outcomes across the globe.[327]

Fredman points out that "in the current era of globalisation, information technology and the knowledge economy, flexibility is said to achieve the highest levels of efficiency." [328] The significance of flexibility in modern labour market has been praised for being associated with efficiency. For this reason employers have an opportunity to utilise workers on a trial basis as potential applicants for permanent internal jobs.[329] Such an opportunity allows a user firm to shift less important responsibilities to someone else by way of outsourcing certain functions. This gives employers sufficient time to concentrate on core functions of the enterprise.[330] The costs of imposing on employers to employ casual workers on a permanent basis are likely to be high and therefore bound to be

325 Standing, G. 1999. "Global Labour Flexibility: Seeking Distributive Justice." *International Labour Organisation*, p2-63.
326 (ibid.).
327 Thompson, C. 2003. "The Changing Nature of Employment." *Industrial Law Journal.* Vol. 24. Australia 1793.
328 Fredman. (2006: 303-304).
329 (ibid:. 304).
330 (ibid.).

resisted.[331] This means that employers will think twice before employing any person, no matter how short such employment period might be.[332]

Concerning the issue of employment opportunities, Standing observes that most employers are keen to offer job opportunities to job seekers who have good record of work ethics. He claims that since the early 1970s, there have been global growths in employment or "numerical" flexibility whereby firms have tried to become more "competitive." These firms have always wanted to be able to alter employment with minimum constraints quickly and with little costs. Employment flexibility reflects the ability of firms to hire and dismiss workers easily and at low costs.[333] Collins argues that labour flexibility has been identified as one of the reasons agency workers were preferred, particularly in the wake of financial crisis employers use restructuring and outsourcing strategies to replace regularly employed workers with precariously employed ones.[334] This obviously meant that the conventional method of production has been substituted by small business which was connected to commercial contracts.[335]

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331 Dudy, J. 2012. "Labour hire debates rages on." *The Namibian*, p3.

332 Fredman. (2006: 303-304).

333 Standing, G. 1999. "Global Labour Flexibility: Seeking Distributive Justice." *International Labour Organisation*. Palgrave Macmillan, p101.

334 Benjamin, P. 2012. "To regulate or to ban? Controversies over temporary employment agencies in South Africa and Namibia." In Malherbe, K & Sloth-Nielsen, J. *Labour Law into the Future: Essays in honour of D' Arcy du Toit.* Juta & Co Ltd, p194. See also Douglas J. 2006. "Employer Perspective: Competing through a Flexible Workforce." In Gleason, S.E. *The Shadow Workforce: Perspectives on Contingent Work in the United States, Japan, and Europe*: *W.E Upjohn Institute for Employment Research Kalamazoo*. Michigan, p5.

335 Collins, H. 1990. "Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws." *Oxford Journal of Legal Studies.* Vol 10, p354.

2.4.1 Is labour flexibility the solution to modern work demand?

Burgess *et al* argue that labour flexibility is hailed as the solution for achieving greater organisational competiveness, efficiency and effectiveness hence employers search for a workforce which can respond quickly and easily to change.[336] Meulders points out that temporary agency work activities have become internationalised and has expanded across many sectors of the economy.[337] This has increased for the demand of agency workers and for the industry which, to date, has been innovative and adaptive to the needs of job seekers and employing organisations.[338] Since the early 1970s, there have been growths in employment or "numerical" flexibility whereby firms have tried to become more "competitive." These firms have always wanted to be able to alter employment with minimum constraints, quickly with the ability to hire and fire workers easily and at a low cost.[339] Fredman has associated the concept of flexibility with globalisation saying that "in the current era of globalisation, information technology and the knowledge economy, flexibility is said to achieve the highest levels of efficiency."[340] However, Supiot warns that sight should not be lost of the need not to replace the existing forms of employment or the old one during the process of introducing new type of employment relationships in the labour market. According to him the emergence of new forms of employment does not necessarily mean that the old forms have

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336 Burgess, J & Connell, J. 2004. *International Perspectives on Temporary Agency Work'* Routledge, p5.

337 See Meulders, D &Tytgat, B. 1989. "The emergence of atypical employment in the European Community." In Gerry, H & Rodgers, J. *Precarious Jobs in Labour Market Regulation: The growth of atypical employment in Western Europe,* International Labour Organisation: International Institute for Labour Studies, p196.

338 (ibid:.197).

339 (ibid.).

340 Fredman. (2006: 303-304).

disappeared. Similarly, the advent of widespread unemployment does not mean 'the end of work' for the society as a whole."[341]

It appears that there is no doubt that global competition has intensified as a result, employers prefer to employ workers on temporay basis. The reason being that such workforce can be decreased or redeployed quickly as market opportunities shifted.[342] It is this shift in the labour market which calls for the re-adjustment, or redefining of labour laws in order to respond to the ever changing global competition. It is important to take note that the legitimacy or appropriateness of a particular legislation is measured with reference to economic efficiency.[343]

There is a belief that deregulation or greater labour market flexibility is an inevitable response which is required in countries at all levels of development. This view is held, not only by policy makers in many parts of the world, but also by some economists. The mainstream view is that labour market rigidity is bad, both for economic growth and also for job creation. [344] At the other end of the spectrum are precarious or vulnerable workers who are associated with the informal economy and subcontracted labour.[345] Cook *et al* argue that employers have an opportunity to utilise workers on trial basis as potential applicants for permanent internal jobs.[346] Such an opportunity allows a user firm to shift less important responsibilities to someone else by way of outsourcing certain functions. This gives employers sufficient time to concentrate on core functions

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341 (ibid.).
342 Stone. (2006: 159).
343 (ibid.).
344 Lee, E. 1998. "Labour Market Regulation and Economic Growth." A paper presented at the eleventh Annual Labour Law Conference. Switzerland, p1.
345 (ibid:2.).
346 (ibid.).

of the enterprise.[347] The costs of imposing on employers to employ casual workers on permanent basis are likely to be high and therefore bound to be resisted.[348] This means that employers will think twice before employing any person, no matter how short such employment period might be.[349] In practice, most employers are keen to offer job opportunities to job seekers who have a good record of work ethics.

Langile argues that different employment relationships in which power is redistributed have different implications and call for equally different legal responses.[350] Expressing the same sentiment Supiot warns that today's economic and social situation cannot be narrowed down to the emergence of a single model of employment relationship.[351] This is the case because a large number of individuals performing remunerative work were not eemployed on full-time basis and therefore excluded from employment regulatory protection. Such exclusion can also be attacked in respect of many women who perform unpaid work at home.[352] This seems to suggest that the scope of labour law need to revisited with a view to broaden it to include vulnerable workers who depend on a single user of their labour.[353] The underlying objective is to prevent a rift from opening between workers enjoying extensive protection under a contract of employment, on the one hand, and those working under some other type of contract on account of which they enjoy less protection, on the other.[354]

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347 (ibid.).

348 Dudy. 2012: 4).

349 Stone. (2006: 159).

350 Langille, B. 2006. "Labour Law's Back pages." In G, Davidov & B, Langille (Eds.) Boundaries *and Frontiers of Labour Law*. Vol. 14(34), pp 25-26.

351 (ibid.).

352 Davidov, G. 2005. "Who is the worker?" *ILJ.* Vol. 34. United Kingdom, p133.

353 (ibid.: 62).

354 *Denel* case *supra*.. In this case Labour Court was clearly an independent contracting arrangement. The Court, holding that the respondent was an employee for the purpose of the

Thompson points out that "the shape of work has, of course, been changing, but things are a little different now."[355] He explains that the sheer volume and mobility of financial capital, the transferability of intellectual capital and the relative immobility of labour means that the forces of change are driving convergent outcomes across the globe.[356] In addition, he argues that many people work more intensively at odd hours. Such work is performed under arrangements which are more tenuous and varied through telecommuting and in a host of other ways. He further claims that state intervention could alleviate the problem, but not solving it entirely unless the central issue is addressed.[357] This refers to the establishment of an occupational status suited to the newly emerging models of employment relationships. Under the new occupational status, continuity of lifelong trajectory, rather than the stability of particular jobs, must be protected. This means that workers should be protected during very crucial transitional periods as between re-employment opportunities, between training and employment, between unemployment and training as well as between school and work.[358]

The problem of casualisation of labour has attracted some scholars to examine the cause of such development. For example, Benjamin argues that labour market have been marked by the related phenomenon of casualisation and externalization which entails a process whereby employment relations are designed to deprive workers, particularly vulnerable workers, of their basic statutory rights as employees. To be more specific, these are mechanisms whereby employers make use of employees of

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LRA. This approach defied the traditional method that the relationship between the parties must be discerning from the contract concluded between the parties.

355 Thompson. (2003: 1793).

356 (ibid:.1792).

357 (ibid:.1791).

358 (ibid.).

employment agencies and sub-contractors to perform work formerly performed by employees of the employer. These trends have rendered a proportion of workers not to fall outside the protection of labour law which includes casual workers, agency workers and the nominally independent persons who are in a relationship of economic dependence, often referred to as dependent contractors.[359]

According to Benjamin , there is a growing number of workers who cannot, by definition, be called employees or who cannot effectively invoke the labour legislation to protects their rights and they cannot also be called independent contractors because they are not in any real sense independent.'[360] However the good news is that the changes in the nature of work have, to a certain extent, created conducive environments for engaging in full time employment, particularly employable women who were able to reconcile family responsibilities with their professional careers.[361] According to Deankin, changes in the global economy have been associated with growing female participation in paid employment since the 1970's marked the beginning of the erosion of the male being the breadwinner.[362] Such changes also caused the fragmentation of family structures, however, at the same time employment land social security laws extended equal treatment between the two sexes.[363]

Le Roux raises a concern regarding power imbalance between employers and employees saying that since labour and employment laws are believed to recognise the

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359 Le Roux, R. 2009. "The World of Work: Forms of Engagement in South Africa." *Institute of Development & Labour Law: Development and Labour Law Monographs Series.* Vol. 2. University of Cape Town, p23.

360 (ibid.: 791).

361 (ibid:.792).

362 (ibid.).

363 (ibid.: 106).

universal assumption that an employment relationship is an inequal relationship in terms of bargaining power; there is a need to design special legal institutions to deal with power imbalance between the parties to the employment contract.[364] However, she points out that forms and degrees of intervention in the regulation of the employment relationship are not free from controversy.[365] Similar sentiment has been echoed by Le who Roux points out that a number of difficulties associated with labour law points to its inability to protect workers finding themselves outside the scope of its protection which in her opinion has been caused by changes in the empirical reality of the world of work.[366]

Garth *et al* explains that the new forms of work relations have emerged in response to the escalating rates in unemployment and poverty. In this connection they suggest that the state could use law as a tool to solve social injustices and that the focus should not be placed on the shortcomings of the employment law but how such law can be used to address social injustices.[367]

364 (ibid.).

365 Hyde. (2006: 47).

366 (ibid:).

367 The injustices referred to stem from the fact that Africa is known to be a continent endowed with abundant natural resources yet it is experiencing severe poverty amongst its inhabitants partly due to the fact that the continent's natural resources have been used to develop Europe. See Garth, B.G. & Sarat, A. 1998*. Justice and Power in Sociolegal Studies*. North Western University Press, pp4-5.

2.5 Conclusion

This chapter has provided an exposition of how the employment relationship underwent a transitional period which ended during the industrial revolution in Europe. Although the standard employment relationship became the key yardstick against which all other forms of employment arrangements could be measured, the emergence of various other forms of employment relationships followed suit. With much more precision, the labour broking industry emerged alongside the standard employment relationship which continues to present some challenges under the current labour regulatory framework. This chapter has, additionally, highlighted on the purpose of labour legislation and its failure to effectively dispense with contemporary forms of employment relationships, which failure has been intrinsically linked to globalisation. It is an undeniable fact that globalisation played a pivotal role during this transitional period which ultimately led to the emergence of other forms of employment relationships. It was also shown that the 1970s and the years ahead saw an era of statutory regulations owing to the effects of globalisation. As a result, international trade hit unprecedented high trends due to the reduction in trade barriers, communication and transport costs. In the same vein, it was also discovered that the sheer volume and mobility of financial capital, the relative mobility of labour and enabling capacities of especially, information technology, meant that forces of change are driving convergent outcomes across the globe.

Moreover, a global growth in employment or “numerical” flexibility has exerted tremendous pressure on firms to become more “competitive.” To this end, globalisation and the era of information technology were the driving forces behind market efficiency

which, in turn, led to the much needed market flexibility. In response to the intense competition, firms resorted to various adjustment mechanisms in accordance with market forces i.e. supply and demand.[368] It is, thus, these changing trends in the labour market which now call for a re-adjustment of existing labour legislation to provide an effective and decisive response to the globalised crisis. Another aspect which has been dealt with at length in this chapter is the widely accepted notion calling for the deregulation, or at least greater market flexibility, as an imminent response to national development. The widely accepted view is that labour market rigidity hampers economic growth, with agency workers at the receiving end. Lastly, this chapter brought to the fore a closer examination on the significance of employment law as far as it is concerned with easing the high incidence of unemployment and poverty.

[368] Stone. (2006: 159).

CHAPTER 3: LABOUR BROKING IN NAMIBIA AND ITS PERCEIVED FORERUNNER

3.1 INTRODUCTION

Chapter Two sets out the preliminary observations of this thesis and demonstrated that the existence of employment relationships is a pre-requisite for workers to benefit from the protection of the labour law. In addition, it discussed at length the different work arrangements and how labour can be used and controlled. Furthermore, Chapter Two examined the development of the standard employment relationship and its link to the period of Fordism during which labour regulations became resilient in the industrialised nations. Moreover, it touched on the emergence of non-standard forms of work which has been characterised by externalisation and casualisation of employment. In addition, it highlighted the changing nature of modern work arrangements which has been attributed to globalisation.

This chapter provides a detailed analysis of why the contract labour system introduced during the Germany and Apartheid colonial rule in Namibia has been perceived as the forerunner of modern labour broking. However, it is important to note that the two are not identical but both entail the supply of labour to third parties. The chapter moves on to investigate whether adequate labour protection has been extended to workers supplied by labour brokers and whether the latter's rights to carry on trade or business

is adequately protected.[369] It also provides an analytical discussion of the ruling of the High and the Supreme Courts in Africa Personnel Services, a dominant labour broking firm which has been aggrieved by the decision of the Namibian Governmnet to ban labour broking albeit in a disguised form. In order to have an informed understanding of the subject under scrutiny it is imperative to take a glance into the relevance of Namibia's colonial history.[370]

3.1.1 Germany's occupation of Namibia

Namibia became a German colony in 1884 which marked the beginning of the political conflict between the colonial authorities and the "natives" which saw the former forcefully removing the Herero and Nama speaking Namibians from their land and took away their cattle.[371] After their land was taken, many Namibians were forced to live in "reserves" from where they were recruited to provide cheap labour needed for the industries owned by the colonial authorities.[372]

During Germany's colonial rule over the then South West Africa, Namibians were subjected to cruel and inhumane treatment which led to the war between the Germany military forces and the local people; however, due to the lack of modern weapons the latter were defeated.[373] After the defeat of Germany by the allied forces Namibia was administered by the Union of South Africa under the supervision of the League of

369 Article 21 (1) (j) of the Namibian Constitution of 1990.

370 Nujoma, S. 2001. *Where Others Wavered: The Autobiography of Sam Nujoma*. Panaf, pp25 -50.

371 Katjavivi, P.H. 1986. "The Rise of Nationalism in Namibia and its International Dimension." A *Thesis submitted for the degree of Doctor of Philosophy*. University of Oxford, pp30-41.

372 (ibid:).

373 The conflict led to the killing of around 80 000 of the Herero speaking communities which made up of 80% of the group's population [grammatical construction incorrect. See Katjavivi. (1986: 39).

Nations.[374] With the opening of the diamond mines in the south and south west of the then South West Africa, the need for new labour increased. As a result, workers were brought from the northern part of the country through the notorious contract labour system to work on the mines and commercial farms owned by White settlers on fixed-term contracts.[375] These workers were recruited to provide cheap labour hence they were paid very low wages despite the fact they were subjected to poor working conditions.[376] Udogu argues that when an alien and dominant force is brought into the political and economic mix, the competitive clash for power and resources among the inhabitants domiciled in the territory could be extra ordinarily flammable.[377] The encounter between the Germany forces on one side with the Herero and Nama on the other confirms Udogu's assertion that the alien, in their quest to exercise its total political and economic dominance over the inhabitants of the colonised territory triggered the war over the resources and power hence the war waged by Germany against the Herero and Nama ethnic groups.[378]

Cooper explains that the starting point was the year 1908 when a shiny rock was spotted along a railway line in southern Namibia. This set in motion a chain of events

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374 In 1915, Germany South-West Africa was invaded by the Western Allies in the shape of South Africa and British forces. After the war, the administration of the terriitory was taken over by the Union of South Africa (part of the British Empire) and was administered as South –West Africa under a League of Nations mandate. Thereafter the Union of South Africa introduced apartheid policies and discrinatory laws. See Nujoma, S. 2001. *Where Others Wavered: The Autobiography of Sam Nujoma*. Panaf, pp 25 -50.

375 Tsumeb copper mine was opened in 1906, whilst the diamond mine was opened in 1906.

376 Hishongwa, A. *The contract Labour System and Its Effects on Family and Social Life in Namibia: A Historical Perspective*. Gamsberg Macmillan, p49.

377 Udogu, E.I. 2012. *Liberating Namibia: The long diplomatic Struggle Between the United Nations and South Africa*. McFarland & Company, Inc., Publishers. pp17 -20

378 Udogu, E.I. 2012. *Liberating Namibia: The long diplomatic Struggle Between the United Nations and South Africa*. McFarland & Company, Inc., Publishers. pp17 -20.

that had profound implications for the territory.[379] The rock was quickly recognised as a diamond, and for the first time Germany colonial authorities had reason to believe that their South West African colony had great economic potential. European explorers, who settled in Namibia or elsewhere in Africa, were in search of wealth in the form of land, capital and business opportunities. As remarked by Veblem who states that ownership implies wealth and wealth confers status.[380] The object of both ownership and business is money, and so everything is considered in light of its pecuniary benefits.[381]

European penetration into Namibia was pioneered by a Swedish explorer, Charles Anderson, who travelled in 1856 through the central and northern parts of the territory and coined the name by which the territory first became known, 'South West Africa'. Unlike other European settlers, Anderson was optimistic that more precious minerals would be found if he stayed on and eventually amassed great wealth.[382] However, the largest prize went to the perseverant and strong-minded F.A. Luderitz, a Bremen merchant who was granted a huge trading concession on the east coast in 1883. He subsequently purchased 3,200 square miles of the territory for approximately $3,000 and also assumed ownership of the whole tract of land from the Orange river to latitude 26 degrees south extending 20 miles inland.[383] From there on, there was little wonder,

379 This wasa discovery of a diamond in Namibia which market the beginning of the emergence of the contract labour system whereby workers were recruited by an agent or agency from the so-called homelands to work in the mines in the south of the country. This system was the same in South Africa, but in a more large scale, in the sense that, recruitment was not only confined within the borders of South Africa but also beyond. See Cooper (1999:13-20)

380 Veblem, T. 2011. "The Instinct of Workmanship." In Ritzer, G. & Stephnisky, J. *Major Theorists: Classical Social Theorists.* Vol. 1. Wiley –Blackwell (2011) at 195.

381 (ibid.).

382 Udogu. (2012: 17-20).

383 (ibid.).

then, that an increasing number of Europeans came seeking their fortune in the area of Namibia, part of which came to be known as the diamond coasts, since diamonds were so abundant that they were often found loose in the sand.[384]

3.1.2 Namibia under South Africa's colonial rule: The introduction of the of apartheid policies to Namibia

At the end of the First World War, Namibia was defined by the newly formed League of Nations as a "C" class mandated territory, to be administered by South Africa on Britain's behalf after Germany was defeated by the allied forces.[385] In fact it was in 1915 when the South African forces took control of the Capital, Windheok and thereafter extended its own repressive apartheid policies to Namibia, part of which was the creation of "Bantustans" and "homelands."[386] In terms of the then apartheid policies ethnic groups in Namibia were classified based on their race and colour which gave birth to acute polarisation and division amongst the country's population particularly between the Black people and the White community. Such catergorisation of people left a trail of destruction which has negatively affected the Namibian society many ways.[387] Katjavivi argues that the segregation of people ensured cheap labour power for the White-dominated economy which often forced male Namibians to migrate to the so

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384 Katjavivi. (1986: 39).

385 The League of Nation was formed soon after the war ended in Europe. The Allied Powers Convened the Peace Conference which was held in Paris in 1919. The class "C" mandate referred to countries with sparse in population, remote from 'centres of civilization', and were allowed to be governed as 'integral parts' of the country which was the mandatory power, subject to safeguards protecting the interests of the indigenous population. See Nujoma (n 2) at 57-85.

386 Nujoma (2000:55).

387 For example, majority of the Black population lives in poverty after their land and cattle wre disposed by the colonial administration some years back. See Katjavivi. (1986: 25 -42).

called “white areas” in search for jobs.[388] According to Hishongwa, racial discrimination has always played an integral part in the strategy of political and economic domination in Namibia. Hishongwa argues that the colonial administration used the ideology of discrimination as justification of denying the Black population their birth right to own land and have access to the natural resources.[389]

By 1924, South African administrators had established an extensive contract labour system which channelled thousands of Ovambo speaking males[390] from the northern part of the country to work on the mines owned by multi-national companies of which the Consolidated Diamond Mines (CDM) has been the dominant diamond mining firm which operated in the southern border of Namibia.[391] The contract labour system which has been perceived as forrunner of the modern labour broking started with the formation of two large recruiting agencies in 1926, namely the Southern Labour Organisation (SLO) and the Northern Labour Organisation (NLO) which recruited Black workers who were mostly made up of Ovambo speaking individuals mainly to work on the farms, industries, mines and households owned by White settlers.[392] Later, the two agencies merged and formed the South West Africa Native Labour Agency (SWANLA) Ltd.[393] Nujoma argues that through the contract labour system workers were treated like slaves without any rights and were considered as less than human beings, but mere objects that could be thrown away when unfit for work. These workers were not allowed to visit

388 Katjavivi (1986: 23).

389 See Hishingwa (n 17) at 12-40.

390 Ovambos’ is a term used in reference to one of the eleven ethnic groups in Namibia. See Hishingwa (n 17) at 12-40.

391 Cooper, D. 1999. “The Institutionalisation of Contract Labour in Namibia.” *Journal of Southern African Studie.* Vol. 25 (1), pp121-138.

392 (ibid:. 122).

393 (ibid:. 123).

their families and were accommodated in tiny rooms in large groups and were provided with unhealthy food.[394]

Hishongwa explains that under the contract labour system, workers were recruited by an agent or agency and were required to enter into fixed-term contracts and this was necessary to control the movement of the workers to ensure that after the expiry of the contract, the latter would return to their homelands.[395] Hishongwa states that the other purpose of the contract labour system was to regulate the movement of the workers by restricting their freedom of changing places of residence and that it was furthermore used as a means of social control to ensure that Black people do not enter the white' residential areas.[396] According to her such system was used as a cost-effective way of exploiting the cheap labour force needed for capitalist industries.[397] Notwithstanding its obnoxious nature, the contract labour system was the only method through which Black people could be employed to earn a living.[398] Kalula argues that the contract labour system has a long history in southern Africa and its emergence has been associated with the mining industry, where contract labour systems and recruitment agencies have long operated to regulate the flow of labour.[399]

A contract worker was required to complete his work after 12 calendar months or more, as a consequence, workers had to be absent from their families which sometimes caused family breakups. The long absence from the family meant that such male contractor became a stranger to his wife and children and surely was not able to

394 Nujoma. (2001: 55-56).
395 Hishongwa, (1992:51).
396 (ibid.:54).
397 Hishongwa. (1992: 52).
398 Cooper, (1999:140).
399 Kalula & Fewick. (2004: 10).

support his wife emotionally and financially, particularly when the wife became pregnant.[400]

Moreover, families of the contract workers were affected by the long absence of their husbands due to the fact that White employers did not allow the workers to be accompanied by their families and some men went to work for years despite the fact that they were married. Married women were left behind taking care of the children alone and on return; they would be shocked to find out that their wives had eloped.[401] The meagre wages paid to the contract workers was a deliberate measure of implementing racial discrimination at workplaces. Workers recruited under the contract labour system were not allowed to go on leave during the subsistence of the employment contract.[402] This arrangement forced male Black Namibians to be separated from their families for a year or more. After one year's work, the contract of employment came to an end and the worker had to return to his place of origin. Like any other non-standard employment, workers under the contract labour system did not have job security or social security benefits and they were paid low wages.[403]

In the rural north of the country, the role of the husband during his wife's pregnancy diminished as a direct result of the contract labour system, and there were now many women who went through pregnancy period without their husbands' physical and emotional support.[404] An Ovambo speaking family is often large, typically with six to ten children and in most families, children of relatives also live in the family house, either

400 Hishongwa, (1992:88).
401 Hishongwa. (1992: 58).
402 *African Personnel Services* supra note 2 para. 607A-B.
403 See the *Natives Minimum Wage Proclamation*, 1944 (Proclamation 1 of 1944).
404 (ibid.: 90).

permanently or from time to time. Traditionally, the head of the family, who happen to be a man, his responsibility was extended to everyone who lived in his house.[405] However such traditional practice was difficult to sustain in that contract workers were underpaid and therefore were not able to adequately support those for whom they were responsible.[406]

3.1.3 Inhumane treatment of contract workers

One of the inhumane natures of the contract labour system was the way in which potential workers were medically tested to find out whether they were fit for the job. What happened was that these men were to undergo certain procedures meant to test their health and physical fitness.[407] In this respect, a health testing system was invented by the employers and recruitment and placement agencies whereby potential workers were grouped in different classes depending on their health status so that men were instructed to undress and remain naked to allow the medical team examine their private organs.[408] Such practices attracted severe condemnation by the workers because it violated their right to dignity.[409] In addition, the movements of Africans were regulated in such a way that Black workers were not allowed to leave certain areas without an official permit.[410] This meant that if an African intended to travel out of the "police zone"

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405 (ibid.:92).

406 (ibid.93).

407 *African Personnel Services (Pty) Ltd v Government of the Republic of Namibia and Others SA 51/2008 2009* NASC (14 December 2009*),* para.. 606 F-G.

408 (ibid.).

409 (ibid.).

410 These areas were referred as the "police zone" which comprised of the Owambo, Kavango, Caprivi and Kaokoveld reserves in the north of the then South West Africa. See Katjavivi. (1986: 120- 150).

s/he could only do so after registering with the authority to secure an official permit to work in proclaimed areas.[411]

Another problem experienced by the Black workers was the lack of job security. Like today's labour broking practice, any person recruited through the contract labour system was only allowed to work as casual worker. However, in the the context of the latter workers were subjected to severe inhumane treatment, for example a metal badge had to be permanently displayed on their person at all times showing their individual registration numbers and the name of the area to which the recruits were limited to work.[412]

Nujoma points out that Black people in Namibia were moved to the so called "native reserves" from where they were recruited and where resouces were scarce and this was after their land was taken away by the colonial authorities and consequently forced to look for work on White owned farms and mines.[413] The Union of South African government continued the land allocation to White individuals which was initiated by the German colonial administration wherby the land allocation scheme became more extensive, an outright give away scheme which dumped illiterate poor White Afrikaners in Namibia.[414] The former were supported by the then colonial government with cash loans, supplies of boreholes and seeds, and schools were built for their children.[415] Beck argues that the allocation of land continued even after World War II, whereby

411 A proclaimed area was an area where white people were residing which virtually included all the major towns and cities in Namibia to the south of the police zone.

412 This practice was regarded as inhumane and degrading because of long queues up for the identity disk and the manner in which the authorities conducted health inspection of the recruits.

413 Nujoma. (2001: 6-7).

414 (ibid.:9-10).

415 (ibid.: 6).

returning soldiers from war were rewarded with yet more free land. By the mid-1950s, all the usable farmland of Namibia was largely in the hands of the White Afrikaners.[416] The introduction of the "homelands" system followed to ensure that Apartheid policies were implemented in Namibia which fuelled tensions between the local population and the colonial authorities.[417]

It is important to know that the occupational structure of most employment in Namibia during the colonial era was sharply divided between, on the one hand, majorities of unskilled, mainly manual, Black workers and, on the other, Whites occupying clerical, technical, supervisory and managerial positions.[418] Van Rooyen states that workers recruited through the contract system were not allowed to form or join trade unions and therefore could not participate in lawful industrial actions.[419] Heeding to the pressure from the workers, the colonial government of South Africa decided to amend the Labour Relations Act authorising the formation of trade unions.[420] The effect of the amendment was that workers could form trade unions but with limited rights which were sanctioned by the authorities, as consequence industrial unrest continued unabated.[421]

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416 Beck, R.B. 2000. *The History of South Africa*. Greenwood Press, p124.

417 Apartheid in Afrikaans means "apart-ness" or "separateness". It refers to the system of racial discrimination and white political domination adopted by the National Party while it was in power from 1948 to 1994. Apartheid officials legislated the quality and nature of life for every White, African, Coloured, and Indian South Africa from cradle to grave. See Beck, R.B. 2000. *The History of South Africa*. Greenwood Press, p125.

418 Department of Information and Publicity. 1981. *SWAPO of Namibia 'To be Born a Nation: The Liberation Struggle for Namibia.* Zed Press, pp66-67.

419 Van Rooyen, J. 1996. *Portfolio of partnership an analysis of labour relations in a transitional society in Namibia.* Windhoek: Gamsberg Macmillan Publishers, pp233-236.

420 This refers to the Labour Relations Amendment Act of 1956.

421 Du Pisani, A. 1986. The Politics of Continuity and Change. Jonathan Ball Publishers. p.76.

The contract labour system which operated in Namibia was an extension of the one introduced in South Africa by the then Apartheid regime.[422] Although the purpose of recruiting workers through the contract labour system was intended to supply cheap labour to the mines in both Namibia and South Africa, in the latter it was more intensive due to the magnitude of the mining sector in that country which needed extensive labour force and as a result, migrant workers were attracted from most of the Southern African countries.[423] In this respect, Kalula points out that the discovery of minerals in the then British South African colonies in the mid nineteenth century quickly attracted migrant labour, particularly from the Transvaal and southern Mozambique.[424] In addition, he argues that labour migration to South Africa has been associated with the mining industry where the contract labour system and recruitment agencies have long operated to regulate the flow of labour.[425]

It is believed that the outmoded contract labour system functions in the same way as modern labour broking however, it is imperative to know that under the former system agencies only recruit and supply workers to third parties without being party to the employment arrangement entered into whilst in terms of the latter, a labour broker supplies individuals to user enterprises and at the same time assumes employer status over the workers who were under the supervision of the third party. In the context of

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422 Kane –Berman, J. 1972. *Contract Labour in South West Africa.* Johannesburg: South Africa Institute of Race Relations, p3. See also Du Pisani, A. 1986. *SWA/Namibia: The politics of Continuity and Change.* Johannesburg: Jonathan Ball Publishers, p210.

423 In South Africa the system was used to facilitate the supply of migrant labour workers mostly from neighbouring countries. The Witwatersrane Native Labour Organisation (WENELA) recruited migrant labour from the then British Bechtuanaland Proterate, namely: Northern and Southern Rodesia (now Zambia and Zimbabwe respectively), Nyasaland and Tanganyika (now Malwi and Tanzania), Kenya and Uganda to work on South African mines. See Kalula & Fewick. (2004: 10).

424 Kalula & Fewick. (2004: 10).

425 (ibid.).

Namibia the obnoxious nature of the contract labour system triggered the 1972 demonstrations by the workers nation wide in 1972 which led to its dismantle however, it left irreparable scars of hatred and discontent against the perpetrators.[426] However, after the independence of the country, a sizable number of Black people moved into clerical positions whilst few moved up to occupy high political positions however the pre-independence employment structure remained the same.[427]

3.1.4 Post –independence labour legislations and the regulation of labour broking

After Namibia gained her independence, the country has since adopted a liberal Constitution based on the principles of democracy, the rule of law and justice for all.[428] The Constitution guarantees fundamental human rights and freedoms, including the right of workers to organise and bargain collectively as well as the right to practice any profession or carry on any occupation or business.[429] In addition, it prohibits discrimination based on enumerated grounds and has influenced the contents of the post-independence labour legislations including the regulation of contemporary labour broking.[430] Parliament or any subordinate legislative authority is forbidden to make any law which abolishes or abridges the fundamental rights and freedoms contained in the

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426 SWAPO of Namibia. 1981. *To be Born a Nation: The Liberation Struggle of Namibia.* London, p55.

427 Majority of private companies in Namibia are owned by white people. (LaRRI :2000).

428 See Article 1(1) of the Namibian Constitution of 1990.

429 See Article 21(1) (e) of the Namibian Constitution 1990. Namibia gained its independence on March 1990 after the involvement of the five Western Contact Group on one side and the former Soviet Union and its allies on the other, a peaceful settlement was negotiated which resulted in the implementation of United Nations brokered peace deal . Nujoma, (2001: 74).

430 The grounds referred to include: sex, race, colour, ethnic origin, religion, and creed or social status. See article 10 of the Namibian Constitution of 1990.

Constitution.[431] In a situation where an aggrieved person claims that a fundamental right or freedom guaranteed by the Constitution has been infringed, such person shall be entitled to approach a competent Court to enforce or protect such a right or freedom.[432]

Immediately after the independence of the country, the government passed the Labour Act 6 of 1992 (LA) with its primary purpose of transforming pre-independence labour laws and industrial relations in Namibia.[433] It became the comprehensive legislation that regulates employment relationships in democratic Namibia.[434] However, the 1992 LA has omitted to address issues relating to labour broking but focused more on the establishment of democratic institutions whose main purpose was to dissolve the effects of the Apartheid regime.[435] In 2007, the government passed another Labour Act which sought to unify labour laws into a single piece of legislation thereby streamlining the administrative and regulatory frameworks of the labour market.[436] Interestingly, the rise of poorly regulated employment relationships in the country occurred in the context of expanding institutional and statutory regulation of the labour market.[437] In this context, the temporary employment agency industry emerged within the intervening space left by the limits in regulatory coverage. The mediating role of the employment agency between the user enterprise and the temporary worker allows the management to

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431 Article 25 (1) of the Namibian Constitution of 1990.

432 (ibid.: article 25 (2).

433 These provisions include: the non-discrimination principle provided in article 10, the right to organise and bargain collectively in article 21 (1) the, prohibition of forced labour and the incorporation of the provisions contained in Chapter 3 of the Constitution.

434 Labour Act, 1992 (No. 6 of 1992).

435 Some of the colonial laws which have been abolished include: Native Passes Proclamation (1930) ; Native Urban Areas Proclamation (1951); the Vagrancy Proclamation (1920) just to mention but a few. See Hishongwa (n 17) at 79 -87.

436 Labour Act, 2007(No.11 of 2007).

437 Klerk. (2009: 85).

evade or dilute the protection which insulates permanent employees from competitive pressure in the external market.[438]

A democratic Namibia needs inclusive employment legislations capable of addressing the Apartheid inequalities at the workplaces and recognises the positive role private entities play in terms of economic growth, employment creation and poverty eradication. Unfortunately, the discriminatory nature of labour legislation and the violation of the workers' rights implemented during the colonial era overshadowed the debates of the Labour Bill[439] in the National Assembly. The law makers were more disturbed by the past sufferings of Black workers under the defunct contract labour system before independence than to focus on how could they use employment laws as a tool for solving pertinent social problems affecting the majority of the population in a democratic Namibia.[440]

The phenomenon of labour broking or labour hiring as it is commonly known in Namibia turned to be an issue of concern in the late 1990s. Its growth has been partly attributed to the global trend towards labour market flexibility.[441] Following workers' demonstrations against labour broking companies at one of the coastal towns the Government of Namibia decided to engage the Labour Resource and Research Institute (LaRRI) to undertake a research which was aimed at finding out social and economic problems associated with the industry in the country.[442] One of the findings of the study

438 (ibid.: 85).
439 The Labour Act, 2007 (No 11 of 2007).
440 These issues include: high unemployment amongst the youth introduction of minimum wage and eliminate discrimination at workplaces.
441 Endresen. (2000: 8).
442 Labour Resource and Research Institute (LaRRI). 2006. *Labour Hire in Namibia: Current Practices and Effects*. Windhoek, p8.

was that most labour broking or hiring companies in Namibia were mere labour brokers who hire out workers (mostly unskilled or semi-skilled) to client companies for a certain period of time. These companies were mostly concentrated in bigger towns with *Africa Personnel Services* (APS), a subsidiary of Africa Corporation (AFCOR), being the dominant labour hiring company employing around 20 000 employees country wide.[443] Apart from supplying workers to different business entities, APS provides other services such as recruiting casual workers for both private and state-owned companies.[444]

Other smaller labour broking companies which were in competition with APS provide different services, ranging from managerial services, Information Technology (IT), accounting and the supply of workers to retail businesses in the country.[445] The report by LaRRI further revealed that the main reasons for utilising labour hiring workers is to avoid hiring workers on permanent basis which is an expensive undertaking to reduce the impact of strikes, avoid disciplinary obligations and trade union demands. In addition, the other reason is to keep trade unions out from the affairs of the business and to enable client companies to easily replace "unproductive" workers.[446] The report has identified peak periods as being the usual time when the services of the hired workers are used and that with increased labour movement, the industry emerged as part of a broader move towards "flexible production" and casualisation of labour which

443 APS had employed around 20 000 workers in Namibia and the company was managed by local business individuals. See LaRRI (2000:23).

444 These companies include: Rossing Uranium, Namib Mills, Namibia Breweries, Hansa Breweries, Wes bank Transport, Brandberg Construction Transnamib, Nampost, Telecom Namibia and others.

445 These smaller companies include: EduLetu which employs around 100 workers , Welwitchia Consultants 600, Erongo Contract Services with 150 workers, H&L Investment with 76 workers, and JL Merchandising with 23 workers.

446 LaRRI. (2006: 22).

both form part of the process of globalisation.[447] In response to the LaRRI report and the disgruntlement of workers the government of Namibia passed the Labour Act of 2007 which abolished labour broking in Namibia however, its constitutionality was challenged in the Courts of Namibia.

3.1.5 The ban of labour broking in Namibia

The debate whether to ban labour broking in Namibia or not started when the Labour Bill which proposed the prohibition of the practice was tabled in the National Assembly.[448] The deliberations sparked fierce condemnation of labour broking practices by the members of Parliament across the political spectrum whereby politicians were reminded about the offensive nature of the pre-independence contract labour system through which many Namibians were brought to the southern parts of the country as contract workers. The debate in the house concentrated more on the inhumane treatment of workers particularly the way the identification of policy was implemented which required workers to put on tags around their necks as an indication that they were selling their labour.[449]

In an attempt to address problems associated with labour broking which has been identified in this thesis specifically in both Chapter 1 and 2, the new Labour Act included a clause which directly prohibited labour broking activities in in the country. The most contentious part of the Act is contained in section 128 (1) which provides that:

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447 LaRRI. (2006: 22).

448 This refers to the Labour Bill 11 of 2007 which repealed the 1992 Labour Act.

449 Katjavivi, (1986:75)

> [n]o person may, for reward, employ any person with a view to making that person available to a third party to perform work for the third party.[450]

As a result, *Africa Personnel Services* (APS) decided to challenge the constitutionality of the ban in the High Court. The grounds for the legal challenge were that section 128 of the Labour Act had violated the company's constitutional right to carry on any trade or business.[451] The High Court was not convinced that the clause violated the provisions of the constitution as alleged arguing that under common law, employment relationship comprises only of two parties and therefore labour broking practices did not have legal basis in the Namibian law and was considered unlawful for that reason.[452] Based on that finding, the High Court argued that such arrangement could not create any legal right in favour of APS and, a *priori*, could not create a fundamental right in terms of the Constitution.[453]

The right in dispute is part of Chapter three of the Namibian Constitution which contains the Bill of rights.[454] In Government *of the Republic of Namibia v Cultura 2000 and Another 1993 NR 328 (SC)*[455] (*Cultura 2000 case*) the court ruled that in a situation where the latter is requested to interpret the provisions of the Constitution which protect the fundamental rights and freedoms of the people a purposive approach should be adopted.[456] In this connection, Barak points out that purposive interpretation begin*s* with the idea that interpretation is about pinpointing the legal meaning of a text along the

450 See section 128(1) of the *Labour Act, 2007 (No. 11 of 2007).*.
451 *Africa Personnel Services (PTY) Ltd v Government of Namibia and three Others* (HC) Case no. A4/2008
452 *Africa Personnel Services (PTY) Ltd v Government of Namibia and three Others* (HC) Case no. A4/2008
453 (ibid.: para. 38).
454 See article 21(1) (j) of the Namibian Constitution 1990.
455 (ibid.).
456 *Government of the Republic of Namibia v Cultura 2000 and Another 1993 NR 328 (SC)*[456]

spectrum of its semantic meaning. The interpreter determines the purpose according to the criteria which purposive interpretation is established.[457] In *Cultura 2000* case [458] the court held that:

> A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is *sui generis*. It must be broadly, liberally and purposively interpreted so as to avoid the "austerity of tabulated legalism" and so as to enable it to continue to lay a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and disciplining its government.

A similar approach was adopted in *Minister of Defence* v *Mwandingi 1992 (2) SA 354 (NmS)*[459] in which the Court stated that "a broad and liberal" interpretation to constitutional provisions should be given. In this case, a South African soldier was injured in cross fire during the conflict between SWAPO and Apartheid South Africa. The question to be answered was whether the successor government could be held liable for unlawful acts committed by the soldiers of the predecessor government. The appellant successfully sued the post-independence government in light of the fact that the acts committed were unlawful.

Examining the decision of the High Court in *APS* case the author of this thesis argues elsewhere that the approach embraced by the court failed to recognise contemporary changes in the world of work in which modern employment arrangements were

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457 Barak, A. 2005*. Purposive interpretation in law.* Princeton University Press, pxiii.

458 (ibid.).

459 See also *State* v *Achenson* 1991 NR 1 (HC); *Ex parte Attorney –General: In re the Constitutional Relationship between the attorney –General and Prosecutor General, 1991 (3) SA 76 (NmS)*.

characterised by an increase of non-standard employment relationships of which labour broking is one of such arrangement.[460] Furthermore, it is not clear as to why the court *a quo* disregarded the position adopted by the International Labour Organisation Convention 181 which allows labour brokers or private employment agencies (PEAs) as they were commonly known, to engage in commercial business.[461]

Expectedly, the ruling of the High Court was received with much discontent by employers and considered the government's decision to ban the labour broking industry as a violation of their rights protected by the Constitution.[462] Employers further argued that outlawing the practice whilst allowing other forms of outsourcing to continue might not solve the problem.[463]

The ruling of the High Court which upheld the constitutionality of labour *broking activities* in the country has caused division amongst the people of Namibia with some arguing that the industry contributes to employment opportunities for many unemployed individuals whilst others regard the practice as a continuation of the outdated contract labour system in a different form.[464] LaRRI points out that a sizable number of individuals are employed by private employment agencies in Namibia.[465] Therefore its

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460 Nghiishililwa. (2009: 87).

461 The Convention encourages member states to adopt appropriate regulations which protect the right of agency workers and ensure that private employment agencies contribute to economic growth.

462 See article 21(1)(j) of the Namibian Constitution.

463 LaRRI. (2006: 15).

464 Section 34 of the Labour Act 11 of 2007 requires that employers must inform employees at least four weeks before the intended dismissal are to take place and that the Labour Commissioner must also be informed. The purpose is to engage trade unions in negotiating the possibilities of finding alternative employment and to avert the adverse effect s of such termination of employment.

465 LaRRI. (2006: 17-20).

ban would negatively affect those persons who were in employment through the efforts of labour brokers.

3.1.6 Appeal against the decision of the Court *a quo*

The decision of the High Court to uphold the ban prompted APS to launch an appeal against the entire ruling of the Court *a quo*. On appeal, the appellant requested the Supreme Court to set aside the ruling of the High Court on the grounds that High Court had erred in law. In addition, the appellant further requested the Supreme Court to declare that labour broking practices were constitutional. The Supreme Court concurred with the High Court's understanding of the basic nature of consensual contracts for letting and hiring, but cautioned that time has changed in the last two millennia as follows:

> [G]iven the revolution of employment relationships of modern times and the rapid changes in the last decades as a result of globalisation, industrial innovations ,information technology developments and instant global telecommunications, we must point out that contracts for letting and hiring of services have not remained static, but consciously evolved in scope and application to address continuously emerging challenges presented by socio-economic changes at the workplace over more than 2000 years. The process of change has accelerated still further with the technological revolution that has swept the world, and with the globalisation of the international economy.[466]

[466] *African Personnel Services* supra, para. 620F-G.

The court emphasised the need for Parliamentarians to recognise the changes at the workplace which took place over the years due to technological advancements and the impact of globalisation, coupled with economic integration amongst the Nations of the world. It is in this context that non-standard forms of work be considered as being part of the the labour market demand which calls for appropriate labour legislations necessary for the protection of workers' rights and the promotion of the flexibility which the employers require.

It is important to note that the Supreme Court was not impressed by the "sweeping nature" of the ban. It remarked that the ban was clearly wider than activities in which agency work was involved in. It prohibited all persons who may, for reward, employ any person with a view to making that person available to a third party to perform work for the third party.[467] Employing a person for a reward is a common practice. Some examples may include hiring a lawyer to represent an accused, hiring an accountant to audit books, hiring a driver to deliver certain products and the list goes on. The important aspect is the reward for the services rendered. It might be true that contract workers did receive low wages and were subjected to poor working conditions, but yet the affected individuals were employed and could sustain their well-being.

Regarding the question whether the ban was reasonable, the Court stated that the prohibition was so substantially overbroad, and therefore could not constitute a reasonable restriction on the exercise of the fundamental freedom to carry on any trade or business protected in the Constitution.[468] Furthermore, the prohibition was formulated

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467 *African Personnel Services* supra, *para.* 650A-C.

468 See article 21(1)(j) of the Namibian Constitution.

in terms so overly broad that it could not be read down so as to limit its application only to the type of agency services which the appellant provided. It also substantially overshoots permissible restrictions which, in terms of that sub-article, may be placed on the exercise of the freedom to carry on any trade or business protected by law.[469]

Bercusson *et al* argue that the emergence of massive cross-border financial flows, together with trade liberalisation and expanded foreign investments which make global markets more competitive thereby creating the enabling conditions for the onset of globalisation.[470] Most developing countries have adopted free market economic systems which are characterised by policies that have opened their economies domestically and internationally. This, in turn, drives the onset of globalisation. These developments have negative effects on the poor people in the Third World in that free market policies are not pro-poor, but the opposite.

As mentioned earlier, the underlying problem in developing countries is the scourge of poverty and unemployment. According to the report of the Director-General of the ILO on the Decent Work Agenda in Africa, joblessness and poverty are issues which the need joint efforts to resolve. While the United Nations had for many years been drawing the attention of the international community to the need to address the plight of the poorest and least developed countries, the active advocacy role played by social partners and civil society organisations has been a key factor in bringing the question of

469 Article 21(2) of the Namibian Constitution provides that 'fundamental freedoms referred to in sub-article (1) hereof shall be exercised subject to the law of Namibia, in so far as such law impose reasonable restrictions on the excise of the rights and freedoms conferred by the said sub-article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence'.

470 Bercusson & Eland. (2008: 3).

poverty and its linkage with the globalisation process into sharper focus.[471] In order for the African countries to benefit more fully and broadly from trade openness, the continent will require policy adjustments at the national level.

It is essential to note that the regulatory framework which Namibia should adopt should be able to address socio-economic challenges facing the citizens by recognising the importance of employment as a means through which people could improve their living conditions.[472] To achieve such goal, a policy framework should be formulated in terms of which certain activities are undertaken for the realisation of the intended objectives. Melber argues that Namibia ranks in the top category of countries with deepest social divides and the country experiences extreme unequal distribution of income with deep internal socio-economic divides based on both regional, ethnic as well as class lines.[473] A report of the World Bank noted that inequalities inherited at independence persist, despite major efforts to eradicate them. They are evident in the distribution of access, learning outcomes, and resources inputs. These inequalities represent a threat to national cohesion, peace, and political stability, and a failure to realise the productive potential of a large proportion of the population.[474] In order to address the inequality in Namibia specific policy programmes should be designed for such purpose. South Africa seems to have initiated appropriate strategies which this thesis discusses in Chapter Four.

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471 ILO. 2007. "The Decent Work Agenda in Africa: 2007 – 2015." *A paper presented at the Eleventh African Regional Meeting Addis Ababa*, *Report of the Director –General.* International Labour Office, pp 3-5. Accessed via: www.ILO/public/english/standards/rlm/rgmeet/africa.htm on (21 July 2013).

472 See Article 95 of the Namibian Constitution 1990. This article empower the Parliament enact laws that aim at improving the living standard and well-being of the previously disadvantaged persons.

473 Melber. (2007: 10).

474 Mapore, M. T (2007). "Namibia Human Capital and Knowledge." In Melber, H. *Transition in Namibia: Which Changes for Whom?* Nordiska Africa Institute, p115.

3.1.7 Who is entitled to exercise the right to carry on trade

The Supreme Court explained that the right to carry on trade or business could be exercised by a natural or juristic person and that it is linked to individual's dignity.[475] By way of "piercing the veil" the Court argued that in practice, business is conducted by individuals who associate themselves with various forms of legal entities and behind the "corporate veil" of juristic persons one finds members who are the final beneficiaries of the corporate structures. This means that where the freedom of an individual to conduct business is protected, so, too, must his right or freedom to pursue that objective in association with others.[476]

Furthermore, the Court pointed out that in many areas, the law must follow, not lead. Old relationships recognised by law must give way to new arrangements, provided activities pursued are legitimate and lawful and above all, the law must recognise the right of people to regulate their relationships by agreements.[477] However, the Court cautioned that "merely because some forms of work do not fit the typical mould of the bilateral contract of service described in Roman or in common law, it does not mean that they are 'not lawful', as the court *a quo* found."[478] Most jobs available today in the market attract those individuals who prefer short term work, particularly when it comes to agency work. Some scholars argue that given the fact that agency work involves

475 See Art 8 of the Namibian Constitution.
476 *African Personnel Services* at 621A-B.
477 (ibid.).
478 *African Personnel Services* ats 622 A-B.

workers performing various assignments at different workplaces, it is easier for them to "shape their careers."[479] This could be done by means of a "quick match of workers and firms" thus, allowing for a continued accumulation of diversified human capital via short-term assignments.

Despite the criticism which is usually levelled against labour broking businesses, particularly in respect of low wages and reduced labour protection of the workers, the industry has gained popularity due to its labour flexibility.[480] This demonstrates that today's economic and social needs cannot be sufficiently catered for by a single model of employment relationships as a result of other forms of work which has emerged.[481] Stiglitz points out that the ultimate objectives of macro-economic policies should be employment creation, economic growth and aimed at improving the living standards of the people.[482] In this respect, labour regulations could be instrumental in promoting economic activities such as the deregulation of *infant* business ventures which might have the potential to improve peoples' livelihood.

Theron has had more concern with the poor working conditions of agency workers,[483] but paid less attention to the positive side of the industry, particularly its contribution to job creation. However, he points out that agency work has advantages in favour of employing firms, especially it's potential in respect of labour flexibility whereby the firm is able to adjust labour supply in the short term and the required skill. Labour broking

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479 Houseman *et al*. (2001: 45).
480 (ibid.).
481 (ibid.: 34-35).
482 Stiglitz, J.E. 2002. "Employment, Social Justice and Social Well-being." *Industrial Labour Review.* Vol. 141(1-2), p 9.
483 Theron. (2008: 4).

arrangements match the labour force with the available job in the market, even in situations where the demand of labour fluctuates over a day, week or season.[484]

3.1.8 Rejection of the claim that contemporary labour broking is the same as the contract labour system of yesteryears

The Supreme Court expressed its condemnation of the inhuman treatment of the African workers perpetrated through contract labour system.[485] However, the Court rejected the claim that the defunct contract labour system was similar to today's labour broking activities. It argues that the practices of racial discrimination and the ideology of Apartheid have been abolished. All people are equal before the law[486] and may not be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic statuses.[487] People may move freely throughout Namibia and withhold their labour without being exposed to criminal penalties. An employee's performance under a contract of employment is no longer enforced by the threat of criminal sanction.[488] Discriminatory laws were no longer valid as a result of the current legal framework within which agency work is being performed and bears no resemblance to the contract labour system. The key difference between the two systems was that under the contract labour system, labour recruitment and placement agencies did not engage the workers as their employees. More so, they did not

484 (ibid.).
485 See Du Pisani. 1986: 210).
486 See Art 10 of the Namibian Constitution.
487 (ibid.).
488 *African Personnel Services* supra note 2 para.. 649C-E.

remunerate them or become party to the resultant employment contract between the employer and the employee.[489]

However, the Court admitted that it might be true that the much hated contract labour system of yesteryears and the modern concept of agency work may both bear the same label but in reality, in law and judged by the nature of the employment relationships they result in, they have very little in common under the current constitutional dispensation.[490] For these reasons, the Court concluded that it was not correct to prohibit agency work based on the wrong believe that labour broking was similar to the past abusive contract labour system.[491] Agency workers under the current labour dispensation are not separated from their families once they get a job, but rather enjoy the companionship of their loved ones whilst working. Furthermore, contemporary agency workers have not been subjected to Apartheid policies or racial discriminatory laws in that every person can work and settle anywhere in the Namibia, as opposed the Apartheid era.[492]

The Supreme Court did not support the ”sweeping nature” of the ban by arguing that it was clearly wider than the activities in which agency work is involved. In fact, the ban prohibited all persons who may, for a reward, employ any person with a view to making that person available to a third party to perform work for that third party.[493] Employing a person for a reward is a common practice. Some examples may include, hiring a lawyer to represent an accused, hiring an accountant to auditing books, hiring a driver to

489 (ibid.: para. 649F-H).
490 (ibid.: para.. 649D-E).
491 (ibid.).
492 See Article 21 of the Namibian Constitution 1990.
493 *African Personnel Services* supra note 2 para.. 650A-C.

deliver certain products and the list goes on. This chapter revealed earlier on that contract workers were paid low wages and were subjected to poor working conditions. However, such workers could not be compared with those individuals who did not have jobs.

Hishongwa explains that the contract labour system was a source of disunity amongst the Ovambo families. He notes that men were forced to leave their families behind without any support system for them. As a result, family ties were broken apart such that women would take sole responsibilities for family needs, with some having eloped to live with other men.[494] Moreover, children grew up without their fathers and without financial support; families could face hunger, malnutrition and other problems relating to their health, education and their general well-being.[495]

On the question whether the ban was reasonable the Court stated that prohibition was so substantially overbroad, and therefore could not constitute a reasonable restriction on the exercise of the fundamental freedom to carry on any trade or business protected in the Constitution.[496] Furthermore, the prohibition was formulated in terms so overly broad that, it could not be read down so as to limit its application only to the type of agency services which the appellant provided. It also substantially overshoots permissible restrictions which, in terms of that sub-article, may be placed on the exercise of the freedom to carry on any trade or business protected by law.[497] In

494 Hishongwa (1992: 56-60).

495 (ibid.).

496 See article 21(1)(j) of the Namibian Constitution.

497 Article 21(2) of the Namibian Constitution provides that 'fundamental freedoms referred to in sub-article (1) hereof shall be exercised subject to the law of Namibia, in so far as such law impose reasonable restrictions on the excise of the rights and freedoms conferred by the said sub-article, which are necessary in a democratic society and are required in the interests of the sovereignty

addition, the Court pointed out that those provisions contained in Chapter three of the Constitution "must be interpreted in a purposive and liberal way so as to give effect to the full measure of the rights therein.[498] Behind the “corporate veil” of juristic persons are their members, and behind the legal fiction of a separate legal entity are, ultimately, real people. They are the final beneficiaries of the corporate structures which they have created and, therefore, there is no justification to exclude juristic persons from the protection offered by the Constitution.[499]

Regarding the claim that labour broking was similar to the sale of commodities, the Court dismissed such assertion arguing that labour is not a tradable object; but it is simply an activity of human beings. Unlike a commodity, it cannot be bought or sold on the market without regard to the inseparable connection it has to the individual who produces it. It is integral to the person as a human being and intimately related to the skills, experience, qualifications, personality and life of that person.[500] It is the means through which human beings provide for themselves, their dependants and their communities. Although the Court did not explain in detail the significance of employment in people’s lives, it referred to employment as being essential, stating that it is through employment that human beings were able to take care of themselves, their families and their communities by selling their labour to earn an income.

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and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence’.

498 *African Personnel Services* supra note 2 para.. 653F-G.

499 (ibid.: 630).

500 (ibid.).

Referring to the work of Countouris,[501] the Court pointed out that the fulcrum of employment relationships during the 18th and 19th century gradually shifted from "the pre-modern idea of status to the modern contract of employment."[502] In this context, the multilateralism of the employment relationships, the diversity and complexity in market forces and the need to strike a balance between flexibility and security, are but some of the challenges presented in the context of agency services.[503] Recognising the changing nature of work, Thompson states that non-standard employment arrangements are replacing standard employment relationships and this is attributed to the new emerging economies of today.[504] The workplace is no longer where workers actually work and sometimes, the employer does not have control over the workplace because not all employment is based on a binary relationship between the employer and employee.[505]

In addition, employers choose to employ workers on temporary basis because of the changing nature of work which has influenced operations of business, both local and international. The shifting of work from the traditional standard form of employment not only calls for the change in labour regulations, but also poses many challenges.[506] It is clear that the ruling of the Supreme Court in *Africa Personnel Services* opened an opportunity for the government of Namibia to reconsider its stance on the prohibition of labour broking and discard the idea that labour broking is equated with the contract labour system. It is unfortunate to note that the years of suffering by workers can be of

501 Countouris. (2007: 34-40).
502 (ibid.).
503 *African Personnel Services* supra note 2 para. 620F-H.
504 Thomson. (2003: 1798).
505 (ibid.).
506 Thomson, P & McHugh, D. 2009. *Work, Organisations: a critical approach.* Palgrave: Macmillan, p 203

relevance in destructing the attention of the policy makers from the real problem affecting the country, particularly that the contract labour system was abolished four decades ago.[507]

3.1.8 Recognition of non-bilateral employment relationships

The Supreme Court dismissed the assertion that only an employment based on bilateral employment relationships should be recognised but also non-bilateral employment relationship.[508] It argued that binary employment relationship between two parties has declined considerably in that employers favour recruiting individuals who provide cheap labour and for a limited period as a way to cut costs.[509] Du Toit argues that labour is a means through which people could earn a livelihood by selling their labour in the market in return for a sustainable wage and that work is seldom just seen as a means by which an individual endures life.[510] Instead, work is viewed as having many economic functions such as providing a regular wage bill, or a reward to sustain one's basic needs. In addition, one's occupation determines, to a large extent, the kind of livelihood and the organisational structures they join. Social status has long been associated with the individual's job as an essential source of identity, and offers a feeling of self-worth, self-fulfilment and self-esteem through engagement in various employment opportunities.[511] It is a common phenomenon that the unemployed segment of the

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507 For more information on the boycott of the contract labour system in Namibia, see Hishongwa. (1992: 20-40). See also Nujoma. (2001: 58-85).

508 *African Personnel Services* supra note 2 para. 625F-H.

509 Thomson, P & McHugh, D. 2009. *Work, Organisations: a critical approach.* Palgrave: Macmillan, p203

510 Du Toit. R. 2003. "Unemployment youth in South Africa: The distressed generation?" A published Paper presented at the Minnesota International Counseling Institute (MIC), p 2.

511 (ibid.).

population often experiences a low self-esteem due to the absence of an economically valuable activity i.e. work.[512]

The other important principle which the decision of the Supreme Court in APS underscores is the concept of separation of powers between the organs of state i.e. the Legislature, the Executive and the Judiciary.[513] Although the ruling has not been well received by the government and the trade unions, it sent a powerful message to both the executive and the workers' representative organisations that the rights of parties to an employment relationship should equally be respected.[514] Dissatisfied with the ruling of the Supreme Court, the government vowed to see to it that the operation of the labour broking industry comes to an end. This was also the position taken by the trade unions calling for the dismissal of the judges who presided over the case saying that they were insensitive,[515] whilst some trade unionists labelled them "unpatriotic judges".[516] Another notable group which expressed discontent with the Supreme Court's decision is the civil society which strongly questioned the basis of the latter's decision.[517] In this regard, LaRRI also registered its disgruntlement saying that such a judgement has far reaching consequences, one of which is its detrimental effect to the plight of agency workers.[518]

While addressing a conference on the launch of the National Employment Policy project, the President of the Republic of Namibia acknowledged the problem of

512 (ibid.).
513 See article 78 (3) of the Namibian Constitution of 1990.
514 Ndjebela, T. 2010. "Government acts on labour hire." *New Era*, p 6.
515 Sheyavali, N. 2009. "NUNW could be held in contempt of court." *The Namibian*, 4.
516 Shejavali. (2009: 3).
517 These organisations include, Africa Labour & Human Rights Centre, Workers Advice Centre Committee and the Association of Legal Services Providers. See Shipanga, S. & Murarangand, D. 2010. "Labour bodies slam Supreme Court ruling." *The Namibian*, p6.
518 Ndjebela. (2010: 5).

unemployment and poverty experienced in the country and at the same time encouraged entrepreneurs to find ways of creating job opportunities."[519] In this respect one could argue that the call by the Head of State was directed to every one including labour brokers. However, it was supprising that the President's calls for job creation efforts contradict his earlier statement whereby he instructed members of parliament to bring an end to labour broking activities.[520]

The organisation of employers known as Namibia Employers' Federation (NEF) acknowledged that agency workers were subjected to unfair labour practices however, the umbrella body advised that any legislation designed to regulate the labour broking industry should be carefully designed to provide a decent employment relationship considering the significance of the industry to economic prosperity.[521]

3.2 Analysis of the amendment of the Labour Act[522]

Subsequent to the ruling of the Supreme Court in APS, the Government of Namibia decided to amend the relevant part of the Labour Act with a view to implement the decision of the highest court of the land which declared labour broking activieties as

519 At the time of writing this thesis, the unemployment rate amongst the youth aged between 20 and 24 years stood at 48.5 See Statement by the Head of State Mr Hifikepunye Pohamba on the occasion of the National Employment and the launch of the 2013 National Employment Policy (23 October 2013), Windhoek (Unpublished).

520 Uys, U. 2010. "Pohamba condemns labour hire at Luderitz rally." *The Namibian*, p3

521 See Report of the Director-General on 'The Decent Work Agenda in Africa: 2007 – 2015' (Eleventh African Regional Meeting Addis Ababa, April 2007) accessed via; www.ilo.org/public/english/standards/relm/rgmeetafrica.htm on (8 August 2014).

522 Section 128 of the *Labour Act, 2007 (No. 11 of 2007).* which has been repealed by the Labour Amendment Act 2 of 2012.

being legal in Namibia.[523] It is not surprising that the reform of the Labour Act has adopted a non-discriminatory approach.[524] The amendment offers protection of the rights of workers employed through intermediaries.[525] It also requires that the recruitment of agency workers should be based on the same terms and conditions applicable to workers performing the same piece of work at the user enterprise.[526] Practically, this means that employers were no longer allowed to employ workers on temporary basis as a way of putting an end to the casualisation of labour and indirectly force employers to employ workers on a full-time basis. In reality, it is very difficult if not impossible, for policy makers to determine the nature of employment relationship parties intend to enter into rather than to regulate such relationship.

The amendment provides that agency workers were entitled to the same collective rights applicable to other workers in the employ of the user undertaking.[527] This implies that the concern workers have the right to negotiate with their employer for better conditions of employment including remuneration. What is not clear is how practical that would be considering that agency workers perform specific tasks at different sites or workplaces and what would be the role of a labour broker in the bargaining process particularly that normally trade unions negotiate for better working conditions of their members who are usually full-time employees. In addition, the workplace is founded on the common law principle which stipulates that the power of an employer to prescribe

523 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia & Others* (2011) 32 ILJ (South Africa), 205 (NmS).

524 This is in compliance with article 10 the Namibian Constituion of 1990.

525 Section 128 (3) of the Labour Act 2007 as substituted by section 6 of the Labour Amendment Act 2012.

526 Ibid, section 128(4) (a) – (b).

527 See Section 128 (3) of the Labour Act as substituted by section 6 of the Labour Amendment Act 2012.

standards of conduct is confined to the workplace and it is where disciplinary steps against transgressors take place.[528]

Godfrey *et al* argue that a mechanism through which "regulated flexibility" could be achieved is via a collective bargaining system whereby the harmonisation of conflicting interests between the employer and the employees could be realised.[529]

The reform of the Labour Act has imposed some restrictions on the hiring of agency workers to the effect that the user enterprise is forbidden to hire new workers as a strategy to neutralise the effects of an ongoing or imminent industrial action. However, a user enterprise is allowed to employ the services of agency workers where there has been a dismissal of workers directly employed, provided that a period of six months should lapse after the dismissal.[530] This policy consideration seems to suggest that a user undertaking's discretionary power to hire and fire when it is in the interest of the company has been abolished. Furthermore the amendment prohibits a labour broker to become party to an employment relationship between the agency worker and the user enterprise.[531] This means that once the recruitment process has been finalised, a labour broker is prohibited to assume the status of an employer which literally ends the business of labour broking. It is important to know that in other jurisdictions stricter regulation of temporary employee services (TESs) or labour broking has been the norm

528 Grogan (2003: 90).

529 S Godfrey, J, Theron & M, Visser. (Eds). 2007. "The State of Collective Bargaining in South Africa: An Empirical and Conceptual Study of Collective Bargaining." *Labour and Enterprise Policy Research Group*: *DPRU Working Paper 07/130.* University of Cape Town: Development Policy Research Unit, p1.

530 (ibid.).

531 Section 128 (2) of the Labour Act 2007 as substituted by section 6 of the Labour Amendment Act 2012. See also section 1 of the Employment Service Act 2011 as substituted by section 8 of the Labour Amendment Act 2012.

to ensure that the industry contributes to job creation and the alleviation of unemployment.[532]

Another legal implication of the reform of labour broking in Namibia is that the rights of companies to reorganise their business through outsourcing of non-core functions of their businesses to third parties have been put to an end and this is likely to negatively affect the productivity of the entities concerned. According to Theron, modern employment engagements allow business entities resort to the practice of outsourcing functions to external entities through various forms of intermediaries as a cost reduction measure.[533]

By disregarding the existence of new work arrangements, the reform has actually overlooked the stance adopted by the ILO Convention regulating the industry.[534] This thesis will discuss the standard set by the Convention concern and its impact on member states of the international labour body in Chapter 5.

Theron and Godfrey argue that contemporary work arrangement is manifested through the process of externalisation of work through various platforms to allow for market flexibility whereby labour brokers were given opportunity to supply part-time workers to clients in order to cut costs and increase productivity.[535] It is interesting to know that in the developed world the use of agency workers were only allowed on condition that it is justifiable by giving particular attention to the "general interests of agency workers,"[536]

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532 This refers specifically to South Africa (see section 198 of the Labour Relations Act of 1995 as amended and the European Union member countries) see EU Directive, *supra*).

533 Fudge. (2006: 301-302).

534 ILO Convention 181 of 1997.

535 Theron. (2009: 7). See also Kenny & Bezuidenhout. (1999: 33-34).

536 See Article 4(1) and (2) of the Temporary Agency Directive 2008.

an example would be where the legislation is aimed at protecting the workers against unfair labour practices.[537]

Another remarkable aspect the reform has changed is the broadening of the definition of the concept "employee" by including an individual whom a labour broker places with a user enterprise which legally means that the user enterprise becomes the automatic employer upon accepting the worker in his or her employment.[538] The problem of this provision is that any person employed by another no matter how short the duration might be, becomes an employee of latter which implies the reform does not recognise temporary work of any kind.

3.2.1 The exclusion of temporary workers from the definition of an employee

Under common law the definition of the term "employee" is troublesome as it only covers workers who are employed as full-time employees.[539] Oliver *et al* point out that even though the statutory definition of an employee might sometimes go further than what is at common law understood, case law, nevertheless, indicates that major categories such as independent contractors are excluded'.[540] The question which then begs for an answer relates to legitimate casual workers performing work on a temporary

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537 Rubery. (1989: 55-56).

538 See section 128(2) of the Labour Act 2007 as substituted by section 6 of the Labour Amendment Act 2012.

539 See Section 1 of the *Labour Act, 2007 (No. 11 of 2007).* (Namibia). In South Africa, section 39(1) of the Unemployment Insurance Act 63 of 2001 make the Act applicable to all "employees" and "employers". Section 1(1) of the same Act defines a "contributor" as a natural person who is or was employed, to whom the Act applies and who can satisfy the Commissioner that he or she has made contributions for purposes of the Act.

540 Oliver, M *et al*. *2003. Social Security: A Legal Analysis.* LexisNexis Butterworths, p131. Apart from independent contractors, other categories excluded from the South Africa's social security system, notably compensation for workplace injuries and disease, and unemployment insurance, includes the self-employed, the informally employed, and several other atypical employed.

basis, but unwilling to be employed as full-time employees. The revised definition of what constitutes an 'employee' reflects the Court's departure from its traditional definition which is interpreted using various tests.[541]

In terms of the amendment under discussion, only a person entrusted with the supervision and control of the employee could be classified as an employer. Benjamin cautions that the definitional change of the concept "employee" creates an element of uncertainty.[542] According to Benjamine, the distinction between an employer and an independent contractor is difficult to capture which, thus calls for further reforms to be effected so as to guard against the erosion of employment relationships.[543] As far as labour broking practice is concerned, once the business entity has been registered, then the workers fall within the statutory definition of who an employee is.[544] More importantly, affording agency workers the basic labour rights would safeguard against violations of their rights to collective bargaining[545] and the exploitation of vulnerable workers caught in a triangular employment relationship.[546]

As stated earlier in this thesis that the reformed legislation under scrutiny has overlooked the relevant provisions of the ILO Convention which serves as the guiding

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541 See *Smith v Workmen's Compensation Commission* 1979(1) SA 51 (A); SABC v McKenzie 1999 (1) BLLR 1 (LAC) In *Smit's* case the organisational test was laid to rest, while the dominant impression test, weighing up the elements of the contract as a whole, was deemed to be the most effective test to determine the nature of the legal relationship between the parties. In Namibia, see *Hannah v Government of the Republic of Namibia 2002 (2) 215 NLC* where the court made a ruling that a judge of the High Court was not an employee of the State arguing that the latter has no direct supervision and control of judges when performing their professional duties. See also *Paxton v Namib Rand Desert Trails (Pty) Ltd* 1988 (1) 105 NLC in which the court has rejected a volunteered wife assisting a husband who is an employee claim to be an employee too.

542 See Benjamin, P. Borat, H & Van der Westenhuizen, C. 2010. "Labour Relations Amendment Bill, 2010; Basic Conditions of Employment Amendment Bill, 2010; Employment Equity Amendment Bill, 2010 and employment Service Bill, 2010." P 4.

543 Theron & Godfrey (2000: 43).

544 This refers to user enterprises or client companies.

545 Benjamin, P. *et al.* (2010: 33-34).

546 (ibid.).

principle for regulating PEAs, such an error is likely to cost Namibia dearly in terms of the possibility that labour broking might take place in disguise.[547]

Although in theory the Amendment of the Labour Act recognises the existence and the role played by labour brokers in society, in reality the centrally is true. Since the latter could no longer charge a fee for supplying workers to third parties, the Amendment is like an empty hollow. Removing a labour broker from the triangular employment relationship thereby leaving a user enterprise become the employer does not in itself serve as a guarantee that workers were safeguarded against the exploitation.[548] The amendment receives support from the trade unions however, the only thing labour organisations fail to realise is that the ban of labour broking in Namibia is detrimental to those individuals who were in the employment with the assistance of a labour broker. Employer's organisation in Namibia was not happy with the way the Amendment has been crafted arguing that it is tantamount to outlawing of the practice.[549]

Namibia has adopted a unique legal framework uncommon to many jurisdictions where the use of labour brokers has been monitored stricter to ensure that the rights of the parties to the triangular employment relationship were protected.[550] As Arup points out that both the traditional topics such as pay and legalities such as industrial awards are less central than they were in the heyday of labour law."[551] This confirms the assertion that the nature and character of modern work structure has changed and therefore there

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547 For example, the ILO Convention 181 of 1997 allows an agency become the employer of individuals placed with user undertaking.

548 Sasman, C. 2011, "Labour hire changes praised'. *The Namibian,* p1.

549 Dudy. (2012: 1-2).

550 The term 'Labour-only contracting' is used in Norway which is the same as 'private employment agencies' used in Namibia. See R, Blainpain & M, Weis (Eds). 2003. "Changing Industrial Relations and Modernisation of Labour Law." *Kluwer Law International,* p117.

551 Arup, C. 2001. "Labour Law as Regulation: Promise and Pitfalls." *Australian Journal of Labour Law* (*AJLL).* Vol. 14, p 229.

is a need for a tailor-made regulatory framework which in Roger's view should be less restrictive when it comes to the utilisation of the services of employment agencies due to need for flexibility.[552]

The broadening of the definition of the term "employer" to include a user enterprise seems to suggest that the latter could no longer avoid the responsibility over those individuals working under its control and supervision.[553] The amendment defines an 'employer' as any natural person, including the State and a user enterprise, who employs or provides work for another person and undertakes to remunerate that other person, either expressly or tacitly.[554] This definition contradicts the common law principle in respect of the freedom of the parties to an employment relationship to regulate terms and conditions of the employment contract they have entered into.

Le Roux observes that the employer and the employee voluntarily negotiate a contract which regulates their relationship and such contract sets out their respective rights and duties.[555] This is not the case with the amendment under discussion.[556] It is unfortunate that the amendment has curtailed the right of employers to choose whom to employ and that firms were no longer able to shift non-core functions to intermediaries through outsourcing which, in turn, provides employers with sufficient time to concentrate on core functions of the enterprise.[557]

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552 See Rodgers. (1989: 34-39).

553 Labour Act 2 of 2012 which inserts new sections in the *Labour Act, 2007 (No. 11 of 2007).* whereby section 128 of the latter has been substituted. The new section 128(1) provides that 'user enterprises' means a legal or natural person with whom a private employment agency places individuals.

554 See section 1(a) of the Amendment Act 2 o 2012.

555 Le Roux, P.A.K. & Strydom, E. 2009. *Essential Labour Law*. Labour Law Publications, p 46.

556 Le Roux. (2008: 100).

557 Theron & Shane. (2000: 24).

3.2.2 The restriction of the powers of the employers

The amendment has restricted the power of employers to reorganise their businesses but has also stalled the notion of workplace flexibility which entail the capacity of an enterprise to adapt to changing circumstances, particularly the labour market which has shown a remarkable capacity to achieve organisational competiveness, efficiency and effectiveness.[558] By banning labour broking, the reform has deprived companies to achieve greater organisational competitiveness, efficiency and cost saving.[559] Burges argues that employers seek greater flexibility in the hiring and deployment of labour which has caused permanent employment agencies to become the single fastest growing segment of the labour industry.[560] Fredman points out that in the current era of globalisation, information technology and the "knowledge economy," flexibility is said to achieve the highest levels of efficiency.[561] Brown doubts whether it is feasible for one to expect an inclusive regulatory structure which can harmonise all power relations so that legal intervention may be deemed appropriate to protect the interests of employees, employers and the public at large.[562]

558 Burgess & Connell. (2004: 5).
559 Raday. (1999: 3-4).
560 Burgess & Connell. (2004: 1-6).
561 Fredman. (2006: 303-304).
562 Brown, W. & Oxenbridge, S. 2010. "Trade Unions and Collective Bargaining: Law and the Future of Collectivism." In C, Banard, S, Deakin & G, Morris. 2011. *The Future of Labour Law: Liber Amicorum Bob Hepple QC.* Oxford and Portland Oregon, pp 63-64.

Notwithstanding the fact the reform of labour broking in Namibia classifies agency workers as employees within the definition of the Labour Act,[563] it is not clear how the latter would qualify for social benefits such as social security, pension and medical benefits, given the scenario that the workers concerned do not have security of their jobs to enable them contribute to their social security scheme. Theron *et al* point out that the use of temporary or seasonal labour in certain sectors is well established for various reasons.[564] What is important is the extent to which these arrangements are becoming predominant, which indicates a profound shift in the labour market.[565] This shift has been attributed to the changes in modern employment relationships which require the legislators to be mindful of the new models of employment.[566] In fact, there is a plethora of evidence to support the claim that agency workers are excluded from social security benefits, mainly due to the emergence of new forms of employment relationships.[567]

Despite the fact that the Amendment extends protection to agency workers, the reality is that labour broking practice in Namibia has come to an end with the inclusion of the provision in the amendment which prohibits a labour broker from assuming an employer status and impose employer responsibility on a user enterprise.[568] Cheadle argues that regulated flexibility may be put to good use in extending protection to those who most

563 Section 1 of the Labour Act, 2007(No. 11 of 2007).

564 Theron &Godfrey (2000:6).

565 (ibid.).

566 See for example, Fewick, C. 1992. "Shooting for trouble? Contract Labour-hire in the Victorian Building Industry." *Australian Journal of Labour*. Vol. 5, pp 237-238. See also Theron. (2005: 618-619). See further Stewart. (2002: 238-239).

567 These categories of workers include: the self-employed, the informally employed and many other atypically employed workers. See Oliver, *et al*. (2003: 131).

568 Section 128 (2) of the Labour Act 2007 as substituted by section 6 of the Labour Amendment Act 2012.

need it, especially with respect to temporary workers.[569] Despite available evidence supporting that most companies utilise the services of temporary workers, the Amendment overlooks such fact by including a provision to the effect that an employee is presumed to be employed indefinitely, unless the employer can establish a justification for employment on a fixed term.[570] This seems unrealistic since there is a significant number of persons who prefer temporary work.[571] Chief amongst this group are women who have chosen to harmonise employment and family responsibilities. The other category is the young workers who have just started new jobs and wish to gain experience. Le Roux suggests that casual or temporary workers should be considered for some employment benefits schemes, even on *pro rata* basis.[572] The difficulty with this provision would be its implementation, particularly that statutory social security benefits are designed to benefit permanent employees.

3.2.3 The requirements for engaging in labour broking business

In terms of the reform any person who intends to conduct the labour broking business should pay the prescribed fee in order to acquire a licence.[573] Such licence may be renewed. A licence issued in terms of this section may be subjected to certain

569 Cheadle, H. 2006. "Regulated Flexibility: Revisiting the LRA and the BCEA." *Industrial Law Journal*. Vol. 27, p 666.

570 Section 128C of the Labour Amendment Act, 2012 (No.2 of 2012).

571 For example, for many, temporary work is their first choice. This group not only includes women who try to reconcile occupation and family responsibilities but also young people looking for 'a little job'. Other group is workers with specialized skills (nurses, translators, computer operators or bookkeepers. See Bronstein, B. 1991. "Temporary work in Western Europe: Threat or complement to permanent employment?" *International Labour Review.* Vol. 130, pp 299-300.

572 Le Roux. (2008: 142-143).

573 See section 19 (1) (a) of ESA.

restrictions, which if not complied with, will result in the revocation of the license.[574] Decisions made in terms of this legislation are appealable should there be an aggrieved party.[575]

Furthermore, the labour broker is prohibited from charging any person a fee, directly or indirectly, for placement with a user enterprise.[576] It should further be noted that this provision sufficiently complies with the ILO Convention provisions dealing with the same issue.[577] Under certain defined circumstances, a private employment agency and a user enterprise can be held jointly and severally liable for contravening the provisions of the labour legislation.[578] This allows agency workers to seek relief from either the private employment agency or the user enterprise, or both in the event that their rights have been violated. Claes points out that little research was done on the potential influence that multiple employers have on psychological contracts as well as employee attitudes and behaviours.[579] However, it has been confirmed that employees' commitment to the client or user enterprise and to the agency was based on procedural justice and perceived organisational support of the respective party.[580]

One aspect which remains blurred is the principle to the effect that a private employment agency is prohibited from becoming a party to the employment relationship

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574 See sections 20 -22 of the ESA. In case the issuing officer of licences refuses an application to operate as a private employment agency, a written notice giving reasons should be given in terms of section 20 (4) of the ESA.

575 Section 23 of the ESA. The Labour Court hears the appeal against the decision of the Director and rules of such Court apply.

576 Section 24 (1) of the Employment Services Act 8 of 2011 as amended.

577 See ILO Recommendation???

578 The Minister of Labour may grant an exemption in respect an applicant who applied not to comply with the Act.

579 Claes, R. 2005. "Organization Promises in the Triangular Psychological Contract as Perceived by Temporary Agency Workers, Agencies and Client Organizations." *Employee Responsibility and Rights Journal*. Vol. 17(3), p 133.

580 (ibid.: 133).

created, but the duty to control and supervise agency workers rests with the private employment agency.[581] In practice, it is strenuous, if possible at all, to control and supervise employees stationed at different workplaces. Eminent scholars claim that temporary agency work has become a fast growing business on the international arena.[582] The extremes of the business cycle offer opportunities for the industry which, to date, has been innovative and adaptive to the needs of job seekers and employing organisations.[583]

To facilitate an efficient regulatory framework on private employment agencies, there are designated bodies which have been established to this effect.[584] In addition, one of the objectives of such bodies is to register the names of unemployed members of the society for the purposes of assisting them to find employment opportunities.[585] These bodies also provide career guidance and other related programmes aimed at improving the employability of members of the society.[586] Furthermore, they also keep an updated list of foreign nationals working under work permits for the purposes of disseminating employment related statistical information.[587] However, it is not clear whether or not job seekers will undergo interviews or any other examination for the purposes of determining their employment suitability. It is important to point out at this juncture that the there has been an increase in unemployment rates and that the Labour Act is silent on the issue of unskilled labour force which constitutes the majority of the unemployed.

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581 Supra, section 1(b) (b).

582 See Meulders & Tytgat. (1989: 196).

583 Burgess & Connell. (2004: 19).

584 These bodies are the National Employment Service Board and the Employment Service Bureau.

585 See section 13(a) –(c) of the ESA. Other functions are to provide vocational guidance, career and labour market information to job-seekers and other interested persons. See s. 13 (d)-(m).

586 See section 13 (2) (g) and (k) of ESA 8 of 2011.

587 (ibid.: section 13(2) (j) and (l)).

The decision to implement the amendment has been criticised in some segments of Namibian societies,[588] with *Africa Labour Services* (ALS), having expressed similar sentiments. This resistance is mainly due to the fact that the reforms are designed to achieve a complete ban on labour hire in Namibia.[589]*APS* points out that the reformed legislation on labour law had a detrimental effect on its operations. Reinforcing its assertion, APS noted that several commercial enterprises cancelled their contractual agreements with the company following the reformation of labour laws. This, according to APS, resulted in the reduction of its workforce to 319 from a whooping 1600.[590] The reservation of judgement as far as the legality of labour hire is concerned has been reserved, which has caused further uncertainties in the future of labour hire in Namibia.[591]

In other jurisdictions, comprehensive regulatory framework has been put in place in an effort to protect agency workers.[592] It should be highlighted at this point that the approach adopted in South Africa, as far as labour broking is concerned, will be explored later in chapter five. The legal fiction which imputes the labour broker an employer status not only creates a legal distance between the agency worker and the user enterprise, but it is also misleading.[593]

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588 Menges, W. 2012 "Labour –hire Judgment reserved." The *Namibian*, p 1.

589 (ibid.).

590 (ibid.: 1-2).

591 (ibid.).

592 Van Eck, St. Temporary Employment Services (Labour Brokers) in South Africa and Namibia (August 27, 2010). Potchefstroom Electronic Law Journal, Vol. 13, No. 2, 2010. Available at SSRN: https://ssrn.com/abstract=1677244. Last accessed on March 1, 2017.

593 Section 198(1) defines a' temporary employment service' as any person who, for reward, procures for or provides to a client other persons- (a) who render services to, or perform work for, the client, and (b) who are remunerated by the temporary employment service.

Instead, the question which has to be asked is: how would these vulnerable workers' rights be effectively enforced against employers? This leads, yet, to another exciting discussion to determine whether or not imposing an employer status on the user enterprise will solve these issues. It should then the observed that the nature of work provided by some user enterprises cannot be performed on a permanent basis, but on a short term employment contract.[594] It should be highlighted that the unti-labour hire faction was shocked to learn of the massive layoffs which ensued as people were harbouring the belief that the labour hire industry was meant to exploit_workers. They argued that the retrenchment of agency workers was not the most appropriate procedure as other alternative avenues could have been explored to prevent massive job losses.[595]

Additionally, the National Employers Federation (NEF) also expressed its disappointment towards the amended legislation by arguing that government had opted not to heed the call against implementing the reformed law partly and followed an expediently short-term ideological route dictated by the unions.[596] To this end, trade unions launched a massive attack on the government criticising it of misinforming the general public in a bid to justify the dismissal of workers.[597] The Minister of Labour also accused the NEF, saying "the organisation claimed, as it often did, when Government attempted to strengthen protections of workers, that the new law was certain to cause

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[594] For example, in the fishing industry, harvesting of fish products takes place at certain times only. Another typical temporary work is loading and offloading vessels, for instance.

[595] One such campaigner for the ban, Herbert Jauch, felt that the layoffs are deliberate and unnecessary.

[596] Duddy (2012: 1).

[597] (ibid.).

unemployment".[598] Whatever outcome the Court decides, the debate on the pros and cons of labour hire in Namibia continues.

3.2.4 The challenge of the new amendment in the High Court

Immediately after its promulgation the new Amendment has been subjected to legal challenge by APS.[599] The company claimed that its right to carry on trade has been violated particularly that the Act prohibits a labour broker becomes a party to the employment relationship in which the latter assumes an employer status. According to Africa Personnel Services the new law has adversely affected the majority of workers who were forcibly retrenched in compliance with the new amendment.[600] Facing impending liquidation, APS instituted a legal suit challenging the constitutionality of parts of the provisions of the Act which effectively put an end to labour broking business in the country.

As indicated earlier in this Chapter the new Amendment has removed a labour broker the triangular employment relationship created, once the worker got a job with the user enterprise.[601] This implies that if APS fails to convince the Court that the implementation of the new Act would put the company out of business then the company will be forced

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598 The Minister of Labour is Immanuel Ngatjizeko. He vowed to put an end to labour hire in Namibia at any cost. See The Namibian, 10 August 2012.

599 *Africa Personnel Services v The Minister of Labour and Others,* Case no:A 163/2012 at p 2-3.

600 (ibid.). The implementation date of the new amendment was 1st August 2012. Namibia's largest labour-hire company, Africa Personnel Services (APS) confirmed that since the new legislation came into effect last week, 75 per cent of the companies that hired workers through them have cancelled their contracts which led to major layoffs of about 7000 , out of 10 000 workers.

601 Section 128 (2) of the Labour Act 2007 as substituted by section 6 of the Labour Amendment Act 2012

to close its doors.[602] APS argues that the Amendment is too wide and does not provide clear guidelines, thus, it violates its entrenched constitutional right to engage in any business or trade.[603] To be more specific, the legal issues which were brought before the Court for determination were: whether the regulation is contrary to article 21(1) (j) of Constitution and whether the legal provision at issue imposes a rational limitation on the right to practice any trade or business in terms of article 21(2) of the Constitution.

In resolving the legal questions before it, the Court adopted a deferential role. The latter concedes that socio-economic regulations imposed by the Executive deal with policy considerations [604] which, if found to have been rationally made, will result in no need for judicial intervention. The Court pointed out that the Executive is vested with the duty to make policies, as opposed to the judiciary which illustrates the importance of the principle of separation of powers designed to prevent the concentration of power in one organ of state.[605] Being mindful of its duties, the Court stated that it cannot sit in judgment on economic issues because it is ill-equipped to do so in a democratic society.[606]

With regard to the question whether or not the challenged legal provision constituted a rational limitation on the right to practice any trade or business, the Court held that it was not so invasive and thus constituted a rational limitation on the right to practice any

602 *APS*' urgent application to halt the new law goes to court on Monday the 13th August 2012. See Ashipala S 'D-Day for labour hire' 01 *The Namibian*, 2012 at 1.

603 Routh, R. 28 September 2012. "Labour hires case back in court, judgment reserved." *New Era*, pp 1-2.

604 See summary notes of *Africa Personnel Services v The Minister of Labour and Others,* Case no: A 163/2012 at page 2-3.

605 The concept of separation of powers has been discussed in detail in the Namibian case of S v Heita

606 See *Namibia Insurance Association v Government of Namibia & Others* 2001 1 NR (HC).

business or trade.[607] As far as the constitionality of section 128 of the Act was concerned, the Court rejected the applicant's bid to declare it as being unconstitutional.[608] In this respect the Court argues that the regulation at issue is aimed at curing the perceived "mischief" as it bridges the gap in the existing legislative framework. However, the Court acknowledged that the amended legislation might "overkill" in order to achieve the intended goals in its own peculiar way; *such regulation could have been moulded in a different or even better fashion*.[609] In most contemporary societies, Courts are not involved in the fashioning of economic policies, but such duty is vested in respective governmental ministries. The Court noted that the language employed by the Minister in specific sections of the amendment reveals that the Minister has discretionary powers to make regulations.[610] Consequently, the Court concluded that failure to promulgate regulations prior to the implementation of the Act could not be regarded as an *ultra vires* act[611] such that the Court had to dismiss the application with costs.

The Court further looked at the provisions which *APS* sought to be struck out alleging that they were tantamount to a violation of its right to carry on any trade or business and in this respect it provided a historical overview of the issues raised as well as a synopsis of the decision in *Africa Personnel Services* in which the Supreme Court declared section 128 of the Labour Act as being unconstitutional for imposing an absolute ban on

607 Here the law referred to is article 21(2) of the Namibian Constitution.

608 This refers to the provision of article 21(1) (j) of the Namibian Constitution of 1990.

609 See summary notes in Africa *Personnel Services v The Minister of Labour and Others,* Case no: A 163/2012.

610 See sub-section (10) of the *Labour Act, 2007 (No. 11 of 2007).* as amended by the Labour Amendment Act 2012.

611 See summary notes in *Africa Personnel Services v The Minister of Labour and Others, Case no*: A 163/2012.

labour hire.[612] In addition the Court found that a total ban on labour hire would substantially overshoot the permissible restrictions in terms of article 21(2) of the Namibian Constitution.[613] Furthermore, the Court pointed out that the section in question was very broad[614] thereby making an absolute prohibition wider than is necessary to achieve the objectives in the labour legislation.[615] As a result, a total prohibition was considered to be disproportionately harsher than what is reasonable and necessary in a democratic society. It was emphasised that the Legislature is vested with the duty to regulate the labour industry and guard against the exploitation of workers who might be caught in a triangular employment relationship.[616]

In compliance with the Supreme Court's decision, two legislations and whose purposes are set out in their respective preambles[617] were subsequently promulgated.[618] In responding to the issues raised for a determination, the Court adopted a contextual approach in respect of the amended provisions.[619] However, since this chapter has already touched on these provisions earlier on, it becomes unnecessary to repeat them here. The Court went on to consider the new definition of an "employee" and an

612 *Africa Personnel Services v Government of Namibia* 2009 (2) NR (SC).

613 Particularly article 21 (1) (j).

614 *Africa Personnel Services v Government of Namibia* 2009 (2) NR (SC).

615 Labour Act, 2007(No. 11 of 2007).

616 *Africa Personnel Services v Minister of Labour and Others* (2013) at para. [5] – [6].

617 See the Preamble of Labour Amendment Act 2012 which provides as follows: '…to regulate the employment status of individuals placed by private employment agencies to work for user enterprises; to provide for protection for individuals placed by private employment agencies; to prohibit the hiring of individuals placed by private employment agencies in contemplation of a strike or lock-out or for the collective termination,---to substitute certain provisions in order to align them with the definition of private agency;…". The corresponding portion of the Preamble of the Employment Services Act reads as follows: "---to provide for the licensure and regulation of private employment agencies; ---." See *Africa Personnel Services* (2013) at para.s [8]-[9].

618 These are: the Labour Amendment Act No of 2012 and the Employment Services Act No 8 of 2011.

619 Section 128 (4) (a) requires equal treatment between individuals placed by private employment agencies and incumbent employees performing similar work; section 128 (5) prohibits a private employment agency employ an employee during or in contemplation of a strike or lock-out. See also sections 128 (6) – (10) of the Labour Act 2007 as amended.

"employer" [620] as well as the provisions which create a presumption of employment where certain factors are present.[621] For the purpose of this thesis, it is very crucial that the legal provision at issue be analysed for a full understanding of how the Court arrived at its decision. [622]

Acknowledging the heated controversy surrounding labour hire in Namibia, the Court remarked that labour regulations have not effectively dispensed with this issue.[623] From a personal perspective, our colonial past seem to have contributed tremendously to the current position on labour hire in Namibia as noted by the Supreme Court. Reinforcing its stance, the applicant noted that nine user enterprises had cancelled their contracts with it and that it had significantly reduced its workforce subsequent to the implementation of the Amendment.[624] Thus, one can safely conclude, that if the figure indicated by the applicant turns out to be genuine and accurate, that the reformed legislation has devastating consequences on agency workers who might lose their employment thereby worsening the unemployment rate which is already disturbing. Furthermore, the applicant contended that excessive legislative interference with the labour hire industry would force it out of business by creating a hostile environment in the industry and which would amount to a total "overkill."[625]

620 See section 128 (1) (a)-(b) of the Labour Act, 11 of 2007 as amended.
621 See section 128A of the Labour Act, 11 of 2007 as amended.
622 These are sections 128 (4) – (10) as amended by the Labour Act 1 of 2007.
623 *Africa Personnel Services v Minister of Labour and Others* (2013) at paras [12] – [14].
624 The applicant claims that its employees have declined from 1618 to 319 employees.
625 *Africa Personnel Services v Minister of Labour and Social Welfare (A 163/2012) [2013]* (NAHCMD) 179/2013 at para. [13].

The applicant correctly noted that the prohibition of the labour hire industry was put into effect under the guise of a Legislative regulatory framework.[626] On the other hand, the respondents mainly contended that the amendments were not aimed at labour brokers per se, but were aimed at regulating the relationship between user enterprises and the agency workers which[627] does not amount to any violation of application's constitutional rights.[628] In this regard, it seems the respondent has conceded that the applicant is entitled to the right to carry its business as claimed, thereby shifting the applicability of the contentious legal provision from labour brokers to the relationship between agency workers and user enterprises.[629] In response to respondent's claims, the applicant conceded that although the freedom to partake in economic activities should be subjected to reasonable restrictions, such restrictions should not be so onerous as to amount to an infringement of fundamental right and freedoms.[630]

3.2.5 Legislative intervention: an overkill of the labour broking industry

Notwithstanding the fact that the Supreme Court expressed its unwillingness to interfere with the function of the Legislature; it however remarked that legislative interference with the operations of labour hire entities was intended to ban the operation of such entities.[631] In addition, the Court stated that the enactment of various legislations by Parliament which aim at restricting the activities of labour brokers could be described as

626 (ibid.:para. 14).
627 Section 128 of the *Labour Act, 2007 (No. 11 of 2007).* as amended.
628 Article 21(1) (9j) of the Namibian Constitution of 1990.
629 See *Africa Personnel Services v Government of Namibia* 2009 (2) NR 596 (SC) at 669 H-I [118].
630 *Africa Personnel Services v Minister of Labour and Social Services* (2013) at para. [16], see also *Namibia Insurance Association v Government of the Republic of Namibia 2001* NR 1 (HC) at 18 B-D.
631 *Africa Personnel Services v Minister of Labour and Social Services* (2013).

amounting to an "overkill" of the industry.[632] Furthermore the Court took cognisance of the fact that applicant's main claim arises from the respondent's policies and regulations which the former alleges that they constituted an impermissible barriers on its operations.[633]

In deciding whether the new regulation was rational, the Court relied on the decision in *Namibia Insurance Association v Government of Nami*bia [634] in which the Court *a quo* observed that any regulation on the right to practice must not only be rational, but must not also be so invasive that it constitutes a material barrier to the right to practice the profession which offers sufficient justification under article 21(2) of the Constitution. The other question the Court has to determine was whether a regulation constitute a material barrier to the right to practise is permissible under art 21(2).[635] In light of this authority, counsel, on behalf of the applicant, submitted that the effect of the section was such that it constituted a material barrier to applicant's right to do business. The Court was also referred to other relevant legislations[636] which provide that a labour broker and the user enterprise are both liable for any contravention of the Labour Act. Such a provision has the effect of opening the "door" for the employee to sue any one of the employers for a financial relief.[637] The legal representative of the applicant argued

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632 (ibid.).

633 (ibid.:para. 18).

634 2001 NR (HC) at 18 B-D.

635 *Africa Personnel Services v Minister of Labour and Social Services* (A 163/2012) [2013] NAHCMD 179/2013 at para. [27].

636 For instance section 26 (b) (ii) of the Affirmative (Employment) Equity Act, 29 of 1998 which requires labour hire employers to police user enterprises in respect of the latter's compliance with the Act. Other provisions include: section 128 (9) of the Labour Act which made user enterprises jointly and severally liable with labour hire employers for any contravention of any labour related legislation serving as disincentive to use labour hire services; section 128(4) of the Labour Act which requires labour hire employees to receive same benefits as directly employed workers; sections 128(8) – (9) of the Labour Act 2007.

637 (ibid.: section 128(9)).

that the provision at issue is overbroad to such an extent that it encompasses the contravention of innocuous provisions such as record keeping and that the regulation was s restrictive such that the restrictions constituted a barrier to applicant's business, thereby, calling on the respondent to justify its assertion.[638] Unfortunately, no attempt was made to justify these restrictions and it appears as if the powers to regulate provided in the amendment may save the constitutionality of the section as a whole; sadly no regulations had been promulgated at that time.[639]

Counsel for the respondent noted that applicant's business involves the recruiting of workers to make them perform work at the premises of a third party to perform work for such persons at their premises. In this way, the recruited personnel is contracted only to work for a fixed period of time depending on whether the work to be completed is a project, seasonal employment or to fill vacant position in the user enterprise's structures.[640]

Other aspect which the new amendment regulates is the requirement that any person or entity intends to engage in labour broking business should first acquire a licence which is consistent with the practice at the international level.[641]

Apart from the pre-requisite to obtain a licence before commencing trading in supplying individuals to user enterprises the Act imposes joint and severally liability on both the labour broker and the user firm unless in a situation where an exemption is applied for

638 *Africa Personnel Services v Minister of Labour and Social Services* (2012) para. [19].

639 Section 128(10) of the Labour Act 2007 as amended.

640 Africa Personnel Services v Minister of Labour and Social Services (A 163/2012) [2013] NAHCCMD 179/2013 at para. [20].

641 In terms of the ILO Convention 181 of 1997 any private employment agency involving in supplying workers to third parties should acquire a licence in order to enter such business.

by either party to the Minister.[642] This situation requires that all the parties to the tripartite agreement agree on whether to apply an exemption or not. However, the Court regards it as nothing but "smoke and mirrors" on the grounds that the exemption is made subject to specific provisions which impose a joint liability on both labour hire entities and user enterprise.[643]

In terms of the employment structure, the applicant purports to assume the responsibility of the "employer," whereas in terms of the agreement it concludes with its workers, employees cannot be paid by the user enterprise if they have not performed, also commonly referred to as the "no work no pay principle." Counsel further noted that it is very much uncommon for there to be a contractual relationship between the user enterprise and the labour broker, whereas there is no contractual relationship between the user enterprise and the agency workers who are subsequently subjected to the control and supervision of the user enterprise.[644] Thus, such an employment arrangement enables the user enterprise to circumvent the ensuing contractual liability between the user enterprise and the agency workers, thereby, leaving agency workers more vulnerable to all sorts of exploitation by the user enterprise.[645] This form of employment relationship poses detrimental effects to agency workers who may be

642 This refers to the Minister of Labour and industrialization who determines whether to grant a licence or not.

643 (ibid.: section 128(9)).

644 (ibid.: para. 20).

645 Employment protection rights such as the right to claim unfair dismissal or a redundancy payment that are typically vest only in employees whose jobs fit into the complementary paradigm form of employment in vertically integrated production: employment which is full-time, stable and for an indefinite duration. See Collins, H. 1990. "Independent Contractors and the Challenges of Vertical Disintegration to Employment Protection Laws." *Oxford Journal of Legal Studies*. Vol. 10. Oxford University Press, p 353.

unfairly dismissed by the labour broker on instructions of the user enterprise.[646] Counsel further contended that although agency workers remain indefinitely listed as nominal employees in the records of labour brokers, payment to the agency workers will only be paid unless another user enterprise engages them in some work.[647]

3.2.6 The rational connection test

The Court adopted a purposive approach by introducing rationally connection arguing that legislative intervention aims at attaining a legitimate governmental objective intended to protect the constitutional rights of the agency workers[648] in compliance with the government's principles of State Policy.[649] It was further emphasised that section 128 affords protection to agency workers who form an "underclass" and the weakest in the triangular employment relationship who need the most protection of labour laws. It prevents persons bypassing the Labour Act[650] through a scheme of arrangement that undermines or renders ineffective the rights afforded to employees by the Act.

Furthermore the Court remarked that the government had pinpointed what it considered to be the major gap in the then existing law, mainly that labour brokers and user enterprises could enter into contracts which went beyond the reach of labour laws. [651] It

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646 This is contrary to the principle set in *Denel (Pty) Ltd v Vorster* (2004) 25 ILJ 659 (SCA). In this case the court directed that an employer has an obligation to follow a particular disciplinary procedure if the latter intends to dismiss an employee. Where an employee has been summarily dismissed without following procedures and any valid reasons, damages should be paid to the employee in lieu of not being given a hearing. See *Key Delta v Marriner* [1998] 6 BLLR 647 (E).

647 *Africa Personnel Services v Minister of Labour and Social Services* (2012) above at para. [21].

648 These rights include: the right to dignity (Art 8); to right to equality and freedom from discrimination (Art 10); the right to fair trial (12) ; and the freedom of association, which includes the freedom to form and join trade unions (Art 21(1) (e).

649 See Article 95 of the Namibian Constitution.

650 (No 11 of 2007).

651 *Africa Personnel Services v Minister of Labour and Social Services* (2012) above at para. [24].

further stated that the purpose of labour law is to reduce the exercise of employers' contractual power by giving employees those rights to which they are not accessible through contract, that the common law of master and servant was regulated exclusively through contract and was premised on the fiction of bargaining equality between the employer and employee, and that, given the greater bargaining power of the employer, the common law contract of employment was calculated to protect employers' powers at the expense of the employee's interests,[652]

In directing its attention to the mischief which it sought to remove, the Court indicated that the legislature saw it unfit to prohibit the labour hire industry in its entirety, but to allow the industry to flourish subject to the requirement that it did not exonerate the user enterprise from its statutory obligations towards the employees particularly that these employees were employed at its instance and were *de facto* its employees and ought therefore *de jure* to be treated as such.[653] The court signalled that in issues concerning economic matters, it is a common phenomenon that national polies will be introduced to regulate the actors involved which makes such responsibilities fall outside the scope of labour law. The same sentiments were also echoed in *Namibia Insurance Association v Government of the Republic of Namibia and Others* the court[654] in which it was stated that economic regulations inevitably involves policy choices by the government and the Legislature and once it is determined that those choices were rationally made, there is no further basis for judicial intervention.

652 (ibid.:para. 25).
653 (ibid.:para. 26).
654 2001 NR 1 (HC).

Furthermore, the Court proceeded arguing that the latter could not sit in judgment over economic issues because they are ill-equipped to do so and it is not their role to do so in a democratic society and in support of its reasoning referred to a United States court's decision in which the Court refused to regulate business and industrial conditions for fear of striking out state laws.[655] Also, reference was made to a court ruling in South African in which it was stated that in a modern state, the question whether or not there should be a regulation and redistribution (in the public interest) is essentially a political question which falls within the domain of the Legislature and not the courts.[656]

In determining the rationality of the new amendment the Court admitted that the latter seeks to protect agency workers' rights such as equality of treatment between agency workers and employees directly employed by a user enterprise and it explained that labour regulations were aimed at discouraging employers from using agency workers as a strategy for suppressing industrial actions and promote the employment of full- time employees, as opposed to casualisation of labour.[657] In light of this principle the Court argued that once the amended Act passed the rationality review, the applicant, that is, *African Personnel Services* could not show a limitation it claims unless if the latter could prove that the reform had created a material barrier to the operation of the labour hire industry.[658]

In response, the applicant contended that the amended provision will obviously have a negative impact for both the user enterprise and the labour brokers operating outside

655 *Furgeson v Skrupa 372 US 483*.
656 *Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC0 at para. [180].
657 *Africa Personnel Services v Minister of Labour and Social Services* (2012) above n at para. [31].
658 This is referring to Article 21 (1) (j0 of the Namibian Constitution. 1990.

the confines of the law. Furthermore APS argued that it has already put measures in place to comply with the changes by mainly focusing on value addition to both its employees and clients.[659] Concerning the claim by the applicant that its workforce had declined drastically and that many of its clients had cancelled agreements, the Court held that the applicant could not show that a material barrier to practising its profession had been created. In fact surprisingly, the applicant has conceded that its employees were declining without any effect caused by the Amended Act ascribing the subsequent drop in employment numbers to the misdirected intervention of the unions.[660]

Africa Personnel Services further submitted that the effect of the Amendment Act was that there will no longer be any inherent market value in the bare rental of workers' labour and denied that it has ever been engaged in business involving the bare rental of workers' labour, but contended that it provides properly trained personnel to user enterprises. However, it appears that there is nothing in law which prevents private employment agencies from providing the required services to user enterprises and also the amended legislation is silent concerning the situation where a user enterprise and a labour broker enter into a contract for purposes of sharing financial responsibilities arising from the labour related legal proceedings.[661]

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659 *Africa Personnel Services v Ministry of Labour and Social Services* (2012) above at para. [32].

660 (ibid.).

661 These may issues such as dealing with misconduct committed by labour hire employees; disciplinary hearings proceedings and any other labour related complaint arising out of employment relationship.

3.2.7 The dominant objective of the amendment

Emphasising the significance of the reform the Court argued that that the dominant objective of the Act was to do away with the exploitation of temporary workers and the deficiency in the labour markets which have been aiding user enterprises to enjoy the services of workers, whilst simultaneously avoiding responsibility under the Labour Act.[662] Accordingly, any limitations imposed by the provisions of the Labour Act would be justifiable in terms of the relevant constitutional provisions which represent a proportional legislative response to the needs of agency workers.[663] The Court observed that the Minister acted *ultra vires* by allowing the Amendment Act to come into operation before promulgating regulations under the Labour Act but dismissed the claim that the absence of the regulations constituted a material barrier to the right to trade or carry on any profession. However, it pointed out that it was crucial to determine whether the challenged law constitutes a rational regulation of the right claimed and if it does, constitute a material barrier to the practice of a trade or profession, occupation or business, then the government will have to establish that it is, nevertheless, a form of regulation that falls within the ambit of article 21(2).[664]

The fundamental claim advanced by the applicant was that the amended legislation amounted to a "total overkill" which the Court construed as the intention to "kill," although it found nothing irrational with such construction.[665] It should be emphasised that the respondents were contending that the amended legislation constitutes a rational

662 (No, 11 of 2007).
663 Article 21(2) of the Namibian Constitution.
664 *Trustco Ltd t/a Legal Shield Namibia & Ano v Deeds Registries Regulation Board & Others* at para.s [26]- [27].
665 *Africa Personnel Services v Minister of Labour and Social Services* (2012) at para. [21] ??

and legitimate response to the applicant's case and that the means employed by the Legislature is rationally connected to the attainment of legitimate government objectives.[666] The Court accepted this reasoning stating that the legislation is aimed at preventing persons from bypassing the provisions of the Labour Act and that the legislation strives to achieve the intended objectives by closing loopholes in the legislation.[667]

One complaint expressed by the Applicant was the responsibility imposed on it to police user enterprises for compliance with specific laws and to ensure that the company makes contributions to the Social Security Commission.[668] In this regard the court pointed out that it cannot see how these provisions, desirable or not, constitutes a material barrier for the applicant to conduct its business.[669] Therefore the Court rejected the policing claim raised by the applicant stating that there was no policing done as claimed and that the Employment Service Act[670] merely sets out pre-conditions for the use of agency workers by requiring that the user enterprise must have complied with its legal obligations.[671] The Court went on to reject applicant's other claim and held that the Minister is empowered to make regulations in respect of the enforcement of the labour regulations whenever it is necessary and from this perspective, the Court stated it appeared that the scheme adopted by the reformed section 128 surely intended to cure the "mischief" by closing all loopholes in the existing legislative framework and that the amended_legislation aims at achieving the above mentioned goals in its own

666 (ibid.:para. 24).
667 (ibid.:para. 26-27).
668 Affirmative Action (Employment) Equity Act, No 29 of 1998.
669 See Africa *Personnel Services v Minister of Labour and Social Service* (A 163/2012) para. [42]-[44].
670 Section 26 (1) (b) of the Employment Service Act, No 8 of 2011).
671 Social Security Act of 1994.

peculiar way which is a far cry from being irrational and therefore nothing contained in the legislation which could render it of being irrational.

In a bid of trying to halt the implementation of the new reform, APS challenged the reformed legislation on the grounds that it effectively has the same effect as the original provisions which abolished labour broking.[672] However, the Court was careful not to interfere with the functions of the Legislature for fear of usurping the power exercised by the other organs of state which is consistent with the doctrine of the separation of powers and it argued that the new Amendment Act constitutes a rational regulation of the right of a labour hire agency to practice or trade or carry on any business.[673] In addition, the Court stated that the regulation does not constitute a material barrier to the practice of that profession, trade or business and that the regulation falls within the ambit of the law and that the provision does not conflict with any provisions of the Constitution, but is aimed at curing of the perceived "mischief" as it obviously attempts to close the "gap" in the existing legislative framework. The Court conceded that although the amended legislation might amount to "overkill," yet it achieves the intended goals in its own peculiar way.[674]

672 *Africa Personnel Services v The Minister of Labour and Others,* case No: 163/2012. The case was heard on the 27th September 2012 and was delivered a year later that is on the 27 June 2013.

673 In terms of the doctrine of separation of powers each organ of State, that is, the Executive, the legislature and the Judiciary, perform their functions independently without the inference by the other organ.

674 *Africa Personnel Services v The Minister of Labour and Others,* case No: 163/2012.

3.3 Conclusion

This chapter started out with an introductory section which highlighted the discussion covered in chapter two. It proceeded to narrate the abusive and exploitative nature of the contract labour system through which Black Namibians were employed before independence and which was equated with modern labour broking practices. A critical analysis of the ruling of the Courts in *APS* case was later discussed in detail in order to provide a complete understanding of the *ratio decidendi* for the judgement of the Supreme Court which declared labour broking as constitutional. The chapter revealed that the Apartheid policies which were introduced in Namibia by the South African government during the colonial period contributed to poverty and destitution in Namibia. The colonial powers took all the land from the Black population as well as other natural resources which resulted in creation of unequal societies. Namibians were forcefully removed from their fertile land and were relocated to what was called “Native Reserves” from where they provided cheap labour on White owned farms, factories and mines.

In addition, the chapter further discussed the problem of unemployment and poverty as it stands in Namibia and the overstepping of the reform which ban labour broking. It analysed the consequences of the ban which resulted in job losses. A detailed analysis of the ruling of the Supreme Court revealed that the Legislators were mostly concerned about the past inhuman treatment of the workers through the contract labour system which was used by the colonial authorities to oppress the Black population. The unemployment situation in Namibia was examined and it was found that the majority of the Namibian people do not have jobs, particularly the youth. As a consequence, a large

section of the society is experiencing poverty. The chapter found that by proscribing temporary and part-time work as set out in reformed legislation, it will not only affect the business of labour brokers, but also any other employment arrangement which does not fit within the definition of standard employment.

The chapter further revealed that immediately after the new Labour Amendment Act came into force, APS unsuccessfully challenged its implementation. The company pointed out that the new reform has violated its constitutional right to carry on trade or business, arguing that the regulation has the same effect as the original repealed legislation which abolished labour broking *ab initio*.[675] However the Court was not convinced that the reform violated the right of the applicant stating that the new reform constitutes a rational regulation of the right of the applicant claimed.[676] The Court further explained that the regulation does not constitute a material barrier to the practice of trade or profession and does not infringe the alleged constitutional right, is but aimed at closing the "gap" in the current legislative framework. Therefore, it has achieved the desired objectives.[677]

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675 *Africa Personnel Services v The Minister of Labour and Others,* case No: 163/2012. The case was heard on the 27th September 2012 and was delivered a year later; that is on the 27 June 2013.

676 In terms of the doctrine of separation of powers each organ of State, that is, the Executive, the legislature and the Judiciary, perform their functions independently without the inference by the other organ.

677 *Africa Personnel Services v The Minister of Labour and Others,* case No: 163/2012.

CHAPTER 4: ANALYSIS OF THE AMENDMENT OF THE LABOUR ACT[678]

4.1 INTRODUCTION

The preceding Chapter concentrated on the controversy and regulation of labour broking or labour hire in Namibia. The Chapter discussed in detail the strict approach adopted by the Namibian government in regulating the industry in such a way that the latter is prohibited labour brokers to operate as a business entrepreneurs. It analysed court litigations in which *Africa Personnel Services* challenged the law which outlawed labour broking arrangements and outlined the reasons and the approach adopted by the Supreme Court in arriving to its decision declaring labour broking in Namibia as being constitutional.

This chapter examines the reform of the relevant section of the Labour Act[679] (LA) which previously outlawed labour hire in Namibia. It proceeds to determine whether the new reform provide adequate protection for agency workers' rights. The Chapter further explores whether the reform creates conducive environment for solving pertinent social problems experienced in Namibia and whether it is consistent with the decision in *Africa Personnel Services*[680] *(APS)* in which the Supreme Court ruled that a blanket prohibition of labour hire in Namibia was unconstitutional and that if properly regulated within the ambit of the Constitution[681] and the ILO Convention 181[682], labour

678 Section 128 of the *Labour Act, 2007 (No. 11 of 2007).* which has been repealed by the Labour Amendment Act 2 of 2012.

679 This refers to section 128 of the *Labour Act, 2007 (No. 11 of 2007)..*

680 (2009) 2 NR (SC).

681 This refers to article 21 (1) (j) of the Namibian Constitution of 1990.

hire would typically be temporary of nature and would significantly contribute to the growth of the economy of the country.[683]

The reform has adopted a non-discriminatory approach. It extends protection of labour rights to individuals placed by private employment agencies (PEAs) with user firms.[684] This means that employment rights enjoyed by full-time employees have been extended to agency workers.[685] The reform requires that the recruitment of agency workers be on the same terms and conditions of employment similar to those that apply to other workers who perform the same work at the user undertaking.[686]

4.1.1 Impact of the reform

In practice, the impact of the reform has legally ended the discretion employers enjoyed to employ casual or temporary workers when necessary. Another change which the reform introduced is the requirement that agency workers would be entitled to the same collective rights as other workers in the employ of the user undertaking.[687] This implies that agency workers have the right to organise and negotiate with their employer for better conditions of employment. It should be noted that collective bargaining has particular importance because it is the mechanism through which 'regulated flexibility'

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682 ILO Convention 181 of 1997.

683 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia & Others* (2011) 32 ILJ (South Africa), 205 (NmS).

684 Section 128 (3) of the Labour Act 2007 as substituted by section 6 of the Labour Amendment Act 2012.

685 These rights include the basic conditions of employment, the right not be unfairly dismissed, the right to organise and bargain collectively and any other employment benefits which full-time employees are entitled to. See section 15 – 35 of the *Labour Act, 2007 (No. 11 of 2007)*..

686 (ibid.: section 128(4) (a) – (b)).

687 See Section 128 (3) of the Labour Act as substituted by section 6 of the Labour Amendment Act 2012.

will be achieved. In other words, the ability of collective bargaining to set wages and conditions that balance employees' needs with those of employers is critical for the ability of the labour relations system to balance the imperatives of equity and economic development.[688]

Considering the fact that agency workers tend to perform the tasks assigned to them at scattered workplaces with workers usually located at different sites it is not clear how the right to organise and associate would be exercised under such circumstances. Under common law the power of an employer to prescribe standards of conduct is perceived to be confined to the workplace where disciplinary steps against transgressors take place.[689] It is not surprising that the new Amendment has placed restrictions on the use of agency workers particularly where a strike or contemplation thereof or lockout by workers directly employed by the user undertaking a user firm r is not allowed to employ agency workers as replacement.[690]

However, it is allowed to employ the services of agency workers where a user firm has dismissed workers who are directly employed, provided that a period of six months should lapse after the dismissal.[691] Another crucial change introduced by the new amendment is the prohibition of a labour broker carrying on business for a fee resulting in the latter ebing simply a facilitator between a user firm and the worker.[692] Practically,

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688 Godfrey, S. Theron, J. *et* Visser, M. 'The State of Collective Bargaining in South Africa: An Empirical and Conceptual Study of Collective Bargaining' Labour *and Enterprise Policy Research Group*, University of Cape Town (Development Policy Research Unit, DPRU Working Paper 07/130, November 2007) 1.

689 Grogan, J. 'Workplace Law' (eds) Juta Law (2003) at 90.

690 (ibid.: section 128(5) (a) – (b)).

691 (ibid.).

692 Section 128 (2) of the Labour Act 2007 as substituted by section 6 of the Labour Amendment Act 2012. See also section 1 of the Employment Service Act 2011 as substituted by section 8 of the Labour Amendment Act 2012.

this means that a labour broker would no longer be able to assume an employer status as an entrepreneur but simply a recruiting agency. In this respect the prospect of companies to outsource non- core functions of their firms to third parties have been adversely affected if not totally banned. Strictly speaking, the labour broking industry in Namibia has been put in the situation where some employers may use disguised methods to remain in business particularly if the new legislation is not tailor - made to the needs of the industry.[693] In fact modern employment practices allow firms to resort to outsourcing of their functions to outside entities through various forms of intermediaries to avoid retaining the services of workers directly which is believed to be costly.[694] Theron *et al* argues that modern work arrangements which is characterised by outsourcing through externalisation of work via various forms of work structure for purposes of restructuring internal operations of businesses.[695] The key objective of externalizing work to outside entities is to reduce costs and thereby increase productivity.[696]

Elsewhere, the use of agency work is only allowed on condition that it is justifiable based on the grounds of 'general interest of agency workers'.[697] A good example is where the legislation is aiming at protecting agency workers against unfair labour

693 Theron, J. Godfrey, S. *et* Greenburg, J. (note 91) at 40.

694 Fudge, J. 'The Legal Boundaries of the Employer, Precarious Workers and Labour Protection' in Davidov, G. Boundaries *and frontiers of labour law: goals and means in the regulation of work* (2006) at 301-302.

695 This could be done through sub-contracting of work to outside entities. See J Theron and S Godfrey, *Protecting workers on the periphery*, Institute of Development and Labour Law (2000), 24; see also Theron, " Responding to Externalisation: Part 1" (2000) 24 SALB, p 60.

696 Theron, J. "Indecent employment: What is to be done about labour broking?" (2009) 33 No.2 SALB, p 7; see also Bridget Kenny and Andries Bezuidenhout, "Complexity and Control: Subcontracting in the Mining Industry" Economic Monitor: Indicator SA (1999) 16 p 33-34.

697 See Article 4(1) and (2) of the Temporary Agency Directive 2008.

practices.[698] The common law definition of the term 'employee' is exclusionary because it only covers workers who are employed as full-time employees.[699] Oliver *et al* point out that even though the statutory definition of an employee might sometimes go further than what is at common law understood the term 'employee', the case law nevertheless make it clear that major categories of workers , such as independent contractors are excluded'.[700]

It is interesting to know that the new Amendment has broadened the definition of the term 'employee' by including an individual whom a private employment agency places with a user enterprise in its definition and the latter becomes the employer.[701] The implication of this wide definition implies that any person hired to carry out work, even for a short period of time, such person may qualify to be classified as an employee. The question one may ask is what about genuine casual workers who only perform work on temporary basis and may not be willing to be employed as full-time employees?

Obviously, by broadening the definition of the concept 'employee' the new legislation contradicts the common law meaning of who an employee is whereby courts have been involved in providing qualified interpretations using various tests.[702] In terms of

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698 Rubery, J. 'Precarious forms of work in the United Kingdom' in Gerry and J Rogers (1989) above 9 at 55-56.

699 See Section 1 of the *Labour Act, 2007 (No. 11 of 2007).* (Namibia). In South Africa, section 39(1) of the Unemployment Insurance Act 63 of 2001 make the Act applicable to all "employees" and "employers". Section 1(1) of the same Act defines a "contributor" as a natural person who is or was employed, to whom the Act applies and who can satisfy the Commissioner that he or she has made contributions for purposes of the Act.

700 Oliver, M. *et al* 'Social Security: A Legal Analysis' LexisNexis, Butterworth's (2003) at 131. Apart from independent contractors, other categories excluded from the South Africa's social security system, notably compensation for workplace injuries and disease, and unemployment insurance, includes the self-employed, the informally employed, and several other atypical employed.

701 See section 128(2) of the Labour Act 2007 as substituted by section 6 of the Labour Amendment Act 2012.

702 See *Smith v Workmen's Compensation Commission* 1979(1) SA 51 (A); SABC v McKenzie 1999(1) BLLR 1 (LAC) In *Smit's* case the organisational test was laid to rest, while the dominant

the new amendment an employer is a person who is entrusted with the supervision of the employee which appears to exclude many workers who perform work without the supervision of an employer. Benjamin points out that the definitional change of the concept 'employee' creates an element of uncertainty.[703] The distinction between who is an employee and an independent contractor has been extremely difficult to maintain in practice which resulted in the need of amending the definition of the term 'employee' because of the erosion of the notion of employment relationship, the regulation of labour and for social insurance purposes.[704]

In the context of labour broking practices, key issues that need to be regulated may include but not limited to the registration and control of agencies that place employees to work for "Other".[705] More importantly, extending core labour rights including the right to organise and bargain collectively would allow the latter to participate in collective bargaining[706]. Benjamin suggests that placement of young and vulnerable workers by labour market intermediaries should be promoted.[707]

One unexplained stance concerning the reform under discussion is its disregard of the provisions of the ILO Convention which allows private employment agencies engages in

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impression test, weighing up the elements of the contract as a whole, was deemed to be the most effective test to determine the nature of the legal relationship between the parties. In Namibia, see *Hannah v Government of the Republic of Namibia 2002 (2) 215 NLC* where the court made a ruling that a judge of the High Court was not an employee of the State arguing that the latter has no direct supervision and control of judges when performing their professional duties. See also *Paxton v Namib Rand Desert Trails (Pty) Ltd* 1988 (1) 105 NLC in which the court has rejected a volunteered wife assisting a husband who is an employee claim to be an employee too.

703 See Benjamin, P. Borat, H. and Van der Westenhuizen, C. 'Labour Relations Amendment Bill, 2010; Basic Conditions of Employment Amendment Bill, 2010; Employment Equity Amendment Bill, 2010 and employment Service Bill, 2010' dated 9 September 2010.

704 Theron, J. and Godfrey, S. 'Protecting workers on the periphery' *Institute of Development and Labour Law, University of Cape Town* (2000) at 43.

705 This refers to user enterprises or client companies.

706 Benjamin, P. *et al* (2010) above 52 at 33-4.

707 (ibid.:21(1)1).

business as employers.[708] In these, respective policy makers in Namibia were quick to point out that labour broking companies were not prevented from doing business but simply to ensure that a user enterprise still has the responsibilities of an employer to the worker and that the aim was to close loopholes that permit exploitation of workers.[709] This position has been supported by some prominent members of the opposition party but not by the business community in Namibia.[710] The criticism against the amendment of the Labour Act has been echoed by employer's organisation with their leader saying that the reform is tantamount to banning labour hire in the country.[711] This is contrary to the position taken by trade unions.[712] Surprisingly, the government of Namibia has conceded that some dislocation of temporary employees may result however; the services provided by the latter will nevertheless be required but employers can no longer "dump" their workers.[713]

Elsewhere, temporary agency work has been closely restricted whereby the control of the use of 'labour –only contracting' as it known has been the norm.[714] Apart from being legitimate employment relationship, the supply of workers by PEAs has been warranted

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708 For example, the ILO Convention 181 of 1997 allows an agency become the employer of individuals placed with user undertaking.

709 Sasman, C. 'Labour hire' changes praised'. *The Namibian,* 10 November 2011 at 1.

710 For example, a member of the opposition party, the Rally for Democracy and Progress (RDP) MP, Peter Naholo remarked that the reform puts to rest unfair labour practices by labour –hire companies. See Sasman above n32 at 2. The most affected sector was the fishing industries in which exploitation of workers through labour broking system has been high. See Steenkamp, Labour brokers created unequal playing field' *Informante*, 08 August 2012 at 1.

711 Dudy, J. 'Labour hire debate rages on' *The Namibian*, 10 August 2012 at 1-2.

712 (ibid.).

713 The dumping of workers refers to the practice of user enterprises and labour brokers dismissing their workers without valid reasons because of job insecurity of the latter. See Gerry Rodgers 'Precarious work in Western Europe: The state of the debate' in Gerry and Janine Rodgers '*Precarious Jobs in Labour Market Regulation: The growth of atypical employment in Western Europe'* International Labour Organisation (International Institute for Labour Studies)' 1989 at 3.

714 The term 'Labour-only contracting' is used in Norway which is the same as 'private employment agencies' used in Namibia. See Blainpain, R. and Weis, M. (Eds), 'Changing Industrial Relations and Modernisation of Labour Law' *Kluwer Law International (2003) at 117*.

by the decline of traditional employment structures. As Arup put it 'both the traditional topics (for example, pay equity) and legalities (industrial awards) are less central than they were in the heyday of labour law.[715] Although the use of employment agencies have in the past been restricted in many countries[716] majority of restrictions were lifted by the mid-1990s due to increased need of flexibility.

4.1.2 Broadening the definition of an 'employer'

In terms of the new Act [717] the definition of an employer has been broadened. The new Act provides that an 'employer' means any person, including the State and a user enterprise that employs or provides work for, an individual and who remunerates or expressly or tacitly undertakes to remunerate that individual.[718] Even persons who permit an individual to assist that person in any manner in the carrying on or conducting that person's trade are classified as employers.[719] This definition contradicts the common law principle concerning the freedom of the parties to an employment relationship which regulates their terms and conditions of employment. From a common law perspective, the employment contract is a contract concluded between two parties to their mutual benefit – the employer and the employee voluntarily negotiate a

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715 Arup, C. 'Labour Law as Regulation: Promise and Pitfalls' (2001) 14 *Australian Journal of Labour Law* (*AJLL) at 229.*

716 See Marshal, A. 'The sequel of unemployment: The changing role of part-time and temporary work in Western Europe' in Rodgers, J. and Rodgers, J. *'Precarious Jobs in Labour Market Regulation: The growth of atypical employment in West Europe'* International Labour Organisation (International Institute for Labour Studies) *1989 at 34-39.*

717 Labour Act 2 of 2012 which inserts new sections in the *Labour Act, 2007 (No. 11 of 2007).* whereby section 128 of the latter has been substituted. The new section 128(1) provides that 'user enterprises' means a legal or natural person with whom a private employment agency places individuals.

718 See section 1(a) of the Amendment Act 2 o 2012.

719 (ibid.: section 1(b)).

contract that regulates their relationship and this contract sets out their respective rights and duties.[720] This means that imposing employer status on a user enterprise violates common law principles of freedom of contract.[721] For one to become an employer it is a matter of choice and that depends on whether one can financially afford to employ others. This means that an employer has the right to choose who to employ based on the skill and experience of such person needed by the employing firm. It is for this reason that employers choose to utilise the services provided by labour brokers.[722] One of the reasons for utilising the services provided by the latter is acquiring readily available skilled workers who fill short-term vacancies in an efficient manner and at the same time enable employers to utilise workers on trial basis as potential applicants for permanent internal jobs[723]. In addition, it allows firm shifts non-core functions and responsibilities to intermediaries by way of outsourcing some of its functions which gives employers sufficient time to concentrate on core functions of the enterprise.[724]

Based on the above argument, it is likely that a user enterprise would resists become an employer considering the costs associated with employing an individual on full-time basis.[725] The new Amendment has not only restricted the power of an employer to

720 Le Roux, P. and Strydom, E. 'Essential Labour Law' Labour Law Publications (2009) at 46.

721 Le Roux, R. 'The Regulation of Work: Wither 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' *Thesis Presented for the Degree of Doctoral of Philosophy in the Department of Commercial Law,* University of Cape Town, June 2008, at 100.

722 Theron, J. and Shane, G. ' *Protecting workers on the periphery'* Institute for Development and Labour Law, University of Cape Town (2000) at 6 -7.

723 Cooke, G. and Zeytinoglu, I. 'Temporary employment: The situation in Canada' in Burgess, J. and Connell, J. "*International Perspectives on Temporary Agency"* Routledge *(2004) at 94.*

724 Theron, J. and Shane, G. '*Protecting workers on the periphery*, Institute of Development and Labour, University of Cape Town at 24.

725 Routh, R. 2012. "Labour Hire case Back in Court, Judgment Reserved". *The New Era,* 28 September at 1-2; Dudy, J. 2012. "Labour hire debates rages on' The Namibian, 10 August. In Namibia for example, Namibia Employment Federation leadership criticised the Government's decision to implement the new law that impose employer status to clients or user enterprises.

reorganise his or her firm but also put an end to the notion of flexibility at the workplace. 'According to Burgess *et al* flexibility concerns the capacity of an enterprise to adapt to changes in circumstances, especially in the labour market which has been hailed as the solution for achieving greater organisational competiveness, efficiency and effectiveness. In modern world of work many employers seek a workforce that can respond quickly to change.[726] This is because the nature of work to be performed may require the services provided by temporary workers supplied by labour brokers or through sub-contractors. The advantages of temporary employment for organisation are its potential in respect of labour flexibility which enables companies adjusts labour supply in the short term. The other advantage is the ability of labour brokers to match labour supply with demand in the short term, even in situations where the demand of labour fluctuates over the day, the week or the season.

Most countries make use of private employment agencies for achieving greater organisational competitiveness, efficiency and cost saving.[727] Employers seek greater flexibility in hiring and deploying labour. PEAs have become the single fastest growing segment of many countries' labour markets.[728] Fredman states that in the current era of globalisation, information technology, and the 'knowledge economy', flexibility is said to achieve the highest levels of efficiency.[729] However one cannot expect any one regulatory structure to be appropriate to all power relations. Legal intervention may be

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726 Burgess, J. and Connell, J. '*International Perspective on Temporary Agency Work'* Routlege (2004) at 5.

727 Raday, F. 'The Insider-Outsider Politics of Labour- Only Contracting' 20 *Compara.tive Labour Law and Policy Journal* (1999) at 3-4.

728 Burgess, J. and Connell, J. '*International Perspectives on Temporary Agency Work'* Routledge studies in the modern world economy, Routledge Taylor & Francis Group (2004) at 1-6.

729 Fredman, S. 'Precarious Norms for Precarious Workers' in Fudge, J. and Owens, R. *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms'* Onati International Series in Law and Society Oxford and Portland Oregon (2006) at 303-304.

considered necessary to protect the interests of employees, or employers, and of public at large. But which of these interests might be felt to be more in need of protection at any time will depend on many factors. Some of these factors relate to the political complexion of the government of the day, and also upon the prevailing economic pressure.[730]

Although regulatory approaches differ from country to country, problems associated with temporary agency workers appears to be the same. For example, apart from job insecurity temporary agency workers do not have access to social security benefits and employer funded training. When the work is inherently temporary, particularly where an employee fills in for absentees, it is difficult to accumulate social security benefits[731]. By its very nature, temporary agency employment arrangements have the potential to render the employment relationship ambiguous and pose challenges for trade unions.[732]

4.1.3 Does the new legislation allow agency workers have access to social security benefits?

730 Brown, W. and Oxenbridge, S. 'Trade Unions and Collective Bargaining: Law and the Future of Collectivism' in Banard, C. Deakin, S. and Morris, G. '*The Future of Labour Law: Liber Amicorum Bob Hepple QC'* Oxford and Portland Oregon (2006) at 63-4.

731 These benefits may include: annual holiday, severance pay, or an occupational pension. See Raday, F. 'The Insider –Outsider Politics of Labour –Only Contracting' 20 *Compara.tive Labour Law & Policy Journal*
(1999) at 413.

732 (ibid.:2-3). These challenges include organising temporary agency workers at various working places on diversified assignments.

In terms of the law, employees are required to make contribution to the social security fund certain percentage of their income to enable them benefits from the fund. The question whether agency workers qualify for social security benefits depends on whether they are classified as employees within the definition of the relevant legislation.[733] In fact there is sufficient evidence showing that there are a large number of categories of workers and groups who are excluded from social security systems which has been attributed to the growth of new forms of work.[734] In an attempt to address this problem, the new Amendment extends employee status to any individual who works for or renders service to any other person, regardless of the form of the contract or the designation of the individual.[735] In the case of an individual who works for an organization, the individual's work forms an integral part of the organisation.[736]

Unfortunately, the existing statutes and case law makes it clear that independent contractors are excluded from social security benefits.[737] In fact several other categories of the atypical employed are legally excluded from compensation for workplace injuries and disease, and unemployment insurance.[738]

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733 See section 1 of the *Labour Act, 2007 (No. 11 of 2007).*

734 These categories of workers include: the self-employed, the informally employed and many other atypically employed workers. See Oliver, M. *et al 'Social Security*: *A Legal Analysis'* LexisNexis Butterworths, (2003) p 131.

735 See section 128A (a) of the *Labour Act, 2007 (No. 11 of 2007).* as amended.

736 Ibid, section 128A (c) - (d).

737 Section 1 of the *Labour Act, 2007 (No. 11 of 2007).*. See also *Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 (A*); Liberty Life Association of Africa Ltd* v Niselow 1996 17 *ILJ* 673 (LAC); *SABC* v *Mckenzie* 1999 20 *ILJ* 585 (LAC).

738 Examples of atypical work which is not covered by social security schemes may include: casual work, temporary work, precarious work, peripheral work and odd jobs. In practice many atypical employees who have contributed to social security intermittently or for a limited period finds themselves within the scope of the scheme for purposes of payment of contributions but excluded for purposes of entitlements to benefits. See Guy Caire 'Atypical wage employment in France' in Gerry and Janine Rodgers *Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe,* International Labour Organisation [International Institute for Labour Studies] (1989) at 104-5.

Cheadle argues that regulated flexibility may be put to good use in extending protection to those who most need it, especially with respect to temporary workers.[739] Theron *et al* point out that THE use of temporary or seasonal labour in certain sectors is long established for various reasons. What is important is the extent to which these arrangements are becoming predominant, indicating a profound shift in the labour market.[740] This shift has been attributed to the changes in modern work relationships which require the legislators to be mindful of the new models of employment.[741] Despite available evidence supporting that most companies utilises the services of temporary workers, the amendment disregards this fact by including a provision which state that 'an employee is presumed to be employed indefinitely, unless the employer can establish a justification for employment on a fixed term'.[742]

The obvious question is what about genuine casual workers who work shorter hours, where do they fit? Le Roux suggests that casual or temporary workers should be considered for benefiting from some employment benefits even on pro rata basis.[743] However, the matter is more complex in that individuals placed with a user enterprise have the same rights as any employee in terms of the Labour Act.[744] The problem with this provision would be its implementation particularly that statutory social security benefits is designed to benefit full-time employees. Other rights that would be difficult to

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739 Cheadle, H. 'Regulated Flexibility: Revisiting the LRA and the BCEA' *Industrial Law Journal* (2006) 27 at 666.

740 Theron, J. and Godfrey, S. '*Protecting workers on the periphery'* Institute of Development and Labour Law, University of Cape Town (2000) at 6.

741 See for example, Fewick, C. 'Shooting for trouble? Contract Labour-hire in the Victorian Building Industry' *Australian Journal of Labour* (1992) 5 at 237-238; Theron, J. 'Intermediary or Employers? Labour Brokers and the Triangular Employment Relationship' *Industrial Law Journal* (2005) at 618-619. Also see Stewart, A. 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' *Australian Journal of Labour Law* (2002) 15 at 238-9.

742 Section 128C of the Labour Amendment Act 2 of 2012.

743 Le Roux (2008), above 46 at 142-3.

744 See section 128 (3) of the Labour Amendment Act 2 of 2012.

implement is the right to join trade unions and to bargain collectively with their employers.[745] Although the right of every worker to organise and participate in collective bargaining is recognised internationally, some argued that agency employment is a means for de-unionisation and moving employment outside of collective agreements. For this reason, trade unions are challenged in recruiting and representing workers who have short-term engagements with different organisations.[746]

Another problem of classifying all those who are working as full-time employees is that even where an individual worked for a single day or two for a user enterprise would be regarded as an employee in terms of the new amendment. This appears to be unrealistic because there are a large number of individuals who prefer temporary work.[747] Amongst this group are women who choose to work and at the same time have family responsibilities. The other category is the young workers who have just started new jobs and wish to gain experience.

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745 (ibid.: section 128 (4) (a)).

746 Burgess, J. and Connell, J. 'International aspects of temporary agency employment' in Burgess, J. and Connell, J. '*International Perspectives on Temporary Agency Work'* Routledge at 19.

747 For example, for many, temporary work is their first choice. This group not only includes women who try to reconcile occupation and family responsibilities but also young people looking for 'a little job'. Other group is workers with specialized skills (nurses, translators, computer operators or bookkeepers. See Bronstein 'Temporary work in Western Europe: Threat or complement to permanent employment?' 130 *International Labour Review (*1991) at 299-300.

4.2 What is the legal requirement for conducting labour broking business?

In terms of the new Amendment, any person who intends to conduct labour broking business should possess a licence.[748] However, the applicant should pay the prescribed fee before a licence is issued. Such licence may be renewed. A licence issued may be subjected to conditions which the authority may impose and if the applicant fail to comply with the conditions, such licence may be cancelled.[749] In a situation where the applicant is aggrieved by the decision of the authority he or she may appeal against such decision.[750]

The new law prohibits for a labour broker to charge a fee directly or indirectly to an individual using its services to be placed with an employer.[751] This provision complies with the standards set by the ILO Convention dealing with the same issue.[752]

Under certain situations a private employment agency and a user enterprise could be both jointly and severally liable for contravention of the new Act particularly where an exemption to comply with the latter has been granted.[753] This allows employees placed by private employment agencies to seek relief against either the private employment agency or the user enterprise or both in the event their rights have been violated. Claes points that there was little research on the potential influence that multiple employers

748 See section 19 (1) (a) of ESA.

749 See sections 20-22 of the ESA. In case the issuing officer of licences refuses an application to operate as a private employment agency, a written notice giving reasons should be given in terms of section 20 (4) of the ESA.

750 Section 23 of the ESA. The Labour Court hears the appeal against the decision of the Director and rules of such Court apply.

751 Section 24 (1) of the Employment Services Act 8 of 2011 as amended.

752 See ILO Recommendation???

753 The Minister of Labour may grant an exemption in respect an applicant who applied not to comply with the Act.

have on psychological contracts, as well as employee attitudes and behaviours.[754] However, it has been confirmed that employees' commitment to the client or user enterprise and to the agency was based on procedural justice and perceived organisational support of the respective party.[755]

One aspect which seems confusing is the statutory prohibition that a private employment agency is not allowed to become a party to the employment relationship entered into. However the duty to supervise employees placed with an employer concerning the execution of tasks assigned remains the responsibility of the private employment agency.[756] In practice it is difficult if not impossible to control and supervise employees working at another person's work place. Scholars argue that temporary agency work has become internationalised and is expanding across many countries.[757] The extremes of the business cycle offer opportunities for the industry which, to date, has been innovative and adaptive to the needs of job seekers and employing organisations.[758]

The licence required to operate labour broking business is regulated by specific bodies which also ensure that private employment agencies are regulated properly.[759] In

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754 R Claes, 'Organization Promises in the Triangular Psychological Contract as Perceived by Temporary Agency Workers, Agencies and Client Organizations' *Employee Responsibility and Rights Journal (2005) 17 (3) at 133.*

755 (ibid.: 133.).

756 (ibid:. section 1(b) (b)).

757 Meulders, D. and Tytgat. B. 'The emergence of atypical employment in the European Community' in Gerry and Janine Rodgers *Precarious Jobs in Labour Market Regulation: The growth of atypical employment in Western Europe,* International Labour Organisation (International Institute for Labour Studies) [1989] at 196.

758 J Burgess and J Connell 'International aspects of temporary agency employment' in J Burgess, J. and Connell, J. *'International Perspectives on Temporary Agency Work'* Routledge (2004) at 19.

759 These bodies are the National Employment Service Board and the Employment Service Bureau.

addition such bodies register job-seekers and assist to the find suitable employment.[760] Develop career guidance and related programmes aimed at helping persons to gain market orientated competencies as well as keep a register of private employment agencies.[761] Keep a list of non-Namibian citizens granted work permits and collect, analyse and disseminate statistical information related to employment.[762] However, it is not clear whether job-seekers will be subjected to interviews or some sort of examination. This could help in identifying qualified individuals for specific job. Another problem is the large number of job-seekers who are illiterate loitering around on the street in search of jobs. Unfortunately, the Act is silent in respect of unskilled job-seekers who form majority of the unemployed component in the country.

4.2.1 Implementation of the new amendment

A section of the Namibian community criticised the decision to implement the new amendment[763] of which *Africa Labour Services* (ALS), a labour hire firm, leading the discontent over the way the Act under scrutiny have been crafted. ALS felt that the new section is designed to achieve the same purpose as would have been achieved by a complete ban on labour hire.[764] Equally *Africa Personnel Service (APS) points* out that the change in the law had a major damaging effect on its operations arguing that several commercial firms have cancelled their agreements with the company. As a result its workforce has shrunk from more than 1600 workers before the amendment

760 See section 13(a) –(c) of the ESA. Other functions are to provide vocational guidance, career and labour market information to job-seekers and other interested persons. See also s. 13 (d)-(m).
761 See section 13 (2) (g) and (k) of ESA 8 of 2011.
762 (ibid.: section 13(2) (j) and (l)).
763 Menges, W. 'Labour –hire Judgment reserved' The *Namibian*, 28 September 2012 at 1.
764 (ibid.).

came into force to about 319 workers after.[765] The National Employers Federation (NEF) expressed its dismay with the Government's decision to implement the new amendments, saying that 'it appears that Government decided to follow an expediently short-term ideological route, dictated by the unions'.[766] Despite the fact that the tripartite[767] body advised Government not to implement the Amendment, as it was tantamount to banning labour hire, the latter proceeded any way. Trade unions threw their weight behind Government accusing NEF of causing confusion through misinforming the public to justify dismissal of workers.[768] The Minister of Labour also accused the NEF, saying 'the organisation claimed, as it often did, when Government attempted to strengthen protections of workers, that the new law was certain to cause unemployment.[769]

Moreover, the nature of work of some companies can unfortunately not employ workers permanently as they only need such people for a specific period of time.[770] Proponents of the ban of labour hire were caught off guard by the mass layoffs. They suspected that actions of these companies were deliberately directed to punish the workers. According to them retrenchment of labour –hire workers was unnecessary, instead, alternative

765 (ibid.: 1-2).

766 Duddy, J. 2012. "Labour hire fight rages on". The Namibian, 10 August at 1.

767 This refers to the National Employer Federation (NEF), National Union of Namibian Workers (NUNW) and Government.

768 (ibid.:).

769 The Minister of Labour is Immanuel Ngatjizeko. He vowed to put an end to labour hire in Namibia at any cost. See The Namibian, 10 August 2012.

770 For example, in the fishing industry, harvesting of fish products takes place at certain times only. Another typical temporary work is loading and offloading vessels, for instance.

avenues could be explored to keep the workers.[771] Unfortunately, they fall short of suggesting any of the possible alternatives they referred to.

Other countries faced with similar problems associated with labour broking have put in place better or comprising legislation aimed at protecting individuals employed through labour brokers and at the same time allows the labour broking industry to continue operating.[772] The legal fiction whereby the labour broker is considered of being the employer appears to be working although misleading.[773]

4.2.2 The legal challenge of the new Amendment

Africa Personnel Services challenged the new legislation arguing that it violates the company's constitutional rights to carry out business or trade.[774] The new Amendment has sparked major concerns of instability among businesses and labour hire companies.[775] This is also true amongst workers.[776] Some workers who have found permanent employment praise the new legislation but they are in the minority. Most of the casual workers have lost their jobs as labour hire companies hurried to meet the

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771 One such campaigner for the ban, Herbert Jauch, felt that the layoffs are deliberate and unnecessary.

772 This refers to South Africa.

773 Section 198(1) of the Labour Relations Act defines a' temporary employment service' as any person who, for reward, procures for or provides to a client other persons- (a) who render services to, or perform work for, the client, and (b) who are remunerated by the temporary employment service.

774 Routh, R. 'Labour hires case back in court, judgment reserved' *New Era* 28 September 2012 at 1-2.

775 Available at: htt:p//www.namibian.com.na/news/full-story/archive/2012/august/article/7-000-caual…accessed on 06/08/2021.

776 Ashipala, S '7000 Casuals on the Street' *The Namibian*, 6 August 2012 at 1.

demand of the law by laying off workers.[777] Faced with possible liquidation, APS tried to stop the implementation of the new Act arguing that the amendment is too wide and does not provide clear guidelines.[778] Furthermore, the company believes that banning labour hire is not in the interest of the workers neither the country.[779]

Legal issues brought before the Court for determination were, whether the regulation is contrary to article 21(1) (j) of Constitution; whether the challenged law constitutes a rational regulation of the right to practice or to trade; if it does, then the next question arises which is, whether even though it is rational, it is nevertheless so invasive of the right to practice its profession, trade or business and that it constitutes a material barrier to its business. If it does constitute a material barrier to the practice of the intended business, then the government will have to establish that it is nevertheless a form of regulation that falls within the ambit of article 21(2).[780]

In an attempt to resolve the legal questions before it, the Court has adopted a deferential role. It accepts that economic regulation usually involves policy choices by the government and the Legislature.[781] The Court continued arguing that once it is determined that those choices were rationally made; there would be no further basis for judicial intervention. The Court pointed out that the responsibility of making decisions

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777 (ibid.). The implementation date of the new amendment was 1st August 2012. Namibia's largest labour-hire company, Africa Personnel Services (APS) confirmed that since the new legislation came into effect last week, 75 per cent of the companies that hired workers through them have cancelled their contracts which led to major layoffs of about 7000 , out of 10 000 workers.

778 *APS*' urgent application to halt the new law goes to court on Monday the 13th August 2012. See Ashipala S 'D-Day for labour hire' 01 *The Namibian* 2012 at 1.

779 (ibid.).

780 See the Namibian Constitution, Act 1 of 1990. The article referred to impose reasonable restrictions on the exercise of rights and freedoms contained in article 21 (1); see also *Kauesa v Minister of Home Affairs and Others* 1996 (40) SA 965 NmS.

781 See summary notes of *Africa Personnel Services v The Minister of Labour and Others,* Case no: A 163/2012 at page 2-3.

concerning police issues is the duty of the Government and not the courts. This position seems to be consistent with the concept of separation of powers which recognises the division of functions amongst the organs of State, namely, the Executive, the Legislature and the judiciary.[782] Being mindful of its duties, the Court admitted that courts cannot sit in judgment on economic issues because they are ill-equipped to do so in a democratic society.[783]

Concerning the question whether the regulation was invasive, the Court held that it was not. It found that the challenged law constitutes a rational regulation of the right of a labour hire agency to practice or to trade or carry on business. The regulation does not constitute a material barrier to the practice of that profession, trade or business and that the regulation falls within the ambit of the law.[784] Responding to *Africa Personnel Services*' application to have section 128 of the Act strike down for being unconstitutional,[785] the court held that the regulation of labour hire in terms of the new amendment does not conflict with provisions of the Constitution.[786]

Further, it is argued that the regulation is aimed at curing of the perceived 'mischief' - in that it obviously attempts to close the gap in the existing legislative framework. However, the court admitted that although the amended legislation might amount to 'overkill' it achieves the intended goals in its own peculiar way. It further observed that the manner in which the regulation of labour hire was structured exposed that many facets of such regulation could have been moulded in a different or even better

782 See article 1(3) of the Namibian Constitution, 1990.
783 *Namibia Insurance Association v Government of Namibia & Others* 2001 1 NR (HC).
784 See article 21(2) of the Namibian Constitution.
785 *Labour Act, 2007 (No. 11 of 2007).*, as amendment by the Labour Amendment Act No 2 of 2012.
786 Article 21(1) (j) of the Namibian Constitution.

fashion.[787] Courts in most modern democratic countries proceed from the premise that it is not for them to dictate economic policy and regulation, but governments, the court pointed out. It further held that the language employed in specific sections of the amendment reveals that that the Minister has discretionary powers to make regulations.[788] The court concluded that failure to promulgate regulations prior to the putting into operation of the Act – could thus not be regarded as an ultra vires act.[789] It then dismissed the application with costs.

4.2.3 Problematic clauses in the Act[790]

The court identified the problematic sections which *Africa Personnel Services* has requested to be struck down which are mostly those which the company regards as put barriers to its right to carry trade or business of its choice.[791] The court started by briefly giving the background of the problem and in doing so, it provided a synopsis of the ruling of the Supreme Court in *Africa Personnel Services* in which the former strike down the original section 128 of the Labour Act as being unconstitutional.[792] The court recapped on some of the important decisions made such as that the rejection of the

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787 See summary notes in Africa *Personnel Services v The Minister of Labour and Others,* Case no: A 163/2012.

788 See sub-section (10) of the *Labour Act, 2007 (No. 11 of 2007).* as amended by the Labour Amendment Act 2012.

789 See summary notes in *Africa Personnel Services v The Minister of Labour and Others, Case no*: A 163/2012.

790 Section 128 of the *Labour Act, 2007 (No. 11 of 2007).*

791 These sections include sub-section 128(2), (3), (4), (6), (8) and (9) of the *Labour Act, 2007 (No. 11 of 2007).* as amended.

792 *Africa Personnel Services v Government of Namibia* 2009 (2) NR (SC).

total ban of labour broking, saying that the relevant section substantially overshot the permissible restrictions.[793]

It further pointed out that the Supreme Court regarded the original section as being very wide.[794] Thus the absolute prohibition was tailored much more widely than that what would have been reasonably required for the achievement of the objectives enumerated in the Labour Act.[795] As a result - the total prohibition was considered to be disproportionately more severe than what was reasonable and necessary in a democratic society. The Supreme Court in that case emphasised that there could be no objection to the Legislature regulating the relevant framework within which private employment agencies could be allowed to operate and thereby ensuring, at the same time, that workers, utilised in these services, would be adequately protected.[796]

In heeding to the Supreme Court's decision, the Legislature consequentially passed two pieces of legislation.[797] In answering to questions placed before it, the court considered the amended provisions in detail. [798] Confirming the level of the controversy surrounding operations of labour hire the court remarked that amendments of the Labour Act demonstrates that the issue of 'labour hire' in Namibia, and the way in which it is to be regulated, has not come to rest.[799] This appears to be the case for all historical reasons

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793 See article 21(2) of the Namibian Constitution of 1990.

794 *Africa Personnel Services v Government of Namibia* 2009 (2) NR (SC).

795 Act 11 of 2007.

796 *Africa Personnel Services v Minister of Labour and Others* (2013) at para. [5] – [6].

797 These are: the Labour Amendment Act No of 2012 and the Employment Services Act No 8 of 2011.

798 Section 128 (4) (a) requires equal treatment between individuals placed by private employment agencies and incumbent employees performing similar work; section 128 (5) prohibits a private employment agency employ an employee during or in contemplation of a strike or lock-out. See also sections 128 (6) – (10) of the Labour Act 2007 as amended.

799 *Africa Personnel Services v Minister of Labour and Others* (2013) at para.s [12] – [14].

as set out by the Supreme Court. The impression one gets show that the emotions around this issue have not settled.

In support of its case, the APS stated that nine user enterprises had, so far, cancelled their agreements with it since the advent of the Amendment Act. In addition, there has been a drastic decline in number of its employees.[800] If this figure is genuine and correct, then one might argue that the amendment has the effect of indirectly sending individuals placed by labour hire companies in the street. This obviously means, increasing the number of unemployment level in the country which is already disturbing. The applicant further alleged that the legislative interference with the 'labour hire' put them out of business. Hence the new enactments amounted to a total 'overkill'.[801]

The applicant thus contended that the new legislation was deliberately designed to make the environment, in which the applicant operates, so hostile. As a consequence and for all practical purposes, force the latter to close down its business. This has been done under the guise of exercising its regulatory powers. In this context, the applicant argued, the Legislature was actually intending to achieve its initial objective, namely to prohibit the practice of 'labour hire' altogether.[802]

On the other hand the respondents proclaim in the main argument that the Amendment was not aimed at 'labour hire' entities at all. But instead, it aimed at regulating the relationship between user enterprises and the persons made available to work for them

800 The applicant claims that its employees have declined from 1618 to 319 employees.

801 *Africa Personnel Services v Minister of Labour and Social Welfare (A 163/2012) [2013]* (NAHCMD) 179/2013 at para. [13].

802 (ibid.: 14).

by the 'labour hire' entities. As a result the section[803] does not breach the applicant's constitutional rights at all.[804] It appears that the respondent has conceded that the applicant is entitled to the right to carry or do business as claimed. After realising the constitutional hurdle, the respondent tactically direct the attack on the employment relationship between user enterprises and agency workers which was not the case from the beginning.[805]

In response, the applicant conceded that the freedom, to partake in economic activity, should not be free from regulation. However, where regulation itself becomes so onerous so as to infringe impermissibly upon the fundamental right to trade or do business, it should not be allowed, the applicant argued.[806]

4.3 The approach of the Court

In deciding the matter before it the court took cognisance that the crux of applicant's case is that the section and its effect is such that it constituted a material barrier to the latter's right to do business. It then considers the arguments, mustered on behalf of the parties, in detail.[807] The court remarked that the introduction of the legislative interference with labour hire entities' businesses was intended to and in effect put them out of business. This was not only to be inferred from the obtuse refusal by respondents

803 Section 128 of the *Labour Act, 2007 (No. 11 of 2007).* as amended.
804 Article 21(1) 9j) of the Namibian Constitution of 1990.
805 See *Africa Personnel Services v Government of Namibia* 2009 (2) NR 596 (SC) at 669 H-I [118].
806 *Africa Personnel Services v Minister of Labour and Social Services* (2013) at para. [16], see also *Namibia Insurance Association v Government of the Republic of Namibia 2001* NR 1 (HC) at 18 B-D.
807 (ibid.:18).

to admit that labour hire entities will be affected by the legislation, but by the enactments themselves, which amount to a total overkill, the court argued.[808]

Drawing an example, from the ILO, the court pointed out that the latter through its Recommendations or Conventions[809] suggested regulation or licensing, the Namibian Legislature did both. In addition, when the ILO suggests the allocation of responsibilities between the three parties involved, the Legislature allocated all the responsibilities to both the employer (labour hire entity) and the user enterprise, even criminal liability.[810] The court observed that in actual fact a dual employer system was created, one contractual and one statutory, with joint and several responsibility for everything.[811] This has led to a situation where all the three parties to the tripartite arrangement now have to apply for exemption. One might argue that this is not only confusing but also likely to be very costly. Concerning the exemption provided in the amendment,[812] the court regards it as nothing but 'smoke and mirrors', the reason being that the exemption is subject to specific provisions which imposes joint liability on both labour hire entities and user enterprise.[813]

In deciding whether the regulation was rational, the court relied on the decision in *Namibia Insurance Association v Government of Nami*bia [814] in which the court *a quo* observed that "*any* regulation of the right to practise must be rational but that is not the end of the enquiry. Even if the regulation is rational, if it is so invasive that it constitutes

808 (ibid.).
809 Convention 181 of 1997.
810 *Africa Personnel Services v Minister of Labour and Social Services* (A 163/2012) [2013] NAHCMD 179/2013 at para. [19].
811 (ibid.: 20.).
812 Section 128(8) of the Labour Act 2007 as amended.
813 (ibid.: s128(9)).
814 2001 NR (HC) at 18 B-D.

a material barrier to the right to practise the profession, the regulation will be an infringement of the right to practise that will have to be justified under art 21(2)". The other question the court has to determine was whether a regulation constitute a material barrier to the right to practise is permissible under art 21(2).[815]

In light of this authority counsel on behalf of the applicant submitted that the effect of the section was such that it constituted a material barrier to applicant's right to do business. The court was also referred to selected provisions[816] which according to the applicant support the latter's claim. Amongst these provisions is the one that makes both applicant and the user enterprise liable for any contraventions of the Labour Act. Obviously such provision opens the 'door' for the "employee" to look at either of his two employers for the relief sought.[817] Counsel for the applicant argued that the provision is overbroad in that it refers to any contravention of the Labour Act which would include any contraventions relating to record keeping or other innocuous provisions.[818]

Counsel further submitted that the regulation was so restrictive to such an extent that such restrictions constituted a barrier to its business. It was therefore incumbent on the Legislature imposing such a barrier to justify them. Unfortunately in this case there was however no attempt to justify the restrictions, it was argued.[819] In addition, the power to

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815 *Africa Personnel Services v Minister of Labour and Social Services* (A 163/2012) [2013] NAHCMD 179/2013 at para. [27].

816 For instance section 26 (b) (ii) of the Affirmative (Employment) Equity Act, 29 of 1998 which requires labour hire employers to police user enterprises in respect of the latter's compliance with the Act. Other provisions include: section 128 (9) of the Labour Act which made user enterprises jointly and severally liable with labour hire employers for any contravention of any labour related legislation serving as disincentive to use labour hire services; section 128(4) of the Labour Act which requires labour hire employees to receive same benefits as directly employed workers; sections 128(8) – (9) of the Labour Act 2007.

817 (ibid.: section 128(9)).

818 *Africa Personnel Services v Minister of Labour and Social Services* (2012) para. [19].

819 (ibid.).

regulate provided in the amendment [820] may save the constitutionality of the section as a whole. However no regulations have been promulgated. In the end, it was submitted that applicant was entitled to have section 128 declared unconstitutional.

4.3.1 The position of the government

The government denies that section 128 of the Amendment Act infringes any fundamental rights and freedoms of the applicant. Section 128 regulates the relationship between the user enterprises and the individuals placed by private employment agencies to work for the user enterprises. Its object is to ensure non-discrimination and equal treatment of employees placed by a private employment agency, fair labour practices and the protection of their collective bargaining rights.[821] The means employed by the Legislature are rationally connected to the attainment of this legitimate governmental objective. In this context, the respondent explained that Section 128 is intended to protect the constitutional rights of the labour hire workers.[822] In addition, the Constitution imposes on the Legislature to pass laws that give effect to the fundamental objectives of the Principles of State Policy.[823] In this regard the respondents point out that section 128 affords protection to labour hire workers, who form an 'underclass' of workers. Being the weakest in the triangular employment relationship they mostly deserve protection, the respondent argued. It prevents persons bypassing the Labour

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820 Section 128(10) of the Labour Act 2007 as amended.

821 See ILO Convention 181(i) – (iii).of 1997.

822 These rights include: the right to dignity (Art 8); to right to equality and freedom from discrimination (Art 10); the right to fair trial (12) ; and the freedom of association, which includes the freedom to form and join trade unions (Art 21(1) (e).

823 See Article 95 of the Namibian Constitution.

Act[824] through a scheme of arrangement that undermines or renders ineffective the rights afforded to employees by the Act.

Respondent argued that the applicant's business consists of making its "employees" available to other persons to perform work for such persons at their premises. The recruited personnel are engaged to work for a fixed period on a particular project, to work for a fixed period in the context of seasonal employment or, to fill temporary vacant positions in the client's structure.[825] In terms of the employment structure the applicant purports to assume the responsibility of "employer". Consequently, in terms of the agreement that it concludes with its workers, employees do not need to be paid when they are not engaged by user companies. This has been described in the contract of employment as the "no work no pay principle". Counsel further observed that the applicant also enters into a separate agreement with the user company, in terms of which its obligations towards the user company are set out. Although the user company utilizes the placed workers services on a daily basis and in most instances supervises and controls their work at the workplace, it is strange that there is no contractual relationship between the user company and the workers placed by the applicant.[826] Thus such arrangement enables the user company contractually to avoid the creation of an employment relationship with the worker, counsel pointed out. Meaning that, the user enterprise is contractually relieved of all obligations of an employer and the worker also has no enforceable rights against the user enterprise.[827] This is detrimental to

824 Act 11 of 2007.

825 Africa Personnel Services v Minister of Labour and Social Services (A 163/2012) [2013] NAHCCMD 179/2013 at para. [20].

826 (ibid.: 20).

827 Employment protection rights such as the right to claim unfair dismissal or a redundancy payment that are typically vest only in employees whose jobs fit into the complementary para.digm form of

employees in the sense that if the user enterprise wants to get rid of the worker it merely calls upon the applicant to remove him/her.[828] The worker then remains indefinitely on the books of the applicant as its nominal "employee". Nonetheless is not paid anything unless and until another user enterprise chooses to engage the employee, counsel contended.[829]

Returning to the applicant's main argument, the thrust of the matter is: because the parties have privately decided who the employer is, the Legislature cannot simply make the user enterprise an employer or the decision to do so is unreasonable. The applicant further contends that its right to equality[830] is violated by the amended version of the Labour Act.[831]

4.3.2 What does the amendment intent to achieve?

The court observed that approaching the situation anew from a regulatory perspective, the Ministry pinpointed what it considered to be the major gap in the then-existing law and this is what the amendment intent to address. Mainly that the labour hire agency and the user enterprise were able to enter into contracts that placed the relationship

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employment in vertically integrated production: employment which is full-time, stable and for an indefinite duration. See Hugh Collins, 'Independent Contractors and the Challenges of Vertical Disintegration to Employment Protection Laws' *Oxford Journal of Legal Studies*, Oxford University Press (1990) 10: at 353.

828 This is contrary to the principle set in *Denel (Pty) Ltd v Vorster* (2004) 25 ILJ 659 (SCA). In this case the court directed that an employer has an obligation to follow a particular disciplinary procedure if the latter intends to dismiss an employee. Where an employee has been summarily dismissed without following procedures and any valid reasons, damages should be paid to the employee in lieu of not being given a hearing. See Key *Delta v Marriner* [1998] 6 BLLR 647 (E).

829 *Africa Personnel Services v Minister of Labour and Social Services* (2012) above at para. [21].

830 See Article 10 of the Namibian Constitution.

831 Section 128 of Act 11 of 2007 as amended.

between the user and the employees performing its work beyond the reach of the labour laws. [832]

The court explained that the purpose of labour law has always been to cut back the exercise of contractual power by employers. The objective being to provide employees with rights which they could not obtain through contract. It further stated that the common law of master and servant was regulated exclusively through contract and was premised on the fiction of bargaining equality between employer and employee. Given the bargaining strength of employers relative to employees, the regime of the common law contract of employment was calculated to protect employers' powers at the expense of employee's interests, the court argued.[833]

In addressing the mischief which it sought to remove, the Legislature chose not to prohibit labour hire in any industries, the court said. Nevertheless it permits labour hire to continue, subject to the requirement that it did not free a user enterprise from any of its statutory obligations to the labour employees. Considering that these employees were employed at its instance and were, *de facto* its employees and ought therefore *de jure* to be treated as such.[834]

The court signaled that in matters involving a country's economy, it is normal and usual that a government will legislate to regulate the actors. Thus in such a situation, the attitude of the courts is that it is not in their province to interfere. Agreeing with the ruling in *Namibia Insurance Association v Government of the Republic of Namibia and Others*

832 *Africa Personnel Services v Minister of Labour and Social Services* (2012) above n at para. [24].
833 (ibid.: 25).
834 (ibid.: 26).

the court,[835] in which it was stated that 'economic regulation inevitably involves policy choices by the government and the Legislature. Once it is determined that those choices were rationally made, there is no further basis for judicial intervention. The courts cannot sit in judgment on economic issues. They are ill-equipped to do this and in a democratic society it is not their role to do so. . . .' The court also referred to a US case in which the court there declined to regulate business and industrial conditions for fear to strike down state laws. [836]

Again in a South African case which the court referred to it was stated that 'in a modern state the question whether or not there should be regulation and redistribution (in the public interest) is essentially a political question which falls within the domain of the Legislature and not the courts.[837]

4.3.3 Is the amendment Act[838] rational?

Determining the rationality of the Amendment Act, it was submitted that the latter seeks to protect the Labour Law rights of labour hire employees. In addition it ensures equality of treatment between labour hire employees and employees directly engaged by a user company without the intermediation of a labour hire company. Further, it prevents the use of labour hire employees to break strikes or enforce lockouts. Last but not least, it aims to promote permanent employment as opposed to the casualization of

835 2001 NR 1 (HC).
836 Furgeson v Skrupa 372 US 483.
837 *Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC0 at para. [180].
838 Section 128 of the Labour Act as amended.

labour, and prevent user companies from avoiding their Labour Law responsibilities.[839] In light of this assertion it was then contended that once the Amendment Act had passed the rationality review, the applicant could not show a limitation as claimed.[840] However, unless the latter could prove that the Act had created a material barrier to the practice of the profession of labour hire. In response, the applicant admitted that the amended provision will obviously have a negative impact for both client companies and brokers operating outside the confines of the law. Nonetheless it won't change its existing operations much. Arguing that the company has already put measures in place to comply with the changes, focusing on value addition to both its employees and clients… '. [841]

Concerning the claim by the applicant that its workforce had declined drastically and that many of its clients had cancelled agreements, it was pointed out that the applicants cannot show that a material barrier to practising the profession has been created. In fact the applicant has admitted that the employment numbers of the applicant were accordingly in steep decline without any effect caused by the Amendment Act. The former ascribes the subsequent drop in employment numbers to the misdirected intervention of unions.[842]

It was submitted that the effect of the Amendment Act is that there will no longer be any inherent market value in the bare rental of workers' labour. However the Applicant denied that it has ever been engaged in a business that was about the bare rental of workers' labour. But rather, it provided properly trained personnel and to clients.

839 *Africa Personnel Services v Minister of Labour and Social Services* (2012) above n at para. [31].
840 This is referring to Article 21 (1) (j0 of the Namibian Constitution. 1990.
841 *Africa Personnel Services v Ministry of Labour and Social Services* (2012) above n at para. [32].
842 (ibid.).

According to the applicant many clients choose to engage employees for an indefinite and permanent basis. It appears there is nothing in section 128[843] of of the Labour Act, which prevents private employment agencies from continuing to offer to its clients the required services. Moreover, there is nothing in the Amendment that prevent the user company from contracting with private employment agencies to assume responsibility for dealing with any labour proceedings involving labour hire workers.[844]

The court stated that what the Amendment Act does is to remove one constitutionally offensive market opportunity which labour hire companies had in the past. This includes the opportunity to provide user companies with a means of avoiding responsibility to workers under the Labour Act.[845] Accordingly, any limitations imposed by section 128 would be justifiable in terms of Article 22(2).[846] The amended section represented a proportional legislative response to the needs of labour hire employees.[847]

It was submitted that the Minister acted *ultra vires* by allowing the Amendment Act to come into operation before having first regulations promulgated.[848] In this respect the court pointed out that the contention that the Minister acted *ultra vires* in bringing the Act into operation is therefore without basis.' Similarly, the claim that the regulation constitutes a material barrier to the right to trade or carry on any profession, the court

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843 Act 11 of 2007 as amended.

844 These may issues such as dealing with misconduct committed by labour hire employees; disciplinary hearings proceedings and any other labour related complaint arising out of employment relationship.

845 Act 11 of 2007.

846 Article 21(2) of the Namibian Constitution

847 The needs include: the protection of labour law rights of labour hire employees; ensuring equality of treatment between labour hire employees and employees directly engaged by a user company; prevent the use of labour hire employees to break strikes or enforce lockouts and the prevention of user companies from avoiding their Labour Law responsibilities to persons who are *de facto* their employees.

848 Section 128(10) of the Labour Act as amended.

did not agree. The latter argued that the correct approach to this question is set out in the *Africa Personnel Services.*[849] First is to determine whether the challenged law constitutes a rational regulation of the right claimed.[850] If it does constitute a material barrier to the practice of a trade or profession, occupation or business, then the government will have to establish that it is nevertheless a form of regulation that falls within the ambit of article 21(2),[851] the court argued.

4.3.4 The amendment amounted to an 'overkill'

The main argument of the applicant was that the Amendment legislation amounted to a 'total overkill'. The court construed this statement as the intention to 'kill', however the court found nothing irrational in it.[852] Although the approach of regulation employed by the respondent differs from the one which ILO[853] followed, it can be said that the manner of such regulation are irrational or not connected to the underlying purpose. In this respect the respondents have contended that the Amendment legislation constitutes a rational and legitimate response to the applicant's case, also that the means employed by the Legislature are rationally connected to the attainment of legitimate government objectives.[854] The court accepted this reasoning, saying more

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849 *Africa Personnel Services v Government of Namibia* 2009 (2) NR 596 (SC) at 669 H-1 para. [118].

850 See Article 21(1) (j) of the Namibian Constiution.

851 *Trustco Ltd t/a Legal Shield Namibia & Ano v Deeds Registries Regulation Board & Others* at para.s [26]- [27]

852 *Africa Personnel Services v Minister of Labour and Social Services* (2012) at para. [21].

853 The ILO has suggested 'regulation' and 'licensing' and the allocation of responsibilities between the three parties involved. Contrary to this the Government of Namibia has both 'regulated' and 'licensed' and allocate certain 'responsibilities' to both the 'labour hire' entity' and 'the user enterprise'. See *Africa Personnel Services v Minister of Labour and Social Services* (A 163/2012) at para. [22-23].

854 (ibid.: 24).

importantly the legislation is aimed at preventing persons from bypassing the Labour Act 2007.[855] In addition the court agreed with the counsel of the respondents that the Amendment legislation is ordinary labour legislation, aimed at achieving the intended objective and curing the lacuna mentioned earlier. [856]

Applicant complained that it is tasked, under pain of criminal sanction, to police user enterprises for compliance with specific laws.[857] The same duty is imposed on the labour hire employers in respect of the contributions to the Social Security Commission. In this connection the court remarked that it cannot see how these provisions, desirable or not, constitute a material barrier for the applicant to conduct its business.[858]

The court rejected the policing claim by the applicant, saying, there is no policing done as is argued. The Employment Act[859] merely sets as a pre-condition, for the placement of workers with any user enterprise that such user enterprises have complied with its obligations under the law.[860] The court has also rejected other claims by the applicants. In the result the latter's case is dismissed with costs.

855 (ibid.: 25).
856 (ibid.: 26-27).
857 Affirmative Action (Employment) Equity Act, No 29 of 1998.
858 See Africa *Personnel Services v Minister of Labour and Social Service* (A 163/2012) para. [42]-[44].
859 Section 26 (1) (b) of the Employment Service Act 8 of 2011
860 Social Security Act of 1994.

4.4 Conclusion

This chapter shows that the decision of the government to amend the Labour Act[861] was met with mixed opinions. Some sections of the Namibian society were sceptical about it. Apart from the government and trade unions, the amendment has been seen as are direct ban of labour hire through legislation. It is clear that the purpose of the Amendment legislation and particularly section 128 is to regulate the framework within which labour hire entities will be allowed to operate in Namibia.

It appears that the Amendment Act essentially brings about a situation that has the following impact on the situation of the labour hire entities and user enterprises. In that once a labour hire entity has placed one of its employees at the disposal of a user enterprise the user enterprise attracts all the normal statutory obligations of an employer in respect of that individual. The user enterprise is then prohibited from employing a labour hire employee on terms and conditions that are less favourable than those of comparable employees already in its employment. The user enterprise is prevented from employing labour hire employees to break strikes or to enforce lockouts. Thus the engagement of labour hire employees during or in contemplation of a strike or lockout is prohibited. In addition the user enterprise is prevented from engaging labour hire employees to replace existing workers who have been dismissed within the previous six months.

On the other hand the position of the employees of the labour hire entities, who are made available to user enterprises, is improved. These temporary workers are now

[861] Act 11 of 2007.

employed on the same terms and conditions as the comparable employees already in the employment of the user enterprise. All the rights of other employees under the Act including the right to join a trade union and the right to be represented by the trade union in collective bargaining with the employer are extended to labour hire employees. The amendment provides employees with labour law remedies in relation to disputes arising from an alleged contravention of relevant provisions.[862] The Minister is empowered to make regulations concerning the implementation or enforcement of the section, if deemed necessary. It appears that the scheme which was so created by the new section 128 is indeed a response to the *APS* case. It is also a response which is connected to - and is indeed aimed at the curing of the perceived 'mischief' in that it obviously attempts to close the gap in the existing legislative framework, which has allowed the circumvention of the Labour Act, in the past. The Amendment legislation achieves the abovementioned goals in its own peculiar way. That is a far cry from being irrational. On the contrary nothing in these sections indicates in the view of the court that the regulation is not rational, even though it might amount to'overkill'.

862 Section 128 (3) and (5) of the Labour Act, 2007 as amended.

CHAPTER 5: THE REGULATION OF LABOUR BROKING OR TEMPORARY EMPLOYMENT SERVICES (TESS) IN SOUTH AFRICA

5.1 INTRODUCTION

The previous chapter examined the reform of labour broking in Namibia and provides an in depth analysis of amendment made to the Labour Act,[863] and the implications of such reform. The latter appears to have restored the original position which is the ban of labour hire in the country. Although the Amendment was challenged, the Court found it to be constitutional.

This Chapter discusses the regualation of labour broking or temporary employmnet services (TESs) in South Africa. Like in Namibia the industry has been linked to exploitation and abuse of workers due to its complexity in terms employment relationship and thus it has been for this reason that heated debate erupted in South Africa. The Congress of South Africa Trade Unions (COSATU) and the National Council of Trade Unions (NACTU) were in favour of a legislative ban. Interestingly, however, the government of South Africa did not support the proposed ban.[864] The Federation of Unions of South Africa (FEDUSA) and the business community support stricter regulation which is partly reflected in the current position adopted by the Labour Relations Amendment Bill[865] (LRAB). A team of experts was appointed to assess the

863 Section 128 of the *Labour Act, 2007 (No. 11 of 2007).*

864 BPS van Eck. 2010. "Temporary Employment Services (Labour brokers) in South Africa and Namibia." *PER/PELJ.* Vol. 13(2), p107.

865 Section 198 of LRA, (No 66 of 1995).

risk and impact associated with the earlier Bill[866] who ended up recommending a diferrent approach.

This chapter investigates the approach adopted in South Africa as far as the regulation of TESs. Over the past few years, South African role players in the lobour industry have been engaged in heated debates over the regulation of temporary employment services.[867] The main piece of legislation which regulates TES in South Africa is the Labour Relations Act however recently the industry has been under scrutiny.[868]

Active role players met at the National Economic Development Labour Council (NEDLAC) to discuss the various issues surrounding the labour broking industry in South Africa, but failed to reach a unamimous agreement on how best the law should be reformed.[869]

5.1.1 The original legislations regulating TESs

The Labour Relations Act[870] (LRA) and the Basic conditions Employment Act (BCEA) contain the same definition of a temporary employment service. It reads as follows:

> *". . .any person who, for reward, procures for or provide to a client other persons –*
>
> *(a) who renders services to, or perform work for, the client; and*

866 This was the proposed Labour Relations Amendment Bill of 2010.

867 Van Eck, BPS. 2010. "Temporary Employment Services (Labour brokers) in South Africa and Namibia." *PER/PELJ.* Vol. 13(2), p107.

868 (ibid.: 107).

869 For example the trade union federations, namely the Congress of South African Trade Unions (Cosatu), are in favour of a legislative ban on labour broking. Whilst the Federation of Unions of South Africa (Fedusa) prefers the retention of the existing regulatory frame work.

870 (No 66 of 1995).

(b) who are remunerated by the temporary employment services."[871]

In terms of the definition, a triangular employment relationship has been created involving three parties. The labour broker enters into a contract with a user enterprise to supply workers who will render services or perform work for the user enterprise. Such an employment relationship is recognised in law.[872]

In this case, the labour broker becomes the imployer of the worker, but an independent contractor cannot be said to be an employee of the labour broker.[873] It follows that the labour broker does not have to enter into any contract with the third party (user enterprise) for whom the worker has been recruited, but it is possible for the labour broker to enter into a contract with an independent contractor, either on permenant or temporary basis depending on the availability of assignments. However, if the existing contract between the temporary employment agency and the user enterprise lapses, so, too, will the contract between the temporary employee and the temporary employment agency.[874]

In terms of the Labour Relations Act, a temporary employment agency is the employer of agency workers who render services to a user enterprise. Although the control and supervision of agency workers ultimately rests with the user enterprise, temporary employment agencies remain the employers of agency workers whom the user

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871 See section 198(1) of the LRA and 1 of the BCEA.

872 For example, section 198(2) of the LRA as well as section 82(1) of the BCEA states that: '[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."

873 See section 198(3) of the LRA and section 82(2) of the BCEA.

874 Theron & Shane, (2000: 37).

enterprise remunerates through the temporary employment agency.[875] The principal section makes the end user jointly and severally liable under specific circumstances.[876] However, if a TES fails to pay amounts due to the employees, the user enterprise for which the employees worked is liable to make such payments. It does not matter whether the user enterprise has paid the TES or not. In theory, a joint and several liability shifts the risk of TES in default of its obligations towards a user enterprise which has caused complications in TES related labour disputes referred to CCMA. The Labour Court has held that a user enterprise cannot be sued directly in the CCMA or Labour Court as it is not an employer.[877] The employee can only proceed against the user enterprise only if he or she has been grunted a judgment or award against the TES which the TES refuses to satisfy. Generally, vulnerable workers are seldom able to exhaust all the procedures so as to hold the user enterprise accountable.[878] However, if the new proposed amendment is implimented, the Labour Court and CCMA will have jurisdiction over disputes arising between TES and the workers.

The concept of a "labour broker" was introduced into South African law by means of a reform made to the Labour Relations Act.[879] Labour brokers were "deemed" to be the employers of persons they assigned to third parties, on condition that they remunerated the employees. Thus, workers in a triangular employment relationship fell outside the protection of statutory measures regulating employees,[880] owing to the statutory

875 *LAD Brokers v Mandla* (2001), 22 ILJ 1813 (LAC).
876 Section 198 of the LRA of 1995.
877 See Dick v Cozens Recruitment Services (2001) 22 ILJ 276 (CCMA); April and Workforce Group Holdings (Pty) Ltd t/a The Workforce Group (2005) 26 ILJ 2224 (CCMA).
878 Benjamin *et al.* (2010: 33).
879 (No. 28 of 1956).
880 Benjamin *et al* (2010: 19).

definition of an "employee'" which excludes them.[881] This situation exposed employees caught in a triangular employment relationship to all forms of abuse and other unscrupulous business practices.

Section 198 of the Labour Relations Act provides as follows "for the purpose 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."[882] It is submitted that this section establishes a legal fiction by making the labour broker the employer of the person whose services will be required[883] under the contol and supervision of a third party (user enterprise).[884] Moreover, the labour broker and the user enterprise can be held jointly and severally liable for contravening the conditions of service as embodied in the Basic Conditions of Employmnet Act (BCEA).[885]

In reality, a temporary employment agency does not provide work, but only remunerates the employees. The provisons of the Act, which state that the temporary employment agency and the user client are held jointly and severally liable if the user enterprise contravenes a collective agreement, have further complicated this situation. Neither temporary employment agencies, nor the agency workers are represented in negotiations at Council level which further weakens their position during negotiations for

881 Section 213 of the LRA and the section 1 of BCEA define 'employee' in the same way: "employee" means (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.'

882 (ibid.).

883 See Van Eck. (2010: 109).

884 Section 200A of the LRA establish a presumption to the effect that a person who works under the supervision and control of another person is provide with tools of the trade and forms part of the other person's organization is an employee of that person.

885 Section 198 (4) LRA.

conditions of employment. Moreover, the section does not extent an equal responsibility to a user enterprise for unfairly dismissing agency workers.[886]

5.1.2 Complementary legislations

The other legislation which complements and applicable to temporary employment agencies include the Compensation for Occupational InjuriesandDiseases Act (COIDA) which defines an employer as including a temporary employment agency. The labour broker, as an employer, is required to register and report any work related accidents to the Compensation Commissioner which can result in institution of delictual claims by agency workers for work related injuries suffered as confirmed in *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck*.[887] Although the Skills Development Act (SDA) does not make reference to temporary employment agencies, it requires that any person desiring to provide employment services for gain should be registered.[888] Similarly, the same with the Employment Equity Act[889] provides that any person whose services have been procured by a temporary employment agency will be deemed to be an employee of the user enterprise if he or she has worked for the user enterprise for a period longer than three months. In the event that a temporary employment agency has committed an act of discrimination against an employee on the instructions of the user enterprise, whether implied or expressed, both the temporary employment agency and the user

886 See for example, *National Union of Metalworkers of SA v SA Five Engineering* (Pty) Ltd 2007 ILJ 1290 (LC)

887 [2007] 1 BLLR 1 (SCA).

888 (No. 97 of 1998) SDA

889 Section 57(1) of the EEA.

enterprise will be jointly and severally liable[890] since discrimination based on specific grounds is prohibited.[891]

A reflection on the legislation discussed above reveals that agency workers enjoy adequate protection, but, in reality, the opposite holds true. Since agency workers are treated in an inferior manner as compared to the full-time workers, Theron refers to them as "an underclass" in the formal workplace.[892] An additional challenge, as far as disputes between agency workers and the user enterprise are concerned, is that the Commission for Conciliation, Mediation and Arbitration and the Labour Court does not have the jurisdiction to mediate any disputes between the agency workers and the user enterprise.[893] Although the EEA[*894*] attempts to close the "gap" by making the temporary employment agency and the user enterprise mutually accountable if the user enterprise commits an act of discrimination,[895] in practice, it is less likely that the user enterprise would give instructions to a temporary employment agency to discriminate against workers who are not legally employed by them. Since the CCMA does not have jurisdiction to mediate disputes regarding unfair labour practices between agency workers, on one hand, and the user enterprise on the other, agency workers are

890 Section 57(2) EEA.

891 Section 6(1) of the EEA provides that no employer may unfairly discriminate, directly or indirectly, on a number of 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".

892 Theron. (2005: 618-626).

893 See *Mandla v LAD Brokers* (Pty) Ltd 2000 BLLR 1047 (LC).

894 (No 55 of 1988) (Hereafter refered to EEA).

895 Section 6 (1) of the EEA stipulates that no employer may unfairly discriminate, directly or indirectly, on a number of 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"

excluded from legal protection despite the gravity of the dispute.[896] The fact that the LRA fails to impose equal obligations in the wake of an agency worker being unfairly dismissed constitutes a lacuna which needs to be accounted for.

It should also be noted that the definition of certain concepts in the LRA poses some serious challenges. For instance, the definition of "dismissal" in terms of LRA means the termination of the contract of employment by the employer, with or without notice.[897] Thus, agency workers whose assignments will have been revoked or terminated by the user enterprise will not qualify as dismissed employees.[898] The current position can be used by unscrupulous employers to exploit employees and deprive them of their legal protection against unfair dismissal and retrenchments, considering the fact that this piece of legislation is designed only to protect full-time employees.

Technically speaking, agency workers are entitled to claim the same rights as full-time employees, but the enforcement of such rights is very complicated in light of the fact that the user enterprise is the one which dismisses the agency worker, and not the temporary employment agency. Suppose an agency worker decides to institute a complaint against a user enterprise on whose premises the alleged unfair dismissal took place, the agency worker will not have any legal remedy since the user enterprise is not regarded in law as the agency worker's employer.

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896 See Theron. (2005: 644). *See also April v Workforce Group Holdings (Pty) Ltd t/a The Workforce Group (2005) 26 ILJ 2224 (CCMA).*

897 Sections 186(1) (a) of the LRA.

898 *Mavata v Afrox Home Health Care* 1998 ILJ 931 (CCMA).

Le Roux claims that an employment relationship based on Labour broking promotes job insecurity and erodes employment standards.[899] Furthermore, it becomes even more complicated with regards to disputes concerning agency workers because the Commission for Conciliation, Mediation and Arbitration and the Labour Court do not have the jurisdiction to consider such disputes.[900] In addition, the contract between the temporary employment agency and the worker is often made subject to the continuation of the commercial contract between the temporary employment agency and the user enterprise.[901] In case where the user eneprise has terminated a commercial contract with the temporary employment agency after an agreement has been reached, courts have confirmed that such termination does not constitute a dismissal.[902]

All workers are entitled to the right to organise and bargain collectively.[903] Although the South African government has not ratified ILO Convention 181, her Constitution[904] protects organisational rights for all workers. One of the setbacks in the enforcement of organisational rights is that they are founded on the concept “workplace” which oftenly bears no application with regard to TES employees.

The LRA defines the workplace as all the places where the employees of the employer work. Trade unions are, therefore, required to have sufficient representation in a particular industry for the purposes of bargaining. However, employees placed by labour brokers do not form part of any collective bargaining process which deprives them of

899 Le Roux. (2008: 154-157).

900 *Mandla v LAD Brokers (Pty) Ltd* 2000 BLLR 1047 9 (LC); *Vilane v SITA* (Pty) Ltd 2008 BALR 486 (CCMA).

901 Van Eck. (2010: 110).

902 *Mavata v Afrox Home Health Care* 1998 ILJ 931 (CCMA).

903 Amongst these Conventions are the Convention on Freedom of Association and Protection of the Right to Organise No. 87 of 1948 and the Convention on the Application of the Principles of the Right to Organise and to Bargain Collectively, No. 98 of 1949, just to mention but a few.

904 Section 23 of the Constitution of the Republic of South Africa Act, No.108 of 1996.

adequate protection against unfair labour practices, thereby, prejudicing them in favour of permenantly workers employed by same user enterprise.[905] Therefore, TES employees working irregular shifts, or say weekends only, will find it difficult to have sufficient membership at the workplace.[906]

Collective bargaining involves negotiations between parties to an employment relationship with a view to harmonise conflicting expectations.[907] As most organisational rights demand a majority membership, the right to organise a trade union requires fifty percent representation of the company's national workforce.[908] The nature of TES employees' work may require them to perform different duties at different workplaces which further strain their capacitiy to excercise organisational rights which, therefore, calls for an ideal legal regime protecting the rights of TES employees. This is the case in respect of union related issues as well as the interests of other workers on the periphery of labour law.

Whilst the existing legislation does not expressly exclude labour broker employees from organising, the practical negative implications of the definition "workplace" arguably prevent them from organising and bargaining collectively.[909] Depriving workers of their right to bargain collectively violates their constitutional rights and deprives them of their entitlement to collective bargaining system leading to loss of jobs. Theron *et al* argue that bargaining councils are typically Fordist institutions premised on a status quo which

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905 Van Eck. (2010:111).

906 Theron & Shane. (2000: 49).

907 Davies & Freedland. (1983: 65).

908 (ibid.: 50).

909 Harvey, S. 2009. "Labour brokers and workers' rights: can they co-exist in South Africa?"*A research dissertation presented for the approval of the Senate in fulfilment of part of the requirements for the Master of Laws, University of Cape Town,* p17.

is rapidly being eroded. Concretely, they are weakened by the weakness of the unions and the erosion of their own financial basis. The political ability of councils to extend their collective agreements to non-parties and to enforce their agreements is been weakened as compared to the old regime which will be uneasy to reverse.[910]

Van Eck points out that employees placed by labour brokers are disadvantaged, as far as bargaining for employment conditions is concerned, to such an extent that employees and trade unions do not form part of the bargaining process. Similarly, negotiations for the commercial agreement between the dominant user enterprise and the labour broker exclude TES employees. To this end, employees placed by labour brokers are not subjected to equal conditions of employment as permanently employed workers of the same user enterprise.[911]

5.1.3 The protection of the right to fair labour practice

In terms of the Constitution,[912] everyone has the right to fair labour practices such as the right to form and join a trade union,[913] which, impliedly, include the right to participate in trade union programmes and industrial action. Likewise, employers are accorder the right to form and join employers' organisations and to participate in their activities and programmes.[914] Consequently, this entails that a trade union has the right to determine its own administration, programmes and activities such as the right to organise, form and join a federation. Both employers' organisations and trade unions

910 Theron & Shane. (2000: 52).
911 Van Eck. (2010: 111-112).
912 No. 108 of 1996.
913 See section 23 (1) of the South African Constitution.
914 Section 23 (2) of the South African Constitution.

have the right to engage in collective bargaining in order to achieve the desired objectives,[915] although national legislation may be in place which may limit the right to a fair collective brgining system.[916]

There is sufficient evidence illustrating that employees placed by labour brokers are paid less than their full-time counterparts.[917] Van Eck, thus, argues that although the Employment Equity Act (EEA) protects workers against unfair discrimination in any employment setting, the EEA does not prohibit unequal treatment between permanent employees of a user enterprise and TES employees.[918] In a nutshell, triangular employment relationships have a great potential to undermine employees' labour rights. With regard to the complexity involved in triangular employment relationships, TES and a user enterprise could be held jointly liable for employees who are working for the user enterprise.

This invites an investigation into whether the functions of temporar*y* employment agencies can be performed without the agency becoming a party to such an employment relationship. South Africa's current labour legislation, including the LRA, theoretically provides some protection to atypical employees.[919] However, the absence of specific protection for particular categories of workers renders these employees vulnerable to exploitation. Benjamin points out that loopholes in the law, characterised

915 Section 23 (3) and (4).
916 The limitation placed must comply with section 36 (1) of the same Constitution.
917 Van Eck. (2010: 111).
918 (ibid.).
919 See section 198 of the LRA and section 82 of the BCEA; See also sections 22 and 23 of the Constitution of the Republic of South Africa, No. 108 of 1996.

by discrimination and inadequate enforcement, pose challenges.[920] In an attempt to "fix" the challenge, the government of South Africa proposed to repeal Section 198 of the LRA in its entirety. The discussion below ascertains the extent to which the proposed reform in South Africa's employment laws in would address various challenges faced by TES employees.

5.2 Amendment of the provisions regulating TES in South Africa

.The purpose of the repeal of the provisions regulating labour broking in South Africa[921] and other employment laws aims at extending legal protection to TES employees'rights. However there has been public outcry regarding the contradictory provisions in the earlier proposed Bills[922] which has triggered the established of a committee which was tasked to deliberate on policy issues[923] According to Benjamin the underlying policy objective points to the need to regulate non-standard employment relationships, including TES in such a manner which recognises the industry's legitimate role of job creation and simultaneously to stop the exploitation of vunerable workers in any type of employment relationship.[924] In terms of the reform, any person carrying out temporary

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920 For example, differences in wages and benefits available to atypical workers compared to equivalent permanent staff, lack of access to benefits such as medical-aid, pensions, and the maternity leave for atypical workers, limited access to training and development opportunities, dismissals of TES workers without following proper procedures, low rates of unionisation and that bargaining council agreements are generally not applied to TES workers. See Benjamin, *et al* (2010: 15-16).

921 No 66 of 1995.

922 See Benjamin, *et al* (2010: 15-16). These Bills were prepared for the Department of Labour and Presidency and dated 9 September 2010.

923 The aspects concern include: atypical employment Relationships; dispute resolution compliance and enforcement; access to employment; equity (including equal pay for equal work) and collective bargaining.

924 Benjamin *et al.* (2010: 13-14.

services for a user enterprise is classified as an employee on condition that the duration of such work should not exceed 6 months.[925]

In situations where the TES terminates the employment services of an employee's assignment with a user enterprise for the purpose of avoiding statutory obligations, such termination is tantamount to dismissal.[926] Employees performing temporary services for the user enterprise should be treated on an equal footing with employees of the user enterprise performing the same work except where differential treatment can be justified. [927] Benjamin argues that repeal of section 198, coupled with the change in the definition of "employee" and the new definition of an "employer" may induce uncertainty in the labour market which, in turn, would in all probabilities increase the number of cases referred to the the Commission for Concialiation, Mediation and Arbitration (CCMA), the Labour Courts and civil courts.[928] Furthermore, he warns that additional responsibilities introduced by the amendment would result in individual user enterprises registering the employee under the relevant legislations.[929] In addition the repeal of section 198 would effectively prohibits labour broking practices contrary to the government policy on the promotion of small businesses.[930] In fact if the amendment is implemented the industry will come to an end. In light of the expansion of the definition of an "employee" whereby user enterprises were imposed employer status such policy

925 Section 198A (1) (a)-(b).
926 Section 198A (3) and (4) as amended.
927 Section 198A (5) as amended.
928 (ibid.: 8).
929 These legislations include: the Compensation for Occupational Injuries and Disease Act (COIDA) and the Unemployment Insurance Act (UIF).
930 Benjamin *et al.* (2010: 12).

is likely to cause confusion amongst TES employees, particularly regarding wage increase demand and aspects of supervision.[931]

The right to engage in trade, occupation or profession is also extended to juristic persons.[932] It follows that if the amendment is implemented, it would undoubtedly violate the provisions guaranteeing the right to practice any profession, trade or business.[933] While permanent employment may see an increase following the repeal of section 198, Benjamin is of the view that the employment sector will generally be on a decline and this will not only contribute to increased levels of unemployment in the country, but also deprive the workers of a valuable source of income to sustain their families.[934]

As mentioned ealier in this chapter the amendment would make the user enterprise be under an obligation to directly employ TES workers if the former decides to continue enjoying the services workers provide. However this may result in higher productivitiy costs for the business and the effect of a high wage bill and hiring costs may ultimately induce employers to hire fewer workers.[935] Nevetheless it could be true that the repeal of the provisions regulating TES may result in the improvement of wage levels as well as employment conditions for some of the workers. Sadly, the amendment of the

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931 (ibid.: 12).

932 This was confirmed in the case of *Africa Personnel Service v Government of the Namibia* SA 51/2008 2009 NASC, in which one of the legal issues the court had to determine was whether the right to trade and choose a profession extended to juristic person or not. The Supreme Court ruled that the right concern include juristic persons.

933 See *Africa Personnel Services v Government of the Republic of Namibia* SA 51 / 2008 2009 NASC 17

934 Benjamin *et al.* (2010: 6).

935 (ibid.: 7).

definition of an "employee" and "employer" is likely to result in additional costs.[936] Moreover, the negative implications will be the reclassification of many employees as independent contractors and that clauses dealing with outsourcing and sub-contracting seek to impose invariable consequences on these transactions rather than regulating abuses.[937] Therefore, the primary goal should be to regulate non-standard work by recognising the legitimate role played by TES workers in contemporary societies in which the exploitation of workers is prohibited.[938]

The new legislation contains provisions aimed at ensuring that vulnerable categories of workers were afforded decent employment conditions[939] as well as safeguarding workers' rights to organise and engage in collective bargaining.[940] The other aspect covered by the amended version is the treatment of all categories of workers on an equal footing and the protection of the latter from discrimination.[941] A new provision in the BCEA has been introduced which imposes an obligation on TES employers requiring the latter contribute the same benefits and afford the contract workers the same rights as enjoyed by permanent employees.[942] This provision would apply to both temporary employees well as tnose employed on full-time basis. Non-standard

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936 This is particularly true in relation to cases referred to CCMA for the Labour Court and civil courts to determine if a person is actually an employee according to the new definitions.

937 Benjamin *et alj.* (2010: 12-13).

938 (ibid.).

939 The ILO defines 'decent work' as productive work which generates an adequate income, in which workers, rights are protected and where is an adequate social protection providing opportunities for men and women to obtain productive work in conditions of freedom, equity, security and human dignity. Available at <http://www.ilo.org/global/about_the_decent_work_agenda/lang_en/index.htm>accessed on ????

940 Section 1 of the LRA provides that the purpose of the Act is to 'advance development, social justice, labour peace and the democratization of the workplace by fulfilling the primary objects of this Act'. This includes giving effect to the rights conferred by section 23 of the Constitution and promoting the effective resolution of labour disputes.

941 Benjamin *et al* (2010), above n 19 at 12.

942 See section 32 (5) of the new proposed provision in the BCEA.

employees would not be employed on less favourable terms and conditions than permanent employees.[943]

5.2.1 Analysis of the TES reform

Benjamin *et al* criticise the reform of TES of being very wide particularly the provisions relating to an obligation imposed on employers to "contribute the same benefits and afford temporary workers the same rights as those enjoyed by permanent employees."[944] According to him such a wide obligation could include a variety of benefits making it difficult for employers to determine with muh precision the exact scope of the provision, thus, discouraging employers from increasing their workforce.[945] More so, Benjamin asserts that since TES employees were mostly novice employees in the labour market, equating them with senior workers in terms of wages and benefits would be very costly for employers.[946] It appears to be unfair to disregard workers' experience as a factor in determining the latter's wages because permanent employees are likely to be equipped with vast experience based on long service and is oftenly rewarded with rising wages and secure retirement.[947] The same concern has been raised regarding the requirement of equal pay for equal work for both full-time and part-time employees.[948]

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943 (ibid.).

944 Benjamin *et al.* (2010: 18).

945 (ibid.: 19).

946 (ibid.: 20). For example, in the event where an employer intends to dismiss an employee, the former is obliged to comply with the provisions of section 186-188 of the LRA Act 66 of 1995. These sections require that a notice be given to the employee concern and that reasons for such dismissal be given. See also J, Grogan. (Eds). (2005. *Workplace Law.* Juta, pp106-117.

947 (ibid.).

948 (ibid.).

Furthermore, the amendment advocates for the principle of equal pay for equal work,[949] however, given the fact that employers determine the wages and salaries of their employees based on various afctors such as special skill and experience the principle of equal pay for equal work may not fully be complied with unless an effective monitoring system would be implemented to ensure that employees are treated fairly and equally and such system should be rational and applied consistently in all facets of the employer's remuneration scheme.[950] Nonetheless, if the employer demonstrates that differentiation between the emplloyees is based on some relevant, rational and objective criteria, a scheme based on different pay for equal work would become justified.[951]

It appears that the new amendment is not very clear on some important employment benefits for employees such as pension as a social security benefits which normally meant for benefitting full-time employees.[952] Since individuals employed through TES were classified as casual workers and therefore could not benefits from employment related entitlements on account that the services they provide were temporary in nature. Employment benefits are based on a long term financial contribution by employees into

949 Section 198(A)–(D) of the LRA as amended.

950 For example, the BCEA does not prescribe a minimum wage. It is left to the employer and employee to negotiate this aspect of employment. Section 32 of the BCEA provides that if an employee is paid in money, he /she must be paid on a daily, weekly or monthly basis. Any deductions from employees' salary is prohibited, unless the employee agrees in writing or permitted in terms of the law. See section 34 of the BCEA.

951 Section 198(A)–(D) of the LRA as amended

952 Branches of social security include: medical/health, sickness, unemployment, old-age, employment injury, maternity and death. See A Basson, *et al*. (Eds). 2009. *Essential Labour Law.* Labour Law Publications, p396. It is worth noting th*et al*l employees are protected against any discrimination at the workplace, hence are entitled to social security benefits provided in law. See section 9 of the Constitution of the Republic of South Africa which states that 'everyone is equal before the law…' and section 5-6 of the Employment Equity Act (EEA) which requires employers to eliminate unfair discrimination against employees at work places.

the fund during their tenure of employment.[953] Hence, adequate pension and medical funds are generally premised on full- time employment of individuals whilst the self-employed are expected to make private arrangement for their pension benefits.[954]

Stanworth and Druker point out that legislation which aimed at fostering equal rights for all employees should allow for beneficial flexibilities to employers and employees.[955] This means that it should allow atypical forms of employment and TES to render services to user enterprises, whilst ensuring that employment relationships will not nagate the objectives of labour laws.[956] Benjamin suggests that that Bargaining Council agreements can be used to determine minimum wages and benefits for temporary workers and that in a situation where collective agreements cover categories of work performed by agency workers, collective agreements should apply to them.[957]

Considering the fact that temporary workers were mostly young people, employers need to be encouraged to employ young and inexperienced workers and this can be achieved through the initiation of a graduate process by which wages and fringe benefits are commensurate with the length of service in a particular sector or industry.[958] In terms of the proposed amendment, "temporary services" is limited to a period not exceeding six

953 See Section 17 of the Government Pension Law, 1996 (Proclamation No. 21 of 1996).

954 Theron & Shane (2000: 42).

955 For example in the UK, traditionally, temps had no rights to pay parity with the permanent workers, however, they are entitled to limited State benefits. Interestingly the situation has changed in 1998 as a result of the implementation of the European Working Time Directive. See Stanworth, C & Druker, J. 2004 "Temporary agency labour in the UK." In J Burgess and J Connell (Eds), *International Perspectives on Temporary Agency Work,* Routlegde, p64.

956 Benjamin *et al.* (2010: 19-20).

957 (ibid.).

958 Benjamin *et al.* (2010: 30).

months which confines work rendered by a temporary worker for the benefit of a user enterprise as a substitute for an employee of the latter who is temporarily absent.[959]

Traditionally individuals employed through TES have no security of employment in that since user enterprises can wittingly instruct the former to dismiss a particular worker, which decision the affected worker can challenge against the latter and not against the TES. This implies that lack effective legal protection against unfair dismissal, regardless of the length of service with a particular user enterprise. It is the TES which retains the authority to enforce the dismissal of a worker owing to the fact that the commercial arrangement only exists between the TES and the user enterprise and this is what exactly the proposed amendment intend to transform.

In an attempt to address the loophole in the existing legislation the proposed amendment to the LRA introduce a new definition of the concepts "employer" and "employee,"[960] which amounts to a repeal of the principal section.[961] The proposed amendment seeks to prevent any form of triangular employment relationships by stating that an employer can only be a person who directly supervises the work of an employee. Ultimately, the operation of TES will be precluded considering that the essence of "labour broking" is premised on the supply of employees to work under the supervision of another (the user enterprise).[962] Thus, changes to the LRA pose

959 Section 198A (b) of the LRA as amended.

960 The proposed definition of an 'employee' means any person who is employed by or works for an employer and who receives or is entitled to receive any remuneration and who works under the direction and supervision of an employer.

961 This refers to section 198 of the LRA.

962 Benjamin *et al.* (2010: 20).

challenges, one of which is the complexity ecountered by the CCMA and the Labour Courts in identifying who an employer is.[963]

5.2.2 The legal implication of the proposed definition of an employer and an employee

The legal implication of the proposed definition of an employer and an employee has far reaching consequences. Benjamin points out that the Bill's conceptualisation of an "employee" requires that a person who works for another is only an employee if he or she is employed by, or works for an employer. The same employer should remunerate the employee who works under his/her direction and supervision. He further argues that the proposed definition of employer and employee elevates "direction and supervision" to be a mandatory requirement for the worker to be a statutory employee. He warns that if this definition comes into effect, many workers who are currently classified as "employees," but who are not directed or supervised in the way they work will cease to be employees. As a consequence and for the purposes of all labour legislation will therefore be excluded from all statutory labour rights.[964]

This is particularly relevant to employees who work away from the office. Workers such as taxi-drivers, truck-drivers and commercial travellers are not considered to be under the "direction and supervision" of their employers, which obviously, amounts to an unjustifiable limitation of the rights guaranteed to workers because they, too, are entitled

963 (ibid.: 34).
964 (ibid.).

to labour protection as a result direct employment may be negatively affected by denying the majority of workers the protection provided by labour law.[965]

Case law shows that it has always been easy to define the employer[966] but the difficulty has arisen with the emergence of non-standard employment relationships.[967] This is particularly true in light of the fact that the traditional control test used to identify the employer has ceased to become helpful.[968] The complexities involved in indentifying the employer have been illustrated by the Courts which have ruled out that the supervision and control test is not the sole *indicium*.[969] It is important to remember that the definition of who an employer has evolved for the purpose of distinguishing employees from independent contractors and not designed to serve the purpose of distinguishing whether the agency supplying workers or the user enterprise is the employer.[970]

In practice, many employees are supervised in their work by both the agency and the client for whom the employee works. For instance, the agency may supervise the overall responsibilities of the employee's duties, while the client *supervises* the daily execution of tasks given at *the* client's workplace. It is not clear how the Bills' proposals

965 Section 23 of the South African Constitution, 1996.

966 For example, in the case of *Buffalo Signs & Others v De Castro & Another* (1999) 20 ILJ 150 (LAC), the Court was requested to determine who the employer was, as the employee rendered his services to more than one employer. The court

967 Triangular employment relationship involves the provision of temporary workers to clients. Generally, employment is on the premises of the client, meaning a high degree of control rests with the client over the workers. See Theron. (2005: 620-621).

968 See the control test formulated in *Colonial Mutual Life Assurance Society Ltd v Macdonald* 1931 AD 412. In that case the court held that employers do exercise a fair amount of control over the activities of the employee, telling the employee what to do, when to do it, where to do it, and in the manner in which the employee must perform the task.

969 In *Smith v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) at 62D-G, the court indicated that notwithstanding the importance the fact that the presence of such a right of supervision and control is not the sole indicium but merely one of the indicia.

970 Benjamin *et al* (2010: 35). Also see *LAD Brokers (Pty) Ltd v Mandla* (2001) 22 ILJ 1813 (LC)

will deal with this situation.[971] This could lead to the conclusion that none of the parties is the employer because supervision is shared and neither the "agent" nor the "client" exercises the full responsibilities of an employer.[972]

Vetori argues that the employer who controls the workplace in which the employee works is likely to be classified as the employer because he or she directly supervises the employee.[973] In some situations, however, the results appear anomalous as can be seen in businesses which hire out expensive equipment like earth-moving machines or cranes. An employee who operates the equipment is fully trained to perform that particular task and the client only needs to give instructions regarding the tasks to be carried out. Hence, the consequences of repealing section 198 will pose the difficulties in identifiying who the employer is such that it will have to be dealt with on the merits of each case.[974] Arguably, this will wide the scope for escaping the responsibilities of an employer and further encourage unscrupulous employers to disguise the activities of their business. Moreover, the uncertainty created is likely to invite more litigation to the detriment of employees[975] and further escalate cases referred to the CCMA, the Labour Courts and the Civil Courts.

One of the essential elements to be considered in determining an employer is to identify the person who pays the employee's wages or salaries.[976] The proposed amendment

971 Benjamin *et al*. (2010: 35).
972 (ibid.: 34).
973 Vetori (2007: 158).
974 This is particularly true where dismissal of an employee is an issue. The definition of dismissal in section 186(1) of the LRA means that the employer 'terminated a contract of employment'. Whether this definition assist arbitrators face with dismissal of TES workers is yet to be tested ones the proposed repeal is implemented.
975 Benjamin *et al*. (2010: 35).
976 Section 32 of the BCEA requires that an employee be paid in South African currency, on daily, weekly or monthly basis. However, the BCEA does not prescribe a minimum wage.

includes “remuneration” as an essential element of employment which constitutes another loop hole employers may resort to in disguising an employment relationship. Particularly those employers must both “directly supervise” and “remunerate” an employee will make it easier for the former to masquerade the real employer. This can be done through activities such as contracting out and externalisation.[977]

Further, employers may decide to split their business into two or more legal entities. This would allow certain employees to be outside the direct supervision of the employer, thereby, disguising the actual supervisor in the processs. It followss that the proposed definition will faciliate labour law avoidance a lot easier.[978] In light of the fact that South Africa has ratified a number of ILO Conventions, the proposed changes would place her in breach of many international conventions.[979] Benjamin recommends that the current definition of an employee be retained in order to maintain stability in the labour market.[980] This is necessary in order to avoid risks destabilising the labour market particularly that the determination of who an employee is has been an area of relative certainty since the enactment of the presumption of an employee.[981]

Storrie points out that one of the advantages associated with temporary agency work is the flexibility afforded to employers to re-organise their businesses and increase

977 Externalisation involves the provision of services or goods in terms of commercial contract instead of an employment relationship. This system place a legal distance between the user services and the risk associated with the employment relationship. See Le Roux (2006) above n 46 at 147.

978 Benjamin *et al*. (2010: 36).

979 These include:Convention 87 of 1948 (Convention concerning Freedom of Association and Protection of the Right to Organise), the Right to Organise and Collective Bargaining Convention (No 98); Convention 100 on Equal Remuneration and Convention 111 on Discrimination (Employment and Occupation).

980 Benjamin *et al*. (2010: 37).

981 See section 200A of the LRA: section 83A of the BCEA in 2002 and the adoption of a code of Good practice by the National Economic Development and Labour Council (NEDLAC) on: Who is an Employee in 2006?

productivity,[982] whilst giving employees an opportunity to reconcile employment with their private lives.[983] Unfortunately the proposed definition of an "employee" seems to be inflexible by limiting the chances of job creation in that it disadvantages first-time job seekers and part-time students who are incapable of taking up full-time employment as well as women who have particular needs in respect of their family obligations.[984]

5.2.3 Prohibition of a labour broker become an employer

The wording of the proposed amendment of TES is crafted in such a way that it prevents a person or agency *which* places employees to work for its clients from being the employer of those employees.[985] Although these provisions do not involve an express prohibition on TES, its legal impact goes against the constitutional principles which require that any limitation of a fundamental right should be "reasonable and justifiable."[986] Consequently, an effective ban on TES not only violates the constitutionally guaranteed right, but also deprives employees genuinely seeking job flexibility.[987]

The question which arises is whether or not a total ban of TES, though not directly, is consistent with constitutional limitations of rights and freedoms guaranteed therein.[988]

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982 For example, employers could diversify risk; thereby increase productivity due to enhanced degree of flexibility afforded to the firm. The other advantage is an element of efficiency of the labour market due to the improvement in the matching of personnel and jobs. See Storrie, D. 2002. "Temporary agency work in the European Union." *European Foundation for the Improvement of Living and Working Conditions,* p 33.

983 K, Malherbe, K. & J Sloth-Nielsen (Eds). 2012. *Labour Law into the Future: Essays in honour of D'Arcy du Toit.* Juta & Co Ltd, p193.

984 Benjamin. *et al*. (2010: 37)..

985 (ibid.).

986 See section 36 of the South African Constitution of 1996.

987 See section 22 of the South African Constitution of 1996.

988 (ibid.).

Moreover, international law does not authorise the negation of the rights of employees by prohibiting labour broking activities which is the fundamental principle contained in the relevant ILO Convention.[989] Vosko argues that the triangular employment relationship violates core features of the standard employment relationship by establishing occupational connections with several employers rather than one. This is rarely parity to an indeterminate contract of employment and usually can be dismissed at will.[990] Theron echoed the same view saying that whether as independent contractors or employees of the agency, workers employed via labour broking arrangement were not assured of job security[991] and hence any legislative intervention attempting to outlaw TES is likely to be challenged in Courts, just like what has been experienced in other countries.[992]

Given the inflexible nature of the reform it is highly probable that if implementend it is likely to adversely affect the job market in that it would remove the flexibility and effectively end the operations of labour broking business which would create disincentives to labour-intensive economic growth as employers will be discouraged to employ new workers and opt for other methods. In addition, the ability of TES to supply workers to firms within a short term would come to an end thereby depriving companies

989 The Private Employment Agencies Convention 181 of 1997 seeks to ensure that workers placed by employment agencies receive adequate protection under labour law. However agencies are prohibited to charge employees fees. See Article 2 -7 of ILO Convention 181 of 1997.

990 Vosko (1997: 47).

991 Theron & Shane. (2000: 29).

992 In Namibia, for example, the Supreme Court directed that if labour hire if properly regulated within the ambit of the Constitution and Convention No. 181, it agency work would typically be temporary of nature. It will not pose real threat to standard employment relationships or unionisation but will greatly contributes to flexibility in the labour market. See *Africa Personnel Services v Government of the Republic of Namibiaand others* (2011) 32 ILJ 205 (NmS) at para. 116.

make cost effective adjustments in terms of workfoce shortages.[993] Thus, the removal of TES as an intermediary agency can have adverse effects on job creation and productivity.[994]

In terms of the proposed amendment, a substituted employee, regardless of the length of service, becomes an employee of the client which implies that employers will have more administrative work to carry out and employers may be encouraged to recruit workers directly from the streets to avoid increased administrative costs. Such an arrangement is consistent with the concept of casualisation in terms of which employers strategise the workforce to avoid their statutory responsibilities towards their employees.[995]

The policy objective underpinning the proposed amendments should be to ensure that workers placed by an agency at a client receive protection against unfair dismissal and at the same time should allow agencies to engage in trade or business of their choice.[996] Thus a compromise legislative approach could be an appropriate measure aimed at maintaining equilibrium between the interests of parties to the employment contract considering that the right to fair labour practice is a constitutional right for all workers.[997]

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993 Category of workers referred to may include: women on maternity leave, employees on annual or sick leave and those on study leave.

994 Benjamin *et al*. (2010: 39).

995 Casual workers fall in the category of those workers who work less than 24 hours per month, part-time workers, and seasonal workers. See Le Roux (2008: 142).

996 Section 22 of the South African Constitution, Act 108 of 1996.

997 (ibid.: section 23).

The proposed amendment prohibits any person performing the functions of a temporary employment service, unless is registered.[998] Even though if the temporary employment agency is not registered, such failure will not constitute a defence to any claim instituted in terms of the law.[999] Raday provides a useful comparative study on legislative techniques on the use of contract labour or leased employees as it is known elsewhere.[1000] She points out that there has been a retreat from full blown prohibition in national legislation of labour-only contracting to its restriction.[1001] To achieve their goal, labour brokers should be required to register, subject to minimum requirements.[1002] This means, a contractual arrangement between a "client" and an unregistered labour broker would be invalid if the labour broker is not properly registered.[1003] The principle of equal treatment of workers could only be implemented if labour brokers are registered and the division of responsibilities between clients and agencies. Another requirement associated with registration could include adherence to anti-discriminatory laws as well as respect for organisational rights of workers and collective bargaining.[1004] Lastly, the exploitation of TES workers and their health and safety could also be prevented.[1005]

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998 Section 198(4F) of the LRA as proposed for amendment.

999 Section 198(4A) of the LRA as proposed for amendment.

1000 Raday (1999: 7).

1001 (ibid.). Raday pointed out that many countries employ technics to protect leased workers and the protection of collective bargaining against the encroachment of labour- only contracting.

1002 These requirements may include: regulation of hours, period of placement. In terms of section 24 of the Skill Development Act 1998 (SDA) registration is mandatory however; strangely the Act makes no reference to TESs. Instead it provides that 'any person who wishes to provide employment services for gain must apply for registration…'

1003 Benjamin *et al*. (2010: 41).

1004 This is in line with ILO Convention, 1948 (No. 87) which protects the right to organise and Convention, 1949 (No. 98) which protects the Right to Organise and Collective Bargaining. See also Article 11 of the ILO Convention 181 that requires national laws to include measures to ensure adequate protection for workers employed by private employment agencies. Also Article 5.1 of the European Directive 2008/104/EC of the European Parliament and the Council.

1005 In order to ensure that employees and the public are protected against workplace injuries, employers are required to comply with the Occupational Health and Safety Act, (No 85 of 1993) (OHSA) as well as Mine Health and Safety Act 29 of 1996 (MHSA).

5.2. 3 Possible alternative regulatory approach in respect of TES

Apart from legislative intervention, TES has an option to become a member of a self – regulatory association which affords its members with a number of advantages. One of such advantage is_the protection of members' interests is vital with a view to achieving recognition of the positive role the industry plays and to help members of the association conduct their activities within the parameters of the law.[1006] In this respect, Damant *et al* adivised that all TES could be required to join an industry association with powers to regulate matters such as dismissals, skills development and benefits.[1007] In addition, written contracts of employment between TES and their employees should be introduced by the association as this could eliminate elements of uncertainties.[1008] Theron *et al* point out that the primary institutions in terms of the current regulatory regime are the bargaining Council which coped better with various challenges.[1009]

Benjamin recommends that TES abide by bargaining Council and collective agreements where applicable and should abide by a Code of good practice.[1010] Since the fees charged by TES for placements vary, it should be mandatory that fees charged be

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1006 One of such an association is the Confederation of Private Employment Agency (CIETT) which was founded in 1967 and consists of 48 national federations of private employment agencies. For more information see Donald Storrie. (2002: 1-5).

1007 One of such benefits is the pension benefit which may be accepted as part of remuneration. See Damant, G. & Jithoo, T. (Eds. 2003. "The Pension Promise: Pension Benefits and the Employment Contract." Vol. 24 *Industrial Law Journal.* Vol. 24, p 3.

1008 See *Laurence v Eximus and Staffing Direct WE 5199-08,* date of award 30 July 2008, in which the user enterprise attempted to escape responsibilities towards its employees.

1009 Theron & Godfrey. (2000: 51).

1010 Benjamin *et al*. (2010: 41).

disclosed. The registration requirements of TES should be accompanied by effective monitoring and enforcement measures. This could be done by allocating sufficient resources to the Department of Labour and empower the inspectorate to carry out its mandate effectively.[1011] Reagrding the issues such as social security, Oliver *et al* recommend that TES should contribute to a pension fund and fidelity fund for their employees, after a serving their employers for a specified period of time and this would ensuer that workers benefit from social security scheme which could help poor people, the informally employed and the unemployed impove their living standard.[1012]

Other option for regulation TES is the possibility of establishing a public-private partnership to support and supplement the existing structure and that the envisaged body, or co-regulatory body, should comprise of representatives from government, business world and the labour_sector.[1013] The functions of such body may include registration, licensing and compliance and_monitoring as well as ensuring adherence to the code of ethics and conduct non-compliance investigations. More importantly, the body can monitor the regulation and protection of unfair labour practices.[1014] Other responsibilities of such body can be the submission of recommendations for de-registration of non-compliant TES to the Minister of Labour. It can also be tasked with developing and enforcing reporting requirements. In conjunction with the Ministry of Labour, the co-regulatory body can be in charge of inspections and providing an

1011 (ibid.).

1012 Oliver, Smit & Kalula (2003: 131). As a rule social security system does not provide coverage to those outside formal employment. Categories and groups excluded include: the unemployed; the self-employed; the informally employed and many other atypically employed categories, such as TES employees. The underlying problem stems from the narrow definition of the concept 'employee' which under common law exclude a large number of individuals carrying out different type of work.

1013 (ibid.: 42).

1014 This include: regulation of hours of work, equal treatment, and period of placement.

arbitration mechanism to adjudicate disputes referred to it.[1015] Registration requirement with statutory bodies can ensure the effective monitoring of the system.[1016]

5.3. The efficacy of the proposed regulatory framework

The efficacy of the proposed regulatory framework depends upon effective and accessible avenues for employees to enforce their rights.[1017] Therefore, it is crucial to ensure that the proposed co-regulatory body has appropriate capacity. This can be done through regular monitoring as a means of enforcing the compliance of the code of conduct.[1018] Legislation should be drafted to clearly set out the principle of co-responsibility and to specify how far liability extends. The legislation could provide that the employee may institute proceedings against either party in the appropriate forum.[1019]

Another important aspect is the introduction of a qualifying period. The purpose is to provide a more clear-cut basis for regulating the entry of employees into employment as the current probation provisions may not be suitable.[1020] In order to encourage new

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1015 Section 65(1) (b) of the LRA provides that if a person is bound by an agreement in terms of which the issue in dispute must be referred to arbitration, a strike or lock-out about issue will be prohibited.

1016 Such as COIDA, UIF, SDL and Bargaining Councils and Sectoral Determinations. Issues of minimum training requirements for agency staff could be included.

1017 This may include unfair labour practice which refers to any unfair act or omission that arises between an employer and an employee. See section 186(2) of the LRA. Also see section 185 of the LRA which prohibits unfair dismissal.

1018 The code of conduct may include the requirement that TESs should join Industry Association, adherence to rules concerning dismissals, skill development , benefits and contribution to pension fund, just to mention but a few.

1019 These Forums could be the CCMA or Labour Court.

1020 Employees on probation are required to serve a period of probation before the appointment is confirmed. During the probationary period, which is for a specific period, employee's performance is assessed and evaluated before awarded the status of permanent employee. See Basson, *et al*. 2009: 136-7).

appointments and prevent abuse of the probationary process, an alternative approach may be to provide for a qualifying period.[1021] This would involve the application of a simplified dispute resolution process during this period, plus a waiver of ordinary unfair dismissal protections (other than automatic unfair dismissals. Provision should be made to shorten or lengthen the period of six months.[1022]

Dismissal of any employee should comply with relevant provisions of the law[1023] with no exception to TES employees. They are entitled to receive the same level of protection against unfair dismissal and unfair labour practices as other employees. An employee who is placed to work for a client on an on-going basis should have the same degree of protection as other employees of that client.[1024] In other words, a decision to withdraw that employee from employment should comply with the same requirements of procedural fairness applicable to "direct" employees.[1025]

Therefore, an employee who is placed to perform "temporary" work with a client should have the same remedies as other employees. However, the client would be entitled to terminate the employment or assignment on a ground which constitutes a valid reason for the dismissal of the employee.[1026] If an assignment with a client is terminated for an invalid reason such as discrimination or trade union membership, the affected

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1021 Such period could be six months in which employees have more limited protection.

1022 (ibid: 44-45).

1023 See section 185 of the LRA. Also in terms of ILO Convention 158 of 1982 the employer must have a fair reason to terminate the employment contract.

1024 See section 23 (1) of the South African Constitution which requires the right of everyone to fair labour practice. This means that an employee has fundamental right not to be unfairly treated.

1025 Procedural fairness requires that an employee who commits a misconduct must be given an opportunity to defend himself or herself against the allegation made (sometimes called the *audi alteram partem* principle). See Basson *et al*. (2009: 81-82).

1026 An employer who intends to bring the contract of employment to an end must do so in a manner recognised as valid in law. See *NALW v Banard NO & Another* (2001) 22 ILJ 2290 (LAC) at Para. [23]).

employees should have the same protection as other employees.[1027] TES workers tend to have very low levels of unionisation. Employees placed by TES (as well as many employees involved in outsourcing and sub-contracting) face challenges in exercising their organisational rights and engaging in collective bargaining.[1028] The reason is that they are required to engage with the agency as the employer, instead of the client company which, in the case of longer term placements, is effectively their workplace.[1029] All employees have the right to join a union and to participate in the union's lawful activities. Registered trade unions are able to obtain statutory organisational rights, provided they obtain sufficient representation among employees in a particular workplace. Unions find it difficult to recruit temporary workers as union members and to retain them on their list of employees.[1030]

5.3.1 The inclusion of the notion of flexibility in the reform

One significant aspect included in the reform of TES is the flexible definition of the term "temporary services" which runs up to a period of six months.[1031] This means that employers could employ individuals for a period running from the first day up to six months. During that period, the employer has an opportunity to decide whether or not to employ such person as a full-time employee. The broad implication of such provision is that the reform has created an environment in which employers can recruite individuals

1027 It does not constitute a valid reason to dismiss an employee for having participated in trade union activities or of being a member of such trade union.. The same is true if an element of discrimination is the ground for terminating employment. See article 5 of ILO Convention 158 of 1982 and section 187 of the Labour Relations Act, (No 66 of 1995) (LRA).

1028 Benjamin *et al.* (2010: 45).

1029 (ibid.).

1030 (ibid.).

1031 See section 198A (6) of the LRA 1995, inserted by section 44 of the LR Amendment Bill 2012.

for a short period of time, depending on the needs of the enterprise. The other advantage in the flexibility of the definition of the term is that it increases the probabilities of employment of new entrants in the job market.

It is interesting to note that the reform requires that the person performing temporary services should be a substitute for an employee of the client who is temporarily absent. Furthermore, an employee who is in a category of work and for a period of time which is determined to be temporary services by a collective agreement concluded in a bargaining Council is regarded as_performing temporary work.[1032] The other critical aspect is that the reform is its protection of vulnerable workers who are involved in activities which fall outside the protective arm of labour legislation, but yet able to generate income. Amongst this group are the employees who are engaged on fixed term and part-time contracts as well as employees who earn below the earnings of the threshold.[1033] Such flexible regulatory approach tends to benefit both the employer and the society at large. Godfrey *et al* argu that labour market regulations can lead to increased labour costs and inflexibility, thereby, undermining the viability of business.[1034] It could be possible that certain provisions of a legislation which aim at improve labour standards may adversely affect other aspects which are beneficial to the

1032 See section 198A (7) –(8) of the LRA 1995, inserted by section 44 of the LR Amendment Bill 2012.

1033 Sections 198A (2); 198B (2) and 198C (2) of the LRA 1995, inserted by section 43 and 44 of the Labour Relations Amendment Bill 2012. See also section 6 (3) of the BCEA.

1034 Godfrey, S & Theron, J. 1999. "Labour standards versus job creation? An investigation of the likely impact of the new Basic Conditions of Employment Act on small businesses." *Development and Labour Monographs* 1/99, Institute of Development and Labour Law. University of Cape Town, p1.

society as a whole i.e. employment creation, poverty reduction and business promotion. [1035]

Another notable aspect included in the reform of TESs is the recognition of the trend in the world whereby employers prefer utilising non-standard forms of work to achieve the desired goals. MCcann argues that the recruitment of part-time and temporary workers is a response to global competition whereby employers are changing with respect to their organisational preferences and their industrial relations. In addition, industrial restructuring leading to lean production and substantial reduction in workforce is taking place worldwide.[1036] Such developments require targeted regulatory approaches which recognise the changes occurring in the labour market and be able to adapt accordingly.

Benjamin claims that forms of employment which are non-standard in the nature of labour law lag behind; therefore, an appropriate adjustment is necessary. The modern employment relationship and the setup of the workplace, coupled with demands of the global market, call for new regulatory approaches.[1037] However, any meaningful regulation of work related activities should aim at improving the well-being of those it is designed to benefits. The traditional focus of labour regulation towards the protection of the rights of workers needs to shift in favour of becoming an instrument of change and

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1035 (ibid.).

1036 McCann, D. 2008 "Regulating Flexible Work." *Oxford Monographs on Labour Law*,(Oxford University Press, p 40.

1037 See Benjamin, P. 2005. "Beyond the Boundaries: Prospects for Expanding Labour Market Regulation in South Africa." An unpublished paper presented at The Scope of Labour Law: Redrawing the Boundaries of Protection, in Belliago, Italy, p 45.

multi-purpose. That means, addressing the historic inequalities, equitable distribution of wealth, poverty reduction and employment creation.[1038]

One of the reasons why temporary employment agencies have been blamed of abusing workers is based on the perceived belief that the TES have been extensively used by user firms for indefinite periods. It was for this reason that South Africa included in her reform clear restriction forbidding employers not to continue utilising TES employees beyond the prescribed time. First, the restriction is aimed at encouraging employers to employ TES employees on full-time basis. Secondly, ensuring that agency work does not become widespread as a category of job at the user firm and, thirdly, it does not undermine standard employment.[1039] However, if the employer can demonstrates any other justifiable reason for fixing the term of the contract, then, it is also acceptable.[1040] Other special measures introduced by the reform were designed to ensure that a person or entity is registered in terms of the applicable legislation to perform functions of a temporary employment service.[1041]

1038 Spier, A. 1994. "Poverty, employment and wealth distribution." *Co-operative HSRC Programme: Affordable Material Provision,* SYNCOM. Johannesburg, p1.

1039 For example, a permanent job supposed to pay a living wage unlike non-standard jobs or "atypical "which encompasses amongst others, part-time work, casual work, homework, sub-contract work, disguised wage work, just to mention but a few. See Mhone, G.C.Z. 1998. "Atypical Forms of Work and Employment and their Policy Implications." *ILJ*, Vol 2, p197.

1040 Section 198B (3) (a) - (b) of the Labour Relations Act of 1995, inserted by section 44 of the LR Amendment Bill 2012.

1041 See section 198(4D) of the LRA 1995, inserted by section 43 of the LR Amendment Bill 2012.

5.3.2 The necessity of restricting the use of TES

Broadly, the significance of specific restrictions on the use of temporary employment agencies is necessary in order to ensure that the industry is not used as a vehicle for the erosion of standard employment.[1042] However, that should not be used as justification for banning the practice under scrutiny, more particularly, that the ILO has legitimises such business and through its Convention 181, clear guiding principles are provided in the form of standards against which benchmarking could be made.[1043] It is unfortunate that the positive side of temporary employment agency services has been overshadowed by the erroneous belief that, by its nature, the issue of job insecurity could not be avoided and that workers' rights were compromised. Proponents of this argument failed to realise that a modern work arrangement is driven by the dynamics of the market which increasing demand temporary employees in line with the global trend. Time has changed and so, too, the need for the market and those in search of jobs. Unlike in the developed world, the unemployed people in developing countries may not recognise the importance of the workers' rights, but rather more worried with the unavailability of jobs.

Fudge *et al* argue that agency work could be used to resolve the perceived conflict between flexibility for employers and employment security for workers.[1044] This can be done through contractual arrangements, for instance, by providing the worker with an employment contract with the agency. Moreover, agency work may offer considerable

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1042 Bezuidenhout, A, Theron, J & Godfrey, S. 2005. "Casualisation: Can we meet it and beat it?" *South African Labour Bulletin.* Vol. 29(1), p 42.

1043 See Article 2(3) of Convention 181 of 1997.

1044 Benjamin *et al.* (2010: 45).

economic benefits to user firms, and profits to agencies. The matching of a worker to job seems to be particularly efficient in agency work and may, thus, serve to reduce "frictional" unemployment.[1045] From this point of view, there may be much to gain from removal of barriers against operators entering the temporary employment agency industry.[1046]

5.3.3 Ensuring job security for workers through TES reform

The initiative of extending labour protection in respect of workers previously excluded from such protection such as temporary workers, aims at ensuring that workers have job security which in turn underscores the significance of labour flexibility.[1047] The latter is associated with the idea that employers were able to adjust their labour force relatively easy in good and bad times. In addition, flexibility with regard to the utilisation of labour, among others, encourages labour intensive production techniques whereas, inflexibility encourages high capital intensity. There is sufficient evidence to show that labour flexibility is important for increased productivity which, in turn, could neutralise the negative impact of high increase in labour costs on employment.[1048] This means that effective utilisation of the labour force would allow employers to be competitive,

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1045 (ibid.: 156).

1046 Some of these barriers include: limitation on the scope of activities permitted to agencies, monitoring procedures and other legal requirements.

1047 See Sections 198A, 198B and 198C of the Labour Relations Act 1995, inserted by section 44 of the Labour Relations Amendment Act 2012. The legislation that regulates employees who earns below the threshold is section 6(3) of the BCEA.

1048 Barker, F. 2007. *The South Africa Labour Market: Theory and practice*. Pretoria: Van Schaik Publisher, p191.

thereby, achieve greater efficiency and effectiveness of their organisations, given the fact that employees perform better if their job security is guaranteed.[1049]

One noticeable aspect TES reform introduces is 'the principle referred to as 'justifiable discrimination' whereby treating workers differently based on "special" grounds, that is to say, permitting an employer to treat employees differently if there are "justifiable" reasons to do so.[1050] For example, employees who are employed on a fixed term of contract for longer than six months qualify to be treated in the same way with those employees employed on a permanent basis performing the same or similar work, unless there is a justifiable reason for different treatment.[1051] Such an exception makes it possible for companies to utilise the services of both full-time and part-time employees without resorting to stiff regulatory mechanisms which might negatively affect the benefits in the activity concerned.

LaRRI argues that despite the challenges posed by temporary employment agencies, the reality is that the latter are able to provide workers on demand for specific hours, days or weeks, and companies could replace staff quickly for short periods, for example, during holidays and peak seasons, in cases of sickness and for seasonal work.[1052] In addition, employers are able to re-organise their businesses and increase productivity,[1053] whereas employees are given an opportunity to reconcile their working and private lives.[1054] First time job seekers and part-time students who might not able to

1049 Burgess & Connell. (2004: 5).
1050 Section 198C of the LRA 1995, inserted by section 44 of the Labour Relations Amendment Bill of 2012.
1051 See section 198B (3) (a) – (j) of the LRA 1995, inserted by LR Amendment Bill of 2012.
1052 LaRRI. (2000: 20).
1053 See Donald Storrie. (2002: 33).
1054 Malherbe & Sloth-Nielsen. (2012: 193).

take up full-time work can get into jobs through labour broking; the same applies to women who have particular needs in respect of family obligations. In this context, it is more beneficial retaining the services of labour broking than banning it as there are individuals in society who prefer short-term employment, as opposed to permanent employment. The importance of being in employment has been identified as one of the main focuses of the Intenational Labour Organisation's decent work agenda which recognises work as central to peoples' well being. It follows that member states of the international labour body were expected to formulate policies aiming at creating jobs for the unemployed and be able to earn an income which pave the way for broader social and economic advancements of the people and also strengthens individuals, their families and communities.[1055]

Temporary agency work (TAW) as it is referred to elsewhere has been a matter for debate whether to regulate it or not. Raday points that there had been a retreat from full-blown prohibition in national legislation of (TAW) to its restriction.[1056] This has been confirmed by Haines who argues that if the industry is well designed and properly regulated it can bring about good results.[1057] Bamu et al explains that the controversy surrounding temporary agency work or labour broking has been fuelled by claims that labour brokers exploit their employee and do not comply with labour legislation and regulations.[1058] In addition, another argument suggests that labour broking does not promote the skills development of employee, and that employment by labour brokers is

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1055 See ILO. 2014. "Decent Work Agenda." Available at: www.ilo.org/global/about-the-ilo/decent-work-agenda/lang-en.index.htm [Accessed on 23/04 2015]

1056 Raday. (1999: 7).

1057 Haines, F. 2011. *The Para.dox of Regulation: What regulation can achieve and what it cannot.* Edwad Elgar, p7.

1058 Bamu & Godfrey. (2009: 28).

precarious and insecure, as clients can easily dispense with the workers.[1059] These arguments all point to the negative side of temporary agency work however, the advantages of the industry outweigh its condemnation, particularly, and its role in finding jobs for the unemployed in the market. Fudge *et al* observe that core activities which were performed by insider employees are being contracted as peripheral.[1060]

5.4. TES reform recognises the plight of low income employees

The other positive development included in the TES reform is the provision that recognises the different categories of employees and their income. For example, the amendment does not apply to employees earning in excess of the threshold prescribed by the Minister.[1061] However, if an employee in this category is performing temporary services for the client, then he/she is the employee of TES. Whereas, if not performing temporary services for the client, then he/she is deemed to be the employee of that client and the client is deemed to be the employer.[1062] Employers were accorded sufficient time to assess whether or not an employee on fixed contract is employable on permanent basis. Once the fixed term contract exceeds six months, an employee on fixed term contract must not be treated less favourable than an employee employed on a permanent basis performing the same or similar work, unless there is a justifiable reason for different treatment.[1063] Nonetheless, it is not clear whether after the expiry of

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1059 (ibid.).
1060 Fudge, McCrystal & Sankaran. (2012: 153-156).
1061 The threshold referred to is prescribed by the Minister in terms of section 6(3) of the BCEA which is currently stands at R172 000 per annum.
1062 Section 198A (2) and (3) of the BCEA.
1063 Section 198B (8) of BCEA.

six months TES employee is automatically taken over by the client or the employee will be supervised by two employers, that is to say, the labour broker and the client.

After the expiry of six months, contracts facilitated by TES can continue with additional liability only in regard to the Labour Relations Act.[1064] This means that the client and the former will be jointly and severally liable as has been the case before the current amendment and obviously there would be a need that the labour broker and the client work together to ensure that contracts and terms of employment and disciplinary processes are arranged correctly.[1065] The reform recognises the long service of those employees who have been employed on fixed term contract. This is so particularly where the term of a fixed contract of an employee who has been employed for a period exceeding 24 months comes to an end. Such an employee is entitled to one week's remuneration for each completed year of the contract.[1066]

The reform underscores the selection of an employee based on the merit, quality or quantity of the work performed however this is likely to face internal challenges, than the selection of an employee based on seniority, experience or length of service.[1067]

South Africa has avoided a "blanket" equal treatment of workers placed by private employment agencies and those directly employment by the user enterprise. An employer is allowed to treat employees differently if there are justifiable reasons to do

1064 See http://downloadpdfz.com/pdf/labour-law-amendments-eal-impact-on-flexibility-29839830.html

1065 See *Bargaining Council for the Contact Cleaning Industry and Gedeza Cleaning Services & Another* (2003) 2 *ILJ* 2019 (BCA). See also section 198 (4) of the LRA.

1066 Section 198B (10) of BCEA.

1067 Section 198B (10) of BCEA

so.[1068] For example, employees who are employed on a fixed term of contract for longer than six months qualify to be treated in the same way as employees on a permanent basis performing the same or similar work, unless there is a justifiable reason for different treatment.[1069] The problem regarding agency work pay is when the total remuneration is related to years of employment at the user firm such as seniority pay and fringe benefits.[1070] To counter such scenario, South Africa has introduced a number of exceptions to the implementation of the principle of equal treatment of workers.

Norvit *et al* argues that the regulation of employees' working conditions can enable them not only to make economic provisions for their families, but also care for their dependents through the promotion of social cohesion, well-being and stability.[1071] Similarly, procedural entitlements to freedom of association, collective bargaining and industrial action can enable workers to assist employers in making better managerial decisions, which may lead to sustainable income for the employer and jobs for the workers.[1072]

1068 Section 198C of the LRA 1995, inserted by section 44 of the Labour Relations Amendment Bill of 2012.

1069 See section 198B (3) (a) – (j) of the LRA 1995, inserted by LR Amendment Bill of 2012.

1070 See Caire. (1989:104).

1071 (ibid.).

1072 Amongst the core Conventions identified by the ILO include: ILO Conventions Nos 87 and 98 on freedom of association and collective bargaining (1948 and 1949); Convention Nos 29 and 105 on the Elimination of all forms of forced and compulsory labour (1930 and 1957); ILO Convention Nos 100 and 111 on the elimination of discrimination in respect of employment and occupation (1957 and 1958) and ILO Declaration on Fundamental Principles and Rights at Work of 1998 just to mention some.

5.4.1 TES reform and the expansion of the power of the Labour Court

Another landmark transformation is the power given to the Labour Court and an arbitrator to rule on whether or not an employee of TES is covered by a Bargaining Council agreement or sectoral determination and whether a provision in an employment contract complies with the Act.[1073] The same requirement is extended to a contract between a temporary employment service and a client. This means that the previous position that such agreements were beyond the jurisdiction of CCMA is no longer valid despite the fact that the LRA defines a dismissal to mean termination of the contract of employment by the employer, with or without notice.[1074] It does not matter whether the termination of employment was triggered by the misconduct of the employee or not yet according to the reform the CCMA has jurisdiction over the dismissal of the employee concerned.

Before the reform of the TES the position was that the client was not regarded as the employer and thus the responsibility of finding alternative employment rests with the dismissed employee.[1075] In fact the latter could practically not able to enter into a long term commercial contract with a client, simply because employees supplied to the client are assigned to perform work for a limited period. As Mhone points out that the terms of employment are contractually and generally of a long-term nature, with stipulated hours of work, levels of pay and benefits. Added to this is a specific location in the occupational and job hierarchy, a career path and specific stipulations of when the

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1073 This refers to section 198(4D) and (4E) of the LRA 1995, inserted by the LR Amendment Bill 2012.

1074 Section 189(1)(a) of the LRA 1995.

1075 See *Buthelezi & Others v Labour for Africa (Pty) Ltd* (1991) 12 *ILJ* 588 (IC) decided under the 1956 LRA.

management prerogative begins and ends.[1076] Moreover, typical, regular or standard forms of work have generally fallen under the ambit of some form of regulation or law governing industrial relations and working conditions which enable an employer manipulate the use of labour within these limits through managerial practices, deployment of technologies and capital, hiring and firing labour in response to changing economic conditions, changes in work organisation and changes in job definitions.[1077]

In terms of the reform it is required that TES register with the relevant authority.[1078] This appears to be consistent with the practice at the international level whereby member state of the ILO were expected to determine the conditions governing the operation of private employment agencies in accordance with a system of licensing or certification, except where they are otherwise regulated or determined by appropriate national law and practice.[1079] This requirement ensures that the activities of TES are controlled and monitored and such records keeping will assist the government to determine the number of people employed through agency work. The reform provides some incentives in favour of the employers, particularly those who own small businesses. In this respect, the new proposed reform exempts employers employing less than ten employees and those whose business employs less than 50 employees and has only been in operation for less than two years.[1080]

1076 Mhone, G.C. 1998. "Atypical Forms of Work and Employment and Their Policy Implications." *Industrial Law Journal.* Vol. 19(2), p199.

1077 (ibid.).

1078 Section 198A (2) and (3) of the BCEA.

1079 Article 3(2) of ILO Convention 181 of 1997.

1080 See section 198C (2) (b) of the LRA of 1995, inserted by section 44 of the LR Amendment Bill 2012.

5.4.2 Protection of vulnerable workers through TES reform

One innovative aspect associated with the reform of TES is the protection of employees who earn an amount not exceeding the threshold prescribed in terms of the relevant legislation,[1081] which can be regarded as one of the strategies of addressing poverty amongst lowly paid employees. The categories of employees who may benefit are those employed perform genuine temporary work. However, where such employees are employed to perform work beyond the period of six months, then they are deemed to be employees of the client, but only if they work for a period in excess of six months.[1082] Moreover, this does not apply to an employee who is employed as a substitute in place of the one who is temporarily not at work. Labour market has shown that employees who earn below the threshold are likely to be those unskilled or semi skilled individuals who depend on their meagre income to sustain themselves and their families.[1083]

The reform further protects those individuals who are already employed, remain in their jobs and employers are encouraged through tax regime to absorb job seekers in their business. It is for this reason, that TES is not allowed to terminate an employee's assignment with a client if the purpose is to avoid continue employing such person; otherwise it would constitute an act of dismissal. The amendment Act stipulates that "the termination by the TES of an employee's assignment with a client for the purpose of avoiding the operation of the deeming provision is a dismissal."[1084] Actually, the reform has introduced the principle of fairness which requires that before any dismissal

1081 Section 6(3) of the BCEA.
1082 (ibid.).
1083 Mhone (1998:200).
1084 Section 198A (4) of the LRA 1995, inserted by section 44 of the LR Amendment Act 2012.

of an employee takes place, the affected employee should first appear before a disciplinary hearing.[1085] In addition, the reform recognises that in recent years there has been a steady increase in cases of atypical employment in terms of which a range of employment opportunities have been created and more flexible ways of working as compared with typical employment.[1086] This development points to the positive side of new forms of work which need appropriate regulation in such a way entrepreneurs are encouraged to set up businesses which could provide jobs for the unemployed whether on temporary or permanent basis.[1087]

Dickens argues that the general perception that the nature of employment is changing appears to be true in that there has been an increased growth of non-standard form of employment where part-time work and temporary employment feature the most.[1088] Similarly, growth has been experienced in the practice of self-employment which includes "pseudo" or dependent self-employment.[1089] Bamu raises a concern about the self-employed who are not provided with labour protection and lays the blame on the practice of externalisation through the commodification of the employment relationship as the cause of exclusion.[1090] Sadly, she has omitted to reveal the contribution which the self-employed and independent contractors make in respect of employment creation and poverty alleviation. In support of flexible regulation of employment relationships

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1085 The purpose of a disciplinary hearing is to give an accused employee an opportunity to tell the side of his/her story and may invite witnesses to testify to his or her defence.

1086 Hiroki, S. 2001. *Atypical Employment: A Source of Flexible Work Opportunities*? *Social Science Japan Journal.* Vol. 2, p161.

1087 Employees who are regarded as being vulnerable and low paid are particularly those that earn below the threshold of R172 000-00 per annum accessed via: http://www.labourguide.co.za/most-recent-put on (20 July 2014).

1088 Dickens, L. 2009. Problems of Fit: Changing Employment and Labour Regulation 920040." *British Journal ofIndustrial Relations.* Vol. 42(4) , p595.

1089 (ibid).

1090 Bamu. (2011: 151).

Babieri *et al* argues that deregulation of employment is expected to lower the high unemployment levels, particularly amongst the youth by a sharp reduction of the time spent on searching for employment, thereby easing the transition from school to work.[1091]

O'Donnell points out that the distinction between fixed-duration contracts terminable by notice is at conceptual or practical level, not all that clears. Conceptually, indefinite procedural restraints on termination can be thought of rolling fixed-term contracts in which the term is defined by the period of notice.[1092] In his article entitled "Employment, social justice and social well-being," Stiglitz states that in standard theory, individuals who contracted to perform a certain job are paid if and only they complete that job.[1093] Theoretically, it is assumed that contract enforcement is costless, partly because of the assumption that information exists on whether or not the task has been completed.[1094] In reality, this seems not to be the case. An employee who is remunerated wholly or partly by reference to the time the employee works does not fall within the traditional scope of labour law. Labour law variously determines minimal levels of employment as necessary conditions for their applicability and exclude the vast numbers of smaller establishments.[1095]

1091 Barbieri, P & Scherer, S. 2009. "Labour Market Flexibilisation and its Consequences in Italy." *European Sociological Review.* Vol 25, p678.

1092 O'Donnell, A. 2004 "None- Standard Workers in Australia: Counts and Controversies." *Australian Journal of Labour Law.* Vol. 17, p 98.

1093 Sriglitz, J.E. 2002. "Employment, social justice and societal well-being." *International Labour Review.* Vol. 141(12), p10.

1094 (ibid.).

1095 Sankara, K. 2006. "Protecting the Worker in the Informal Economy: The Role of Labour Law." In Davidov, G. & Langille, B. *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* International Institute for Labour Studies: Hart Publishing, p205.

The category of part-time employees covered by the LRAB does not include those employees earning in excess of the threshold as determined by the Minister.[1096] However, the employer should 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 such as access to opportunities to apply for vacancies as it provides to full-time employee.[1097]

5.4.3 TES reform and the right of workers to bargain

One of the notable changes introduced by the reform of TES is the fact that the latter's employees would benefit from collective agreements entered into between full-time employees and employers or employers' association. This is particularly in a situation where a dispute of interest arises or the need to negotiate better benefits in favour of TES employees, the reform provides that the employees are entitled to benefit from a collective agreement concluded in a bargaining council or a sectoral determination,[1098] which was not the case before the reform. Theron suggests that the wages of TES employees should be negotiated upon through the trade union structures and not between the client and the broker. The reason for this is that TES employees' representatives have the right to bargain on behalf of their members.[1099] Whilst the existing legislations allow labour broker employees to organise and bargain collectively, the practical effect of the "workplace" definition is arguably preventing them from do

1096 This refers to the powers of the Minister in terms of section 6 (3) of the BCEA.
1097 See Sections 198C (3) and (4) of the LRA 1995, inserted by section 44 of the LR Amendment Act 2012.
1098 Section 198(1) (c) of the LR Amendment Bill.
1099 Theron, J. 2003. "Questions and Comments on labour broking." *South African labour bulletin.* Vol. 33(2), p11.

so.[1100] As stated elsewhere in this thesis, the definition of the term "workplace" needs to be redefined in order to accommodate TES employees. In fact, even if TES employees may not able to exercise their right to organise and bargain collectively, what is important is the fact they have the opportunity to earn an income, unlike those who are in search of jobs.

Theron *et al* point out that there is a need for labour regulations to expand from the traditional bilateral conception towards a more holistic approach to employment relationships.[1101] This is because TES arrangements were not covered under the conventional labour law. However, this was exactly the reason why the reform has extended labour protection in respect of TES employees. For this reason, the concern expressed by Theron *et al* has *been addressed*, although not fully. They further argue that the justification for the proposed expansion of labour regulations is intended to accommodate emerging work relationships like contractors, the self-employed and private employment agencies.[1102] This thesis claims that in addressing some categories of workers not covered is to have a separate legislation dealing with categories of work arrangements not covered elsewhere. Generally, the majority of the unemployed individuals, either unskilled or semi skilled, enter the job market through non-standard forms of employment in which workers' rights are not protected.

A close analysis of the LRAB reveals that the main objectives are to ensure that workers already in employment continue with their job by extending protection towards

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1100 Harvey, S. 2009. "Labour brokers and workers' rights: can they co-exist in South Africa?" A Research dissertation presented for the approval of the Senate in fulfillment of part of the requirements for the Master of Laws. University of Cape Town, p30.

1101 (ibid.).

1102 *LAD Brokers v Mandla* (2001) 22 ILJ 1813 (LAC).

them to avoid possible unfair dismissals. In addition, the reform provides a limited job security for TES employees by prohibiting the termination of the employees' assignment with a client for the purposes of avoiding an employee from becoming directly employed by the client or user firm.[1103] In the event that a user firm decides to employ a former TES employee as a permanent employee, the employee should be entitled to some work related fringe benefits namely, pension, medical schemes and the enjoyment of labour rights.[1104] The advantage associated with full-time employment is the security of employment and a guarantee of regular monthly income which, if properly used, can lead to the reduction of poverty. Morgan argues that rights and regulations each provide a way of framing core preoccupation of sociological scholarship. Frequently, there is a certain taken-for-granted resonance between particular area of social life, and one or other of these two framing concepts.[1105] In an attempt to illustrate this intersection, Morgan referred to questions of law and equality as they arise in the context of race, class and gender. Problems of racial inequities can be framed as a question of rights with relative ease. Responses to economic and class inequalities are commonly associated with regulatory regimes.[1106]

Under common law, the rights and duties of the parties are governed by the terms of the contract of employment which relegates an employee to a subordinate position. This

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1103 See section 198(3) and (4) of the LRA 1995, inserted by section 44 of the LR Amendment Bill of 2012.

1104 This includes the right to basic conditions of employment, such the right to annual or sick leave, the right organize and collective bargaining and the right against unfair labour practice. See LRA 66 of 1995 and section 23 of the Constitution of South Africa 1996.

1105 Morgan, B. 2007. "The Intersection of Rights and Regulation: New Directions in Sociolegal Scholarship." *The Intersection of Rights and Regulation: New Direction in Sociolegal Scholarship.* Ashgate, p1.

1106 For example, the connection of between economic regulation and race-based individual rights arguably make sense only if one accepts a particular, and contested, history of for example ,a specific political event.

is the case since a modern contract of employment is premised on the outdated nineteenth century model of master and servant relationship.[1107] With the advent of non-standard employment arrangements, labour regulation is challenged to transcend its narrow approach and develop a conceptual framework which allows for a "holistic view of multilateral relationships" to ensure a fairer allocation of rights and responsibilities.[1108]

There is sufficient literature to the effect that new forms of employment are in demand owing to the flexibility which is associated with such forms of work. On the contrary, it has been criticised on the grounds that some forms of work outside the standard employment relationship have proliferated and the scope of collective bargaining has contracted in most developed countries.[1109]

5.5 TES reform addresses social and economic problems of workers

As mentioned earlier, the new reform protects the rights of those employees who are traditionally excluded from labour regulations which illustrates that a piece of legislation can be used as a means through which social and economic problems are solved. In the context of this study, the main challenge is the prevalence of unemployment and poverty affecting the majority of the population in developing countries, particularly in South Africa and how to deal with such problems.[1110] Discussing the pros and cons of regulation, Haines points out that regulation should achieve its objectives in the least

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1107 Deakin. (2007: 36).

1108 (ibid.: 175).

1109 Fudge, J. 2011. "Labour as a 'Fictive Commodity': Radically Reconceptualising Labour Law." In Davidov, G & Langille, B. *The idea of Labour Law.* Oxford University, p121.

1110 See section 5.1.1 of this Chapter.

costly manner and the rationale is that the regulatory regime should focus on achieving the best results.[1111]

The concern surrounding the perceived inability of labour legislations to protect workers employed under new forms of work arrangement has been, to a limited extent, addressed by the reform of temporary agencies in South Africa. Le Roux and other scholars raise the issue surrounding job insecurity in respect of TES employees and the fear of the erosion of employment standards. They state that South Africa's reform on TES seems to have provided a remedy. Expressing her concern, Le Roux points out that employment relationships based on labour broking promote job insecurity and erodes employment standards. It is further stated that the contract between the labour broker and the worker is often made subject to the continuation of the commercial contract between the labour broker and the client.[1112] As a consequence, where the client has terminated the commercial contract with the labour broker after an agreement has been reached, Courts have confirmed that such termination does not constitute dismissal.[1113] In addressing this problem, the Labour Relations Amendment Act provides that an individual placed with a user firm by a labour broker is an employee of the labour broker for a period not exceeding six months. During that period, the user firm or client is not allowed to terminate the contract between itself and the broker. Therefore, the issue of job insecurity does not arise, nor the concern regarding the erosion of employment standards.

1111 Haines. (2011: 1).
1112 Le Roux. (2008: 153-155).
1113 *Mavata v Afrox Home Health Care* 1998 ILJ 931 (CCMA) at 37.

In light of the state of destitution the majority Black population in developing countries they live in, labour regulation should not only concentrate on the rights of the workers who were already in jobs, but also attempt to create employment opportunities for the unemployed, too. For this reason, regulation should be flexibile enough to accommodate the interests of both the workers and the employers. Stanworth *et al* argue that legislation which aims to fostering equal rights of all employees should permit beneficial flexibilities for both employers and employees.[1114] This means, allowing TES to render services to clients, whilst ensuring that the employment relationships are not used to reduce conditions of employment or for employment law avoidance. Lobel points out that employment regulation are concerned with both individual relationships and macroeconomic policy. A rights framework in employment law has focused on the individual entitlements of either workers or employers. In contrast, the focus of social regulation of the economic market has been the overall welfare-maximisation in the labour market by taking a utilitarian approach to each individual case in order to achieve macro ends.[1115]

5.6. Conclusion

This chapter examined the regulation of TESs in South Africa and the subsequent reforms which disregarded the contribution labour broking business can play in combating unemployment. The chapter further provided an in-depth analysis of the

[1114] See Stanworth, C. & Druker. J. 2004. "Temporary agency labour in the UK." In J, Burgess & J, Connell. (Eds). *International Perspectives on Temporary Agency Work,* Routlegde, p64.

[1115] Lobel, O. 2007. "Form and Substance in Labour Market Policies." In Morgan, B. *The Intersection of Rights andRegulations: New Directions in Sociolegal Scholarship.* Ashgate, p.21.

reforms in TESs with a view to determine whether or not it provides adequate protection for both agency workers and, simultaneously, allow employers to reorganise their businesses to become more competitive. The chapter further found out that the inclusion of the provisions which encourage the growth and promotion of SMMEs in the reform has created employment opportunities in South Africa.

The chapter revealed that the power of the Labour Court has been expanded as well as the mandate of arbitrators to rule on possible violations of the rights of TES employees which was not the case before the reform. The jurisdiction of the CCMA has been extended to cover TES workers particulay in respect of dismissal of employees. In addition, employees who earn an amount not exceeding the threshold prescribed in terms of the relevant legislation have been brought within the ambit of the protection offered by the reform.[1116] A deeming provision has been introduced whereby employees who are employed to perform work beyond the period of six months were deemed to be employees of the client or user enterprise. The chapter further focused on the right of vulnerable workers whose employment tend to be for a short period by ensuring that they too have job security and that they benefit from collective agreements entered into between full-time employees and employers.

[1116] Section 6(3) of the BCEA.

CHAPTER 6: REGULATION OF LABOUR BROKING OR PRIVATE EMPLOYMNET AGENCIES (PEAS) AT THE INTERNATIONAL AND REGIONAL LEVEL

6.1 INTRODUCTION

Chapter five discussed the regulation of TES in South Africa as well the reform which has transformed the industry of labour broking in that country. It disclosed how TES reform has been used to ensure that temporary employees enjoy the same employment benefits as their counter-part, the full-time employees and the recognition of the vulnerability of TES workers. The previous Chapter revevealed that South Africa has opted for the regulation of the industry in such a way that it contributes to job creation and therefore be able to contribute to the economic growth of the country. In terms of the reform, a labour broker has been retained as an employer and thereby allows the industry to supply workers to third parties for a fee. Chapter four futher examined the legal implications of the new definition of an employee and an employer and the uncertainty created by the reform as far as the determining of who the employer of TES could be.

6.2 International Convention 181

This chapter examines the ILO Convention 181 which regulates Private Employment Agencies (PEAs) or labour broking with a view to determine whether the interntioanal body provides better legal protection of agency workers. The key objective of examining the model adopted by the ILO is to find out what principles and standards have been set

by the international body which could be useful for benchmarking purposes. The chapter will briefly look at the regulation of labour broking at the regional level which in this context is the European Union. The relevance of examining the regulatory system used in the European Union is because many if not all countries in the developing world including Namibia and South Africa has adopted the same legal system as the one found in the developed world.

It is worth mentioning that Namibia and South Africa are members of the ILO and has ratified a number of Conventions including the rights of workers not to be discriminated against.[1117] The ILO Convention 181 sets two standards in relation to the definition of a private employment agency. The first one which recognises that intermediaries employ workers with a view to making them available to a third party for a fee. Secondly, it authorises labour brokers to_supply workers to a user enterprise, without a private employment agency becoming party to the created employment relationship.[1118]

It is important to outline the definition of a PEA in the context of the ILO. The Convetion defines a private employment agency as:

> "any natural or legal person, who is independent from the public authorities who provides services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person (referred to below

[1117] For example, the Right to organise Convention, 1948 (No. 87); Safety and Health Construction Convention, 1988 (No. 167); Forced Labour Convention, 1930 (No. 29)

[1118] See Article 1(a) and (b) of Convention 181 of 1997.

as a 'user enterprise) which assigns their tasks and supervises the execution of these tasks..."[1119]

Convention 181 is twofold; it regulates employment agencies both when they act simply as an intermediary between employers and job-seekers, and also in situations where agencies employ workers with a view to making them available to a third party. It does not matter whether the services provided is by a natural or juristic person, however, what is evident is that in terms of the responsibilities, it is the user enterprise which assigns tasks and supervises the execution of the tasks to be performed by the workers, as opposed to the private employment agency.[1120]

The adoption of Convention 181 by the International Labour Organisation was a response to the serious tension within the prevailing regulatory regimes associated with the standard employment relationship. The Convention not only recognises private employment agencies as employers, but also establishes a minimum level of employees' protection recruited by private employment agencies. By adopting Convention No. 181, the ILO has acknowledged that labour market intermediaries play a pivotal role in the advancement of global economy. It also legitimises a triangular employment relationship in a way. This shows a shift from the standard employment relationship towards a new model which embraces more "flexible" forms of employment.[1121] Raday points out that this tension centres on the perceived necessity to transform the normative model of employment. However, at the same time,

1119 See Article 1(a)-(c) of Convention 181 of 1997.
1120 See Article 1(b) of Convention 181.
1121 (ibid.: 44).

preserving security for workers engaged in employment relationships where responsibility cannot be placed squarely on one entity in full.[1122]

ILO Convention 181 has set standards of which the registration and monitoring of the activities of private employment agencies through a licensing system is the main one. [1123] A compulsory licensing system would provide for the pre-screening of applicants' capabilities and professional experience in job placement activities. The ILO's standards regarding the rights of workers to freedom of association and collective bargaining are one of the oldest international instruments.[1124] These standards are meant to be exercised at the workplace and relate to the organisational rights and basic conditions of employment.[1125] However, exercising organisational rights by employees of private employment agencies could be problematic, unless the definition of the term "workplace" is redefined. Blanpain warns that it is not sufficient to rely on collective agreements to regulate terms and conditions of employment based on collective *laissez-faire* as it is likely to marginalise non-unionised workers and the majority of non-standard workers.[1126]

Furthermore, the phenomenon of globalisation, liberalisation and economic reform has had a great impact on collective bargaining and labour relations.[1127] Theron and Godfrey state that the difficulty with exercising organisatioanl rights is attributed to the fact that the place where the employees of a private employment agency perform their

1122 See Raday. (1999: 1-2).
1123 (ibid.).
1124 See article 4 of the ILO Convention 87 of 1948. (verify)
1125 Murray, J. 2001. "Transnational Labour Regulation: The ILO and the EC Compared." *Studies in Employment and SocialPolicy.* Kluwer Law International, p35.
1126 McCann. (2008: 9).
1127 Blanpain & Engels. (2001: 38).

duties is the client's workplace who only has the right to grant access to the workplace.[1128] Thus, regulations should be used to make sure that all workers exercise their rights to organise and bargain collectively by elaborating the definition of "workplace" to include any place where employees of a private employment agency perform their duties.

Given the volatility of the market, Convention 181 sets standards whereby it forbids private employment agencies from carrying on trade or business on condition that such an undertaking should not be carried out at the expense of the workers.[1129] This particularly refers to those private employment agencies which have become ongoing employers, instead of intermediaries and threaten the standard employment relationship between the user and the performer of the services.[1130] The standards set by the ILO's Convention 181 have not only been useful for its member states, but also in respect of private organisations such as the International Confederation of Private Employment Agencies (CIETT). Based on the Convention, CIETT has developed a code of practice for regulating private employment agencies specifically in relation to the registration and licensing system. A Self-regulatory regime like the one developed by CIETT can be effective particularly that the users are the initiators of such system and not the government.

Another important standard set by Convention 181 concerns the non-discrimination of workers based on various grounds. Despite that, it is left to member states to formulate

1128 Theron & Godfrey. (2006: 34-35).
1129 (ibid.).
1130 (ibid.).

policies in compliance with the international instrument.[1131] In spite of the fact that Namibia has complied with such standard,[1132] the problem is that a blanket equality clause requiring agency workers to be entitled to the same rights as their comparable workers directly recruited by a user firm poses serious challenges. Storrie argues that an ideal solution to the problem in implementating the principle on equal treatment for workers placed by agencies is to allow labour brokers to pursue profitable opportunities which benefit both the workers and the user firm.[1133]

6.2.1 What is the purpose of the ILO Convention 181?

In the nutshell, the purpose of the Convention 181 is to allow the operations of private employment agencies as well as the protection of the workers using their services within the framework of its provisions.[1134] It is the responsibility of member states to determine the conditions governing the operations of private employment agencies in accordance with the system of licensing or certification, except where they are otherwise regulated or determined by appropriate national laws.[1135] It further provides that workers recruited by private employment agencies should not be denied the right to freedom of association and the right to bargain collectively.[1136] Private Employmnet Agencies are prohibited to charge directly or indirectly, in whole or in part, any fees or costs to workers.[1137] Member states have an obligation to ensure that necessary measures are

1131 Article 11 of Convention 181 of 1997.
1132 See Article 10 of the Namibian Constitution of 1990.
1133 Storrie. (2002: 10).
1134 See Article 2 of the International Labour Convention 181 of 1997.
1135 (ibid.: Article 3).
1136 (ibid.: Article 4).
1137 (ibid.: Article 7).

taken to provide adequate protection for workers employed by private employment agencies in relation to their working conditions.[1138]

It is vital to mention that the ILO has called for the abolition of profit driven employment agencies immediately upon its founding.[1139] The idea is to ban profit making employment agencies in favour of a state monopoly.[1140] However, the demand for contingent labour created a demand for service providers. As such demand could not efficiently be met by state actors, private entrepreneurs responded despite legal restrictions or prohibitions. As the demand for change became irresistible a new Convention[1141] was adopted which revises the Convention Concerning Fee-Charging Employment Agencies and formed the legal basis of the ILO priniciple which states that "labour is not a commodity." Adopted in 1949, Convention No. 96 only regulated work recruitment and placement and authorised limited exceptions to the rule laid down in Convention No. 34.[1142]

1138 The protection referred to in Article 11 is in relation to: freedom of association; collective bargaining; minimum wage; working time and working conditions; statutory social security benefits; access to training; occupational health and safety; compensation in case of occupational accidents or disease; compensation in case of insolvency and protection of workers claim and maternity protection and benefits, and parental protection and benefits.

1139 Vosko (1997: 43).

1140 ILO Convention 34 of 1935.

1141 ILO Convention 181 of 1997 adopted on June, 19, 1997. This Convention recognises private employment agencies as employers as well, reversing the ILO's historical stance against labor market intermediaries and its skeptical views of non-standard form of employment.

1142 See Matthew, W. *et al*. (2001: 3-4).

6.2.2 The main objectives of the ILO

The main concern of the ILO has been for the workers who find themselves outside the protection of labour legislation; of which workers employed in a triangular employment relationship is one category. In terms of the Convention,[1143] a private employment agency is deemed to have occurred when "employees of an enterprise (the provider) perform work for a third party (the user enterprise) to whom their employer provides labour or services."[1144]

Worker leasing represents one of the many new patterns of employment which has replaced the traditional employee-employer relationship as labour recruitment agencies have become ongoing employers, instead of intermediaries, and have eliminated the traditional employment relationship between the user and the performer of the services which was typically full-time employment for an indefinite period and in-house.[1145] In this respect, Convention 181 is the legal instrument at international level which serves as a guiding policy of which member states of the ILO are under moral obligation to comply with it, whether such countries ratified the Convention or not.

The protection of agency workers in the developed world appears to be more advanced in that agency workers are entitled to the same labour protection as their counter-part, the full-time employees.[1146] For example, temporary workers are entitled to equal treatment in terms of basic working and employment conditions including pay, holidays, maternity leave, rest periods and working time. They also have equal access to

1143 ILO Convention 181 of 1997.
1144 Vosko (1997: 43).
1145 Raday. (1999: 413).
1146 Directive 2008/104/EC of the European Parliament and of the Council

collective facilities including canteens, transport services and the child care facilities and equal access to training.[1147] The principle of equal treatment applies to temporary workers from day one, except where the social partners in a member State agree otherwise.[1148]

It is estimated that over three million temporary agency workers across the European Union have a right to equal treatment with permanent employees and benefit from better working conditions.[1149] However, some business groups in the European Union member countries have expressed their concern by arguing that increased protection will deter employers from taking on agency workers.[1150]

Generally, the ILO Convention 181 allows profit making employment agencies in favour of a state monopoly.[1151] However, the demand for contingent labour created a demand for more service providers which could not be sufficiently met by State actors and to which private entrepreneurs emerged in response to the demand for change. Convention 181 revises an earlier Convention Concerning Fee-Charging Employment Agencies (CFEA) which formed the legal basis of the principle of the ILO, the tenet that, "labour is not a commodity"[1152] mentioned at the beginning of this Chapter.

By allowing private entrepreneurs to engage in agency work, it implies that Convention 181 has created an opportunity for private businesses to carry on trade as intermediaries and be able to recruit workers in the market. In many jurisdictions, a

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1147 Article 5 of Directive 2008/104/EC.
1148 Social Partners include: government, trade unions and user enterprises.
1149 Storrie (2002: 28).
1150 This is specifically in the United Kingdom (UK).
1151 ILO Convention 34 of 1935.
1152 See Matthew, W, *et al*. (2001: 3-4).

private employment agency is the employer.[1153] However, Convention 181 also provides an option for a private employment agency to choose whether it would only recruit and supply labour to a user enterprise without being party to the employment relations established, or to be a party to it.[1154] In fact, the reality is that in the modern world of work, the growth of non-standard employment has become unstoppable and it is beyond doubt that agency work remains one of the favoured options used in modern work arrangements, whereby, employers would outsource to their advantage non-core functions of their firms to intermediaries.[1155]

The central concern of the ILO has been workers who find themselves outside the protection of labour legislation; of which workers employed in a triangular employment relationship is one category.[1156] Raday points out that the tension which has now emerged between agency workers and those workers who are directly employed by the user firm centres on the perceived necessity to transform the normative model of employment, whilst simultaneously preserving security for workers engaged in employment relationships where responsibility cannot be placed squarely on one entity in full.[1157] The tension referred to is broader than simply conserving the security of workers who were already employed.

The significance of Convention 181 is that it not only recognises private employment agencies as employers, but also establishes a minimum level of protection for agency workers. Its existence is an admission on the part of the ILO that labour market

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1153 See Storrie, D. (2002. "Temporary agency works in the European Union."*European Foundation for the Improvement of Living and Working Conditions*, pp5-9.

1154 See article 1 (a) of the ILO Convention 181 of 1997.

1155 Rideot, R.W. 1966. "The Contract of Employment." Current *Legal Problems.* Vol. (19), p110.

1156 ILO Convention 181 of 1997.

1157 See Raday. (1999: 1-2).

intermediaries play a pivotal role in the advancement of global economy. In fact, this shows a shift from the standard employment relationship towards a new model which embraces more "flexible" forms of employment.[1158] Convention 181 serves as the scale against which member states formulate their national policies for regulating the practice as well as the protection of workers rendering their services within its legal framework.[1159]

Convention 181 has its limitations. Countouris argues that for all its merits, Convention 181 has some regulatory *lacunae* in its personal scope of application.[1160] The problem being that it only applies to workers who are either employees of the agency, or for whom the agency provides a placement service. For example, unlike in South Africa, the Convention does not cover part-time and fixed term contract workers discussed in Chapter four. In addition, the Convention falls short of setting standards regarding what constitutes "temporary services." In addition, the concern raised by Fudge regarding the issue of core activities of enterprises which are performed by insider employees being increasingly contracted as peripheral, would diminish.[1161] Nevertheless, it should be noted that workers who were regarded as being outside labour protection were those engaged in informal employment. Levin further claims that the informal sector acts as a safety net for those who become unemployed not only in developing countries, but also in industrialised countries. Owing to this instrumental function of the informal sector, it

1158 (ibid.: 44).
1159 See Article 2 of the International Labour Organisation Convention 181.
1160 Countouris. (2007: 68).
1161 Fudge, McCrystal Sankaran. (2012: 153-156).

has been presented as an agency for creating the employment which the formal sector cannot.[1162]

The issue of some workers being excluded from labour protection has also been debated at the international level. Martin argues that the international perspective offers some elements to contribute to a common understanding on the issue of lack of protection for depended workers and certain categories of workers, including women.[1163] Faced with the problem of numerous categories of workers, it has become absolutely crucial to define its terms and reference, hence, there has been a certain consensus over the years at the ILO, even though the employers' group has always taken a critical stance.[1164] As discussed in Chapter four, the ILO through its decent work agenda promotes opportunities for work which are productive and deliver a fair income, security in the workplace and social protection for families.[1165]

6.2.3 Extention of labour protection to vulnerable workers

Extending labour protection to categories of workers previously excluded from labour legislations would definitely minimise the possibility of the emergence of disguised employment which McCann refers to as the practice involving depended workers designated as self employed, either by mutual agreement with, or at the behest of their employer. These workers are both personally depended on or subordinate to their hirers

1162 Levin (1994: 30).
1163 (ibid.).
1164 (ibid.).
1165 ILO 'Decent Work'. Accessed via: www.ilo.og/global/topics/decent-worl/lang..en/index-htm on (20 August 2014).

as they are subject to a high level of guidance and instruction as well as being economically dependent.[1166] In addition, he further argues that like the other forms of non-standard work, disguised employment is not a recent phenomenon. On the other hand, a contemporary trend towards flexibilisation, under which it has become common for employers to treat at least some of their workers, is not fully integrated into their organisation which seems to have generated a significant proportion of the workforce in which there is potential for it to emerge.[1167]

The advent of non-standard work can be justified by a number of reasons, of which the failure of states in preventing or relieving poverty and unemployment are the main ones. The next section examines the existing policies in Namibia directed at combating poverty and unemployment as well as the extent to which these policies solve the prevailing social problems.

6.3 Critics against Private Employment Agencies

Private Employment Agencies have been criticised for exploiting workers by paying them low wages. However, such an abuse can be prevented by regulating the rate of pay per hour and by limiting the duration of an assignment. In this regard, Convention 181 provides for a compulsory licensing system of private employment agencies to allow for a system which can examine the applicants' capabilities and professional experience in job placement activities. A license mainly serves as a means to improve

1166 McCann. (2008: 32-33).
1167 (ibid.).

the functioning of the labour market, not as a means to restrain competition.[1168] It further facilitates the entry of entrepreneurs into business with a view to widen the scope of job opportunities.

Once the licensing system is in place a register of all licensed agencies can be made public. Such a public register would ensure that anyone can verify whether the temporary employment agency they wish to consult is a legitimate one[1169] and this would make the process much easier to re regulate. Where the registration or licensing procedure exists, it is very common to collect a registration fee from private employment agencies. The payment of a registration fee serves to cover the administrative procedures involved in licensing the labour agency and can also serve as a proof of the financial capacity of private employment agencies wishing to enter the market.[1170] However, the registration fee payable should not be used as an obstacle to prevent previously disadvantaged groups from entering the business.

The standards set by the ILO Convention 181 require member states to put in place a system which aims to monitor and control the operations of private employment agencies. The relevant part provides that:

A member shall determine the conditions of governing the operation of private employment agencies in accordance with a system of licensing or certification, except

1168 (ibid.: 15).

1169 Issues for verification may include: information concerning addresses of licensed agencies and possibly the expiry date of such license.

1170 (ibid.).

where they are otherwise regulated or determined by appropriate national law and practice.[1171]

The responsibility to request private employment agencies to keep the authorities updated on their activities would rest with the relevant governmental department. Such request should be made on a regular basis by providing administrative records[1172] to allow the competent government body to inspect the structure and activities of private employment agencies for the purposes of and also improve transparency in its recruitment activities.

Given the fact that the user enterprise determines the task to be performed, the time required to complete the job and employment conditions such as safety, hygiene and health should be clearly provided to the worker.[1173] Convention 181 simply laid down the general principles which leave it_up to a member state to formulate appropriate policies suitable for its conditions

Countouris is not convinced that Convention 181 adequately covers all work arrangements which deserve some kind of regulation. He argues that the ILO instrument has some regulatory *lacunae* in its personal scope of applicationin as it only applies to workers who are either employees of the agency or for whom the agency provides a placement service and does not cover all other triangular employment relationship.[1174] This is particularly in respect of other employment interactions where there is a bilateral relationship between a worker and an employer, but not the one

1171 Article 3(2) of Convention 181 of 1997.
1172 Article 13(3) of Convention No. 181 of 1997.
1173 This could be done through a written contract of employment which stipulates details concerning terms and conditions of work.
1174 Countouris (2007: 45).

which can be easily characterised as an employment relationship.[1175] This point sounds valid; however, Convention 181 is specifically designed to regulate private employment agencies and not any other work relationships.

6.3.1 Protection of agency workers' rights

The protection of agency workers' rights has been identified as being one of the main objectives of the Convention which seeks to ensure that agency workers were entitled to the same rights as those employees in the permanent employment of the user firm.[1176]

In terms of the Fee-Charging Employment Agencies Convention it is prohibited to charge agency workers a fee.[1177] In addition, the Convention requires that ratifying countries should have adequate machinery for lodging and investigating complaints concerning the activities relating to labour broking agencies, however, it is not mandatory that the former should have a system of licensing.[1178]

The other important aspect is the division of responsibilities between PEAs and user enterprises which should be stipulated in the legislation particularly concerning issues such as collective bargaining, wages and conditions of employment, social security benefits, health and safety.[1179] Most aspects for regulation include the conditions of work of agency workers, non-discrimination of the latter, and the length of the

1175 (ibid.).
1176 Article 7 of Convention 181 of 1997.
1177 Article 2 of Convention 34 of 1933. The period is 3 years and to not permit the establishment of new agencies.
1178 Article 10 of Convention 181 of 1997.
1179 Ibid, article 10.

assignment to be carried out as well as the health and safety of the workers.[1180] In fact many countries provide for statutory regulation of temporary work agencies.[1181] Among the most important features of the legal regulations cover conditions for setting up the business, duration of the license and monitoring procedures form part of these features.[1182] In most countries, the agency is the employer and the employee has an employment contract.[1183]

The monitoring of the activities of PEAs by the international body aims at ensuring that agency workers are not abused or exploited. The strategy used to screen such activities includes the legal requirement that temporary employment agencies be registered prior to the commencement of the business. After a private employment agency has been licensed on the basis of the described criteria, recruitment activities are monitored. Two alternative ways of monitoring agencies' activities are a desk audit of provided information or field audits.[1184] The most common method for the evaluation of the license conditions is a desk audit. This may be carried out during the application procedure and if the monitoring authority suspects an agency of being involved in fraudulent recruitment practices, the request for additional information would be justified.[1185]

1180 See article 2 to 11 of the ILO Convention 181 of 1979.

1181 For more information s*ee* D Storrie *'Temporary agency work in the European Union'* European Foundation for the *Improvement of Living and Working Conditions, (2002) at 6.* Further see R Blainpain and M Weiss (Eds) '*Changing Industrial Relations and Modernsation of Labour Law'* Kluwer Law International (2003) at 113.

1182 (ibid.: 113).

1183 The written contract which may be of a limited or unlimited duration. Such contract must cover information contained in the commercial contract which should include the expiry date.

1184 Article 5 of the ILO Convention 181 of 1997.

1185 (ibid.).

It is generally the responsibility of a government authority to issue such a license.[1186] The regulation, through a licensing system, helps to keep records and provides not only information such as business addresses of the actors involved in the job placement market, but also on the types of services offered.[1187] The advantage of a compulsory licensing system is that it allows for a pre-screening of the applicants' capabilities and professional experience in job placement activities. A license is used mainly as a means of improving the functioning of the labour market, not as a means to restrain competition.[1188] Once a licensing system for the operation of temporary employment agency is installed, a register of all licensed agencies can be made public. Such a public register ensures that anyone can verify whether the temporary employment agency they wish to consult is actually legitimate.[1189] It is much easier to identify which agencies are licensed or not.[1190] If a registration or licensing procedure exists, it is very common to collect a registration fee from private employment agencies.[1191]The payment of a registration fee covers the administrative procedure of the licensing agency and can also be seen as a proof of the financial capacity of private employment agencies wishing to enter the market.[1192]

1186 Article 3(2) of Convention No. 181 of 1997.
1187 ILO 'Guide to Private Employment Agencies' *International Labour Office,* Geneva, (2007) at 13-14.
1188 (ibid.: 15.
1189 Issues for verification may include: information concerning addresses of licensed agencies and possibly the expiry date of such license.
1190 ILO, above n31 at 15-16.
1191 Convention 181 of 1997 use the term 'private employment agencies'
1192 (ibid.)

The principle of free placement services for workers and employers was first established as a standard for public employment services.[1193] Licenses for the operation of employment agencies are generally issued for a limited period of time which could be between 3 to 12 months.[1194] In some exceptional cases the period could be up to three years. In cases where a renewal of the license is requested, a re-application is sent prior to the expiration of the original license to the licensing authority. However, granting of short licensing approvals (e.g. one year) may hinder legitimate agencies from properly running their businesses, as the period is too short to plan and execute their strategies.[1195]

6.3.2 Division of responsibilities between the parties

Article 12 of the Convention delimits the responsibilities between the agencies and user enterprises concerning the protection of workers.[1196] An obligation to protect all workers rests with governments and it does not matter whether the latter have ratified the relevant ILO Convention or not.[1197] Some of the underlying principles behind the Convention is that all workers have the right to associate freely and to bargain

1193 See article 7 of Convention No. 2 of 1919 which states that PEA shall not charge directly or indirectly, in whole or in part, fees or costs to workers. In the interest of the workers concerned, and after consulting the most representative organisations of employers and workers, the competent authority may authorize exceptions to the provision in respect of certain categories of workers as well as specified types of services provided by PEA. See also Convention 88 of 1949.

1194 (ibid.).

1195 ILO, above n31 at 22.

1196 Article 12 of Convention 181 of 1997 provides that responsibilities which governments could allocate include: collective bargaining; minimum wages; working conditions; statutory social security benefits; access to training; compensation in case of safety and health or accidents or disease and maternity protection benefits.

1197 ILO, above n31 at 28.

collectively.[1198] The Convention put the responsibility on governments to request private employment agencies to inform the former on their activities. Such request should be made on regular basis by providing administrative records.[1199] This is to allow the competent authority to be aware of the structure and activities of private employment agencies. Further, providing information improves the transparency of the recruitment activities. It also offers governments an overall picture of job placement through PEA.[1200] The administration of the registration (or licensing) procedure is important, as there are many ways of organising the licensing and subsequent monitoring of PEA activities.[1201] It is important that the administration of the registration procedure itself should include a division between the actual licensing and registration process, more so, in respect of the subsequent monitoring of the activities of PEA and the enforcement of legislation.

While effective registration and licensing is key in the implementation of the principles of Convention 181, it is important to note the positive role played by professional codes of practice should not be ignored.[1202] Non-compliance with the regulations calls for sanctions to be imposed.[1203] This should be accompanied by proper enforcement of legislative provisions on the operation of PEAs. Sanctions that prohibit permanently the business of PEA engage in fraudulent recruitment and placement activities can serve as a deterrent and protect agencies that conduct their business correctly. In addition,

1198 (ibid.: 28).
1199 Article 13 (3) of Convention No. 181 of 1997.
1200 ILO, above n31 at 30.
1201 (ibid.: 30).
1202 (ibid.: 32).
1203 See Article 10 of Convention 181 of 1997 which called States to adopt laws or regulations which provide for penalties, including prohibition which engages in fraudulent practices and abuses.

legislation should, however, also provide the possibility to withdraw or revoke license for a specific period of time.[1204] In situations where workers have been victims of abuse or malpractice by a PEA, it is necessary to set up adequate complaint procedures. This is necessary in order to identify and examine allegations of violations.[1205]

6.3.3 Protection of agency workers' rights at the regional level

As explained earlier at the beginning of this chapter, protection of agency workers 'rights at the regional level refer to the European Union. The reason of examining the regulation of Temporary Agency Work (TAW) in the context of the European Union is because most of the legal systems if not all, in the developing countries including Namibia have been influenced by those adopted in the developed world before and after the independence of the former. The approach espoused by the European Union is based on the principle of non-discrimination in line with the relevant provisions of the ILO Convention.[1206] In terms of the European Directive (EU) which regulates the labour broking industry, employers must treat temporary agency workers in the same manner as they treat full-time employees and that both workers 'rights were protected under the labour legislations.[1207] The EU Directive is that, it establishes a framework for regulating the working conditions of temporary agency workers.[1208] In a situation where

1204 ILO,above n31 at 38.

1205 See Article 10 of Convention No. 181, which also calls for involving as appropriate the most representative employers' and workers' organisations in the complaint machinery.

1206 See Article 3 of the ILO Convention of 1997.

1207 Article 5 of EC Directive of 2008 on Temporary Agency work. Other aspects which the Directive regulates include: pay,working time, overtime, breaks, rest periods, night work, holidays and public holidays.

1208 EC Directive of 2008 on Temporary Agency Work.

the contract is of unlimited duration, the worker is entitled to an income for those periods when no assignment is available.[1209]

The purpose of regulating the time under which the task to be carried out is completed is primarily to ensure that agency work does not become widespread as a category of job at the user firm, and does not undermine standards there. Christianson argues that the duration of the assignment is influenced by the nature of work and time needed to complete the job however, the essence of a contract of employment appears to remain the same, no matter what the relationship is called.[1210] According to Storrie, potential source of insecurity for agency workers is the unavailability of assignments on continuous basis and the nature of work does not guarantee that those who desire full-time work will be offered it whether monthly or weekly.[1211]

The service provided by agency workers may be required to a specific economic sector, such as construction or administration which requires specific skill however; clear job description should be drawn in order to avoid agency workers to be used to weaken the bargaining power of permanent employees.[1212] The effectives of enforcing agency workers' collective rights may be very difficult to implement due to the dual employment relationship.[1213] Storrie argues that the somewhat hostile attitude taken by some trade

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1209 This is particularly the case in Germany.

1210 M Christianson*, Defining who is an* "employee" *Contemporary Labour Law* (2001) 11:3 at 21.

1211 In Sweden the situation is different; the country provides the greatest working-time security. This is done through inter-sectoral agreements covering practically all agency workers. Employees there are guaranteed a minimum income corresponding to roughly 80% of a full-time working month. See Storrie above n1 at 46-47.

1212 In Sweden, for example, there is no law prohibiting the use of agency workers when workers of the user firm are on strike.

1213 Storrie. 2002., above n 11 at 13.

unions as regards agency work is not conducive to representation of rights for agency workers at the user firm.[1214] Given the perception that agency workers are difficult to organise, and there is potential for rivalry between the agency and the workers at the user firm, one might expect that collective bargaining would be relatively undeveloped however, it is a fact that agency workers do benefit from collective rights.[1215]

The EU Directive puts great importance on the principle concerning equal treatment of individuals placed with a user firm with comparable workers in the user firm. Other means of achieving equal treatment of workers is through the trade unions at the user firm whereby in some countries trade unions have the right to veto the placement of agency workers at the firm.[1216] Storrie argues that true equal treatment for agency workers should in terms of employment status and in labour law provide the same level of employment protection as for other employees.[1217]

1214 In Austria for example, it is a basic principle of the law that the temporary worker must not be placed at a disadvantage in relation to compara.ble workers in the user firm. This is particularly in terms of pay and other working conditions. This principle extends to various 'voice' rights in works councils. Whilst in Germany, temporary workers can take part in elections to workers representative bodies in the agency. In the UK, temporary agency workers formally enjoy the same statutory trade union rights as other workers. This includes the right to be in a union and immediate protection from dismissal for trade union activities. Again in Spain for example, in the agency, all temporary workers entitled to be represented, informed and consulted by the works council. In the user enterprise, they are entitled to submit complaints about their working conditions to the works council. See Storrie (2002), above n 12 at 13.

1215 For example in Sweden, despite the fact that agency work was only recently allowed, in law the entire sector is now covered by collective agreements. While the Employers Association (SAF) continually called for total deregulation, almost every step in that direction was opposed by the trade unions, publicly.

1216 This is particularly the case in Sweden and Denmark collective bargaining is most developed. See Storrie (2002), above n12 at 18.

1217 Storrie (2002), above n 11 at 22.

6.4 Advantages of Temporary Agency Workers

One of the potential advantages of TAW contracts is particularly that the latter can provide an open ended contract for the worker while contributing to numerical flexibility for the user firm.[1218] Practically, in contractual terms, employment with a temporary work agency does not necessarily mean employment insecurity in that some agency workers have open-ended employment contracts.[1219] Hence, temporary agency work could help resolve one of the major conflicts in labour markets such as the reconciliation of companies' preference for flexibility with workers' preference for job security.[1220]

Cheadle points out that one problem linked to TAW is the variation and uncertainty of working hours which illustrates the precariousness resulting from the frequent change of workplace.[1221] In this respect, Benjamin argues that much of the regulation based on the traditional model may not be suited to new forms of employment.[1222] Another feature that is most specific to agency work is the dual nature of the employment relationship, meaning that, for every assignment there are two employers (or rather two firms to which the worker surrenders authority), two sets of co-workers and organisational cultures, and possibly two trade unions.[1223] Undoubtedly, this could make any regulation

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1218 (ibid.: 43).

1219 The term open-ended is used to denote what is traditional referred to as permanent contract.

1220 Cheadle (2006:663).

1221 The traditional model of employment, that is, permanent full-time employment with one employer until retirement is premised on fixed workplace. Thus the change of the latter points to the fact the traditional model of work is steadily giving way to less stable forms of employment. See Halton Cheadle 'Regulated Flexibility: Revisiting the LRA and the BCEA' *Industrial Law Journal* 27 .2006. at 664.

1222 See Paul Benjamin, 'Beyond the Boundaries: Prospects for Expanding Labour Market Regulation in South Africa' Paper presented at The Scope of Labour Law: Redrawing the Boundaries of Protection, in Belliago, Italy (May 2005)

1223 See Storrie (2002) above n 11 at 48.

difficult, more complicated and more open to abuse. These problems are likely to be worsening, in addition to this duality, when assignments are of short duration.[1224]

The duality of the employment relationship combined with the short duration of assignment is potentially problematic particularly relating to issues of workplace health and safety.[1225] Although in principle there would appear to be a rationale for some form of dual responsibility between the agency and user firm, it is obvious that there is potential confusion.[1226] Not only for a lack of clarity and possible assumptions by either party that will a specific matter be dealt with by the other, but also for abuse.[1227] Sadly, management and unions may regard agency workers not to belong to the firm properly and may not be members of the same trade union as other workers.[1228] In addition, pressure within the informal social structures of the workplace may not be conducive to supporting the interests of agency workers.[1229]

Possible abuse of agency workers stem from the fact that the inherent difficulties associated with regulating TWA may result in inferior treatment of workers and hence could provide scope for deliberate abuse and the erosion of existing working conditions and therefore may undermine standards at the workplace.[1230] This could adversely affect not only the agency worker, but also permanent staff. As pointed out in Chapter 3

1224 The term 'Assignment' refers to a continuous period of time the TWA carried out for a specific user.

1225 Storrie .2002. above n 11 at 48.

1226 (ibid.: 48).

1227 The abuse is mostly relate to non-compliance of working conditions by user firms or the agency, lack of job security and poor health and safety of agency workers.

1228 (ibid.: 49).

1229 Directive 91/383/EEC.

1230 Storrie .2002. above n 11 at 52.

and 4 of this thesis, the legal problem is that the user firm and the agency worker do not generally have an employment contract. Hence, the rules governing their relationship do not have to be in accordance with collective agreements between the firm and its employees. It is the commercial contract which is used to regulate the employment relationship between the user firm and the agency however; such an arrangement makes it easy for a user firm to avoid paying social security contributions and taxes.[1231] Cheadle points out that in practice, some opportunistic employers do engage in illegal conduct and henceforth breaking the law because of the intrinsic 'fuzziness' of agency work however, the positive side of agency work is that it is associated with the concept of labour flexibility which implies that employers could structure their working pattern to suit their needs more quickly and cheaply.[1232] Thus, it is necessary in any framework to allow space within which employers and workers can adapt standards to suit the needs of workplace over time.[1233]

One of the problems regarding agency work pay is when the total remuneration is related to years of employment at the user firm. This includes seniority pay and fringe benefits.[1234] On the one hand, as these payments are linked to years of service, it is hardly appropriate that agency workers on temporary assignments should be eligible for

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1231 Social security contribution is made up by both the employer and the employee. Hence, an employment arrangement that is not regulated by a contract of employment falls outside labour protection.

1232 H Cheadle, 'Regulated Flexibility: Revisiting the LRA and the BCEA' *Industrial Law Journal* 27 (2006) at 668.

1233 Here three types of flexibility can be identified. These are: employment flexibility (the freedom to change employment levels quickly and cheaply), wage flexibility (the freedom to determine wage levels without restraint) and functional flexibility (the freedom to alter work processes, terms and conditions cheaply.

1234 These benefits include: occupational pension, membership to medical aid scheme, annual and sick leave benefits and any other social security.

them. On the other, they constitute a significant share of take-home pay which means that if agency workers are to receive equal treatment (and thus *not* receive seniority payments), they will, in practice, be paid significantly less than workers at the user firm.[1235] According to Storrie, one solution to deal with this problem is to introduce seniority pay as part of the wage structure at the agency.[1236]

6.5 The potential of Temporary Agency Work (TAW)

Temporary agency work has the potential of attracting a large section of the community because it creates the opportunity for agency workers to earn a wage while being able to sample different jobs and enable employers to gather a wide range of experiences.[1237] Further, it also provides the opportunity for slurred stigmatised job seekers to gain a foothold in a user firm and thereby prove their worth in realistic situations in firms where they might otherwise have been discriminated against.[1238] More over, agency work may offer considerable economic benefits to user firms as well as profits to agencies. The matching of worker to job seems to be particularly efficient in agency work, and may thus serve to reduce 'frictional' unemployment and therefore there might be much to gain from removal of barriers against operators entering the TWA industry.[1239]

1235 Storrie, above n10 at 53-5.
1236 (ibid.: at 53).
1237 (ibid.: 53).
1238 (ibid.).
1239 Some of these barriers include: limitation on the scope of activities permitted to agencies, monitoring procedures and other legal requirements.

6.6 Conclusion

The first part of this chapter shows that the International Labour Organisation Convention 181 sets international standards against which the regulation of the activities of private employment agencies is measured. There is, however, no clear indication that member states of the ILO were obliged to fully comply with the provisions of the Convention.[1240] However, the growing demand of the services rendered by PEAs suggests that the employment standards provided by the Convention remain relevant for years to come. Non-compliance with the provisions of the international body by member countries is likely to stir up controversies around the use of the services rendered by PEAs and at the same time could overshadow the role played by labour brokers in the labour market.

As long as modern employment relationship continue to involve more than two parties, then the ILO Convention 181 is likely to be a useful tool for assessing whether agency workers' rights are protected and that their job security is guaranteed. In this respect, registration and licensing of labour broking agencies is very critical. This is necessary in order to monitor the activities of the agencies. In fact, the ILO principles on social dialogue, that is to say, employers' and workers' organisations should be consulted during the drafting process of PEA legislation from the very beginning. Expert opinions should not only be sought from workers' and employers' organisations, but also from other stakeholders. The ILO Convention clearly provides that any legislation designed for regulating PEAs should not only provide for control of the abuse of agency workers,

[1240] ILO Convention 181 of 197.

but should also include enforcement measures as well as appropriate sanctions. Setting up of a functioning and effective complaint mechanism has been another critical measure provided by the Convention.[1241]

The second part of this chapter illustrates the regulatory approach adopted in the European Union whereby agency workers were entitled to the same protection in respect of their employment rights as their counter-part, the full-time employees. It is not surprising that agency workers were paid between assignments, meaning that even when they were not rendering services. The chapter reveals in the context of the European Union that agency work has the ability to provide an open ended contract for the workers which is an advantage and thereby could help resolve one of the major conflicts in labour markets such as the reconciliation of companies' preference for flexibility with workers' preference for job security.

[1241] ILO, above n31 at 51.

CHAPTER 7: AN ANALYSIS OF THE REGULATION OF LABOUR BROKING IN NAMIBIA AND SOUTH AFRICA COMPARED

7.1 Introduction

Chapter 3 and 4 discussed in detail the extent to which the two countries regulate labour broking activities in their respective jurisdiction and both reveaveld that Namibia and South Africa have adopted diferrent regulatory frame work which produced divergent outcomes. Furthermore, the two Chapters disclosed that both countries have been engaged in hot debate over how best to regulate the labour broking industry and that the political and ideological framework under which Namibia and South Africa were administered was based on the apartheid policies before the democratization of the two countries.

This Chapter compares the regulation of labour broking in Namibia and South Africa to determine whether there are any similarities and or divergences in the approach adopted by the two countries. The Chapter further will compare the reform of the legislations regulating labour broking in the two countries with a view to determine why such reform has achieved diferent outcome.

7.1.1 Similarities of the discriminatory laws in Namibia and South Africa

Before the independence of Namibia and the period prior to the democratisation of South Africa, most if not all the labour laws in place in the two countries were discriminatory in character. Such laws have elevated the white's race above other races (commonly known as "white supremacy") which resulted in social and economic inequality amongst the people.[1242] In terms of past racial policies White people had access to better amenities and lived in urban areas whilst the Black population lived in "reserves" or on the outskirts of the towns.[1243]

Other discriminatory laws include: the Native Labour Proclamation of 1919, which regulated the labour movement of Blacks, the Native Passes Proclamation of 1930 which requires that Blacks should carry passes when moving from their residents to the other, regardless of the purpose of the visit.[1244] In addition to these were the Native Urban Areas Proclamation of 1951 and the 193 Alliance Control Acts which controlled the movement of Blacks and prevented their full proletarianisation. By virtue of the influx of control regulations, Blacks were made to become foreigners in urban centres which caused women great difficulties in joining their husbands in urban areas.[1245]

The other similarities was the introduction of the contract labour system through which thousands of Black workers were recruited to work on the mines and commercial farms

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1242 See s. 1 of the *Native Administration Proclamation,* 1922; s. 25 of the Native *Administration Proclamation,* 1928; s .1 of the *Natives (Urban Areas) Proclamation* 1951; s.1 of the *Prohibition of Mixed Marriages Ordinance*, 1953.

1243 See s. 1 and 3 of the *Native Locations (Entry of Europeans) Proclamation*, 1919; and sections 1 ,2 ,9-15 of the *Natives (Urban Areas) Proclamation*, 1951.

1244 Hishongwa (1991: 921).

1245 (ibid.).

in Namibia migrants workers contracted to work on the South African mines.[1246] The effect of discriminatory laws enforced in the two countries saw the creation of "Bantustans" and "homelands" where indigenous people practised agriculture on a small scale and were also confined to the so-called white "areas" for cheap labour on mines and farms. In fact, most if not all racial and discriminatory laws applicable in the then Apartheid South Africa was extended to Namibia. Jauch *et al* further states that the colonial government of South Africa formally entrenched segregation and applied the Apartheid model to Namibia. The Odendaal Commission of 1963 instituted a homeland system (which is closely modelled on South Africa's own version) in terms of which 10 percent of the country's land area (mainly in the north) was for the indigenous population, 43 percent for White farmland and the remainder, including diamond areas and game reserves, was considered to be unallocated government land.[1247]

The Apartheid inequalities experienced in South Africa today bear similarities with the prevailing status in Namibia. According to the World Bank, in order for South Africa to address the issue of inequality, a labour demanding pattern and an attempt to achieve a more equitable distribution of assets, services and access to markets should be fostered. This is because there is a need to address accessibility to land by Africans as well as access to assets, infrastructure and basic services.[1248]

After the independence of Namibia and the democratisation of South Africa, the two countries introduced government systems based on the principle of democracy and the

1246 E Kalula and Fewick, above n 31 at 10.
1247 (ibid).
1248 The World Bank. (1994: 3).

rule of law with an independent judiciary. The two country's Constiutions contain a bill of rights in which fundamental freedoms and rights were protected including the rights of any person to carry on trade or profession which is the bone of contention in this thesis.[1249] In *Africa Personnel Services,* the court explained that the word "person" includes juristic person and therefore covers business companies such as the applicant.[1250] Another common feature common to both countries is that the political transformation which took place two decades ago has not changed the social and economic difficulties faced by majority of the Black population with the gap between the poor and rich that keeps widening.

7.1.2 Similarities of the legal instruments regulating labour broking practices in Namibia and South Africa

There are limited similarities in respect of the regulation of labour broking practices in Namibia and South Africa of which registration and monitoring of the activities of the practice under scrutiny are some. For example, in both countries the main concern has been the exclusion of agency workers from labour protection which the two countries have adequately addressed by ensuring that the right of agency workers to organise and bargain collectively is protected.[1251] As Burgess *et al* point out that individuals placed by labour brokers have the right to participate in collective bargaining.[1252]The right to organise and bargain collectively depend on the effectiveness of the trade

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1249 See article 21 (1) (j) of the Namibian Constitution of 1990 and section 22 of the South Africa Constitution of 1996,

1250 *Africa Personnel Services* (supra)

1251 Article 11 of ILO Convention 181 of 1997.

1252 J Burgess and J Connell 'International aspects of temporary agency employment' in J Burgess and J Connell '*International Perspectives on Temporary Agency Work'* Routledge at 19.

unions in the fight for democracy all over the world, because they consist mainly of those with relatively few rights in society.[1253] Similarly the right to equality enjoys protection that is to say individuals placed by labour brokers with a user enterprise are entitled to equal treatment as those workers who are directly employed by the user enterprise. This implies that terms and conditions of agency workers should not be less favourable than those provided for in a collective agreement in that industry.[1254]

One critical legal requirement which Namibia and South Africa put in place is the condition that companies or individuals that intent to engage in the labour broking business should be registered with the relevant authority with the purpose of granting a licence to successful applicants as a way of monitoring the activities of labour brokers and to ensure that the law is adhered to.[1255]

There had been a departure from full-blown prohibition in national legislation of labour broking to its restriction by requiring those who engage in such venture to register.[1256] This means, a contractual arrangement between a user enterprise and an unregistered labour broker would be void.[1257] Another issue which the two countries abolished is the practice of agency workers paying a fee in favour of a labour broker. This policy complies with the ILO Convention regulating the industry under investigation.[1258]

1253 B Hepple, 'The Role of Trade Unions in a Democratic Society' *Industrial Law Journal* (1990) 11 at 646.

1254 Ibid, section 26 (2) (a) of ESA.

1255 See section 19 (1) (a) of ESA (Namibia). See [1255] Section 198(4F) of the LRA as proposed for amendment (South Africa).

1256 Ibid. Raday pointed out that many countries employ technics to protect leased workers and the protection of collective bargaining against the encroachment of labour- only contracting.

1257 Benjamin *et al* (2010), above n 19 at 41.

1258 See section 24 (1) of ESA 8 of 2011. Also see ILO Convention 181 of 1997.

7.2 Divergences in the regulation of labour broking in Namibia and South Africa

Namibia and South Africa have adopted different approaches in the way the two countries regulate labour broking activities. In the context of **Namibia,** the practice of supplying workers to third parties has been banned.[1259] This has been achieved by amending the Labour Act whereby a labour broker is prohibited to assume an employer status whilst acting as an intermediary between a worker and a user enterprise.[1260]

The amendment has placed the responsibility of supervision and control over an employee on a user enterprise. This means that employers were no longer allowed to outsource non-core functions of their companies to third parties for a fee. Furthermore, any employment relationship which could be classified as temporary in nature has been outlawed by a provision which provides that any person in the employ of another who renders his or her services is presumed to be employed on full-time basis.[1261] This provision appears to be in conflict with the fundamental principles of the freedom of the parties to determine the nature of the contract of employment they choose to enter into.

The problem of the "presumption of indefinite employment" discussed in in Chapter 3, is likely to encourage employers invent illegal methods through which they could employ individuals using disguised systems whilst ensuring that the same results is achieved. The reform in Namibia has not only thwarted the opportunity of job creation by labour brokers but also discouraged those entrepreneurs who might intend to establish new businesses which could absorb some of the unemployed individuals. The latter have

1259 See section 128 of the *Labour Act, 2007 (No. 11 of 2007).* as amended
1260 (ibid.).
1261 See section 128 of the *Labour Act, 2007 (No. 11 of 2007).* as amended.

also been deprived of the prospect to be employed for a short-term when the need arise to replace certain workers in time of need, mostly to cover those who could not be at work for fault of not their own.

7.2.1 The position in South Africa

In the context of **South Africa,** the reform of TES or labour broking appears to have achieved better outcome. Firstly, the services of TES have been retained whereby a labour broker has been allowed to supply workers to third parties for a fee as the employer. This position is consistent with the policy on job creation and the promotion of small businesses introduced in South Africa.[1262] In this respect, Benjamin argues that first-time job seekers and part-time students who might not be able to take up full-time work could get employment through TESs as well as women who might have particular needs in respect of family obligations.[1263] In addition, Storrie points out that the advantages connected with temporary agency work is the flexibility afforded to employers to re-organise their businesses and increase productivity.[1264] In the same vein, employees are given an opportunity to reconcile their working and private lives.[1265]

1262 See section 32 (5) of the new proposed provision in the BCEA.

1263 Benjamin, P *et al* (2010), above n 19 at 37.

1264 For example, employers could diversify risk; thereby increase productivity due to enhanced degree of flexibility afforded to the firm. The other advantage is an element of efficiency of the labour market due to the improvement in the matching of personnel and jobs. See Donald Storrie 'Temporary agency work in the European Union' *European Foundation for the Improvement of Living and Working Conditions* (2002) at 33.

1265 Malherbe, Ki and Sloth-Nielsen, J (Eds), '*Labour Law into the Future: Essays in honour of D'Arcy du Toit' Juta & Co Ltd* (2012) at 193.

In fact South Africa has opted for a flexible approach by allowing a labour broker to be part of the triangular employment relationship as an employer.[1266]

The economic policy framework in place in South Africa has created a conducive environment for job creation and employment opportunities therefore; user entreprises find favourable conditions to do business. Barker points out that the South African economy has experienced a sharp increase in both the formal and informal employment sector in recent years. Sadly however, the South African labour industry has recently been witnessing high incidences of strikes as a result of trade unions which aslo had an impact on neighbouring countries.[1267] Spier argues that there is a serious concern amongst southern African countries that the economic might of South Africa poses a permanent threat to regional dominance.[1268] In fact the the GDP of South Africa was worth 350.3 billion in 2013 representing three times of the combined GDP of the ten SADC members states which makes South Africa a regional giant.[1269] In addition, South Africa's modern infrastructure provides a vital link for the efficient distribution of goods throughout the southern African region. Premised on South Africa's Economic Transformation philosophy, a macro policy framework known as "A Strategy for Broad-Based Black Economic Empowerment" was formulated in a bid to contribute to towards Black economic empowerment.[1270] To this end, South Africa has set up her own Development Financial Institutions (DFIs) to support national policy objectives.[1271]

1266 See section 128 of the *Labour Act, 2007 (No. 11 of 2007).* before amendment and section 198 of the Labour Relations Act 66 of 1995.

1267 Barker (2007: 47).

1268 Spier (1991: 7).

1269 www.tradingeconomic.com/south-africa/gdp

1270 See the Broad Based Black Economic Empowerment Act of 2003.

1271 There are 13 of such institutions that provide financial support for various business activities such as facilitating access to credit by small, medium and micro enterprises (SMMES), promote

Furthermore, South Africa is considered as a low risk investment destination for foreign investors on the continent and also contributes significantly in terms of manufactured products and with her well developed manufacturing sector the country has placed more emphasises on the need to achieve a more equitable distribution of national wealth to maintain macroeconomic stability and an attempt to address economic inequalities experienced in the country.[1272] Again, the manufacturing sector in South Africa is well advanced and demands substantial human capital thereby creating employment opportunities for many unemployed individuals and obviously this explains why South Africa has opted for the retaintion of the services provided by temporary employment agencies in line with the country's policy.[1273]

7.2.2 The position in Namibia

In the context of **Namibia,** the economic policy framework seems to be dictated by what is happening in South Africa particularly that the country imports most of the products it consumes from the latter and many business establishemnets including a large portion of commercial farms are still owned by foreign individuals or companies including those that originate from South Africa. Namibia needs concrete policies to transform its economic policy to reduce her economic dependency on South Africa and commit adequate resources to promote the informal sector which could be realized through the provision of financial assistance necessary for the establishment of small and medium

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economic equality and transformation as well as financing state -owned institution. Available at: richardknight..homestead.com/files/southAfrica2006-challengeforfuture.pdf

1272 The World Bank (1994: 3).

1273 This policy is known as Growth, Employmnet and Retribution (GEAR).

enterprises. According to Jauch *et al,* Namibia is a country experiencing wide disparities between the rich and the poor resulting from the unequal in the distribution of wealth and access to national services and resources and that just before independence, Namibia's per capita income was U$ 1200 per year, an unrealistically high figure which overshadowed the extremely skewed nature of income distribution.[1274]

A more accurate figure for the majority of Namibians was later given as U$750 for Blacks in formal sector wage employment and U$85 per capita for those in the subsistence sector. By contrast, the income of Whites accounted for one percent of the population and stood at U$16 500 per year, which was comparable with the income per capita in industrialised countries.[1275] The dependence of Namibia on the South African economy had severely limited the development of an indigenous capitalist class, although some White Namibian business people had developed significant interest in some sectors of the economy such as fishing, agriculture, commerce and light industry. Mining, however, remained predominantly foreign-owned.[1276] Similar sentiment has been expressed by Hishongwa who points out that in Namibia, racial and Apartheid ideology was the legal basis used for justifying depriving the Black population access to better economic and social services, as a result, an unequal society was created which consisted of minority rich Whites and majority poor Blacks, of whom 90% were based in the country side.[1277]

1274 Jauch, Edwards, Cupido. (2009: 13-15).
1275 (ibid.).
1276 (ibid).
1277 Hishongwa (1992: 50).

7.3.2 Divergent perceptions over labour broking in Namibia and South Africa

Notwithstanding the fact that both Namibia and South Africa have been grappling with the same social problems of poverty and unemployment for the past two dacades or so, each country has been faced with its unique challenges as to how to create jobs and eradicate poverty. [1278]

7.3.1 Perceptions over labour broking practices in Namibia

In the context of **Namibia**, the controversy surrounding the labour broking industry stems from the government and trade unions' wrong perception of linking the contemporary practice with the past abusive contract labour system which subjected Black workers to inhumane treatment during the Apartheid era.[1279] As a result, the government of Namibia and the trade unions were from the onset in favour of a ban on labour broking. Trade unions in Namibia were more concerned with addressing the plight of workers under the outlawed contract labour system which influenced the government to ensure that a similar system should never be allowed to operate in the country again. In reality, modern labour broking in Namibia has been blamed for wrongs committed before independence as a result the industry has become the victim of government failure to address the scourge of unemployment in the country.[1280] In terms of the Decent Work Country Programme for Namibia, amongst key challenges identified which need to be addressed include, employment creation, promotion of SMMEs, the

[1278] Namibia got its independence in 1990, whislt South Africa was transformed into a democratic state in 1994.

[1279] See Hishongwa (1991: 87).

[1280] The contract labour system in Namibia was abolished in 1971. See Hishongwa (1991: 87).

creation of access to better employment for the disadvantaged in the labour market and creating employment for the youth.[1281]

Despite the fact that labour broking businesses in Namibia had employed a considerable number of people, particularly the youth who were mostly unskilled or semi skilled which justifies legalising the industry as an effective employment creation mechanism yet the government deem it fit to ban it albeit in disguise.[1282] Elsewhere, the recruitment industry offers clients short or long term placements to consider prospective employees as if on probation before engaging in the labour hire placement as direct employee.[1283]

As discussed in Chapter 3 of this thesis, the Supreme Court condemned the inhumane treatment of African workers under the contract labour system before the independence of Namibia, but dismissed the claim that the modern labour broking is the same as the latter system arguing that the practices of racial discrimination and the ideology of apartheid have been abolished after the independence and all people are equal before the law.[1284] In addition, the Court has pronounced that the contract labour system of yesteryears is not the same as the modern labour broking arrangement.[1285] It further reminded the Government of Namibia and the trade unions that today people were free to move throughout the country and have the rights to withhold their labour without being exposed to criminal penalties in an independent Namibia.

1281 ILO (2010"4).

1282 The number of workers employed by *Africa Personnel Services* was an amount of 16 000 workers. See LaRRI (2006) at 12.

1283 Hall, R. 2002. *Labour Hire in Australia: Motivation, Dynamics and Prospects*: *Working paper* 76, University of Sydney, p3.

1284 See Article 10 of the Namibian Constitution of 1990.

1285 Africa Personnel Services (SC) [cite in full]

Moreover, pre-independence discriminatory and coercive laws that existed during the colonial era were abolished and that the current legal framework within which agency work is being performed bears no resemblance to the contract labour system.[1286] Therefore the Court concluded that it was an error to prohibit agency work in Namibia under the mistaken belief that the industry was similar to the past abusive contract labour system.

In a **South Africa** context, the government has insisted that labour brokers be allowed to supply workers for a limited period of time, rather than banning the industry.[1287] In South Africa the concern was more on the lack of protection of the rights of agency workers and their exclusion from statutory benefits. Unlike in Namibia the issue of agency work has been subjected to rigorous academic debate in South Africa which led to the implementation of a more friendly solution to the problem. One notable trend in South Africa is the drive to implement the conception of labour flexibility characterised by the shift in the labour market to enable employers to structure their working patterns to suit their needs more quickly and cheaply[1288] as well as enabling the part of an employee to easily change jobs, depending on the availability of assignments and therefore it is necessary that in any legislative framework a space should be created in order to allow employers and workers adopt standards to meet the ever changing needs of workplace over time.[1289] In fact, the Constitution of South Africa provides broad

1286 Africa Personnel Services (SC) [cite in full]

1287 Although COSATU failed to convince the government to ban labour broking, the union still believes that could be the right thing to do. See www.cosatu.org/za/show-php?ID=8067

1288 Cheadle. (2006: 668).

1289 Here three types of flexibility can be identified. These are: employment flexibility (the freedom to change employment levels quickly and cheaply), wage flexibility (the freedom to determine wage levels without restraint) and functional flexibility (the freedom to alter work processes, terms and conditions cheaply.

guiding principles which enable private entities to carry on trade or profession of their choice requiring the state to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of socio-economic rights provided by the Constitution.[1290]

One positive development associated with South Africa is the flexibility of the definition of the term ”temporary services” which include workers previously excluded from the class of employees who benefit from the government social security system. According to Barker, the informal sector is vital and although there is no developed system to offer social security benefits to workers in the informal sector, the state has put a system in place to ensure that it offers unemployment benefits and other forms of social support to the needy members of the society. The limitation put on the amounts to “temporary services” is another good initiative whereby temporary services have been limited to a period not exceeding six months. This points to the need for labour flexibility which has been commended for achieving greater organisational competiveness and efficiency in that employers are able to have access to a readily available workforce through labour brokers to respond quickly to changes in the labour market.[1291]

Arguing for labour flexibility, Godfrey *et al* claim that labour market regulation can lead to increased labour costs and inflexibility, thereby undermining the viability of the business. The concern is whether or not parts of a particular piece of labour legislation have the effect of increasing labour costs or limiting the use of efficient labour force

1290 Constitution of the Republic of South Africa, Act 108 of 1996, Chapter 2, Section 7(2).
1291 Burgess & Connell (2004: 5).

utlisation.[1292] It is possible that certain provisions of a legislation aimed at improving labour standards may adversely affect other aspects *which* are beneficial to the society as a whole such as employment creation, poverty reduction and business promotion.[1293] Temporary agency work has become internationalised and is expanding across many countries making it recognisable as one of the forms of work which can adjust to the needs of job seekers and employers alike. Despite some negative assertions that temporary work is in conflict with standards of employment relationships, the contract between the agency and the user firm is only for a short period which, in essence, mitigates the issue.[1294] A temporary employment agency, in fact, acts as a facilitator on behalf of job seekers which is the primary purpose of employment namely, to be able to sustain oneself and eventually move out from poverty. Alcock defines poverty more broadly by stating that it means "going short materially, socially and emotionally meaning spending less on food, heating and clothing than someone on an average income,[1295] although he concedes that poverty is a contested concept which can be understood differently.[1296]

1292 Godfrey & Theron. (1999: 1).
1293 (ibid.).
1294 See Fudge, J, McCrystal, S and Sankara, K (note 61) at 154.
1295 Alcock (1997: 3).
1296 (ibid.).

7.4 In search of the better practice

In general, the problem associated with labour broking has been solved within a legislative framework whereby, for example, the duration of the assignment has been by limited to a specific period of time[1297] and therefore individuals who perform work on a temporary basis may not qualify for benefits such as sick, vacation or other types of paid leave.[1298] In this respect it should be noted that most workers engaged in labour broking jobs are pre-dominantly unskilled and semi skilled whilst semi skilled workers mainly comprise of the college graduates who are unable to find permanent jobs elsewhere.[1299] The advantage for such a group would be that getting into a temporary employment would allow one to gain professional experience as well as managing their affairs.

There is sufficient evidence pointing to the fact that labour broking has flourished due to increased labour movement and, therefore, the industry has emerged as part of a broader move towards “flexible production” and casualisation of labour which forms part of the process of globalisation.[1300] It is beyond contention that most working people prefer short term or temporary work for different reasons. Therefore, taking up temporary work is a choice such that concerns about the duration of the employment relationship and inaccessibility as regards statutory benefits would be immaterial under such circumstances. It goes without saying that the employable population is preoccupied with when and how they would get a job, and not necessarily whether or

1297 See Raday (1999: 7).
1298 See Novitz (2009: 65).
1299 (ibid.).
1300 (ibid.).

not their labour rights will be protected once employed. It is for this reason that the influence of regulations should be facilitative in instances where market failure has been experienced.[1301]

An appropriate legal framework for regulating the practice of labour broking should be the one which is able to strike a balance between the protection of the rights of agency workers and at the same time allow employers to maintain a degree of flexibility. McCann argues that the recruitment of part-time workers is a response to global competition whereby employers are changing their organisational preferences as well as their industrial relations. He points out that industrial restructuring which can lead to lean production and substantial reduction in the workforce is taking place worldwide.[1302] Such developments require a targeted regulatory approach which recognises the changes occurring in the labour market and are able to adapt accordingly. One may argue that the purpose of allowing part-time and short contract work is to provide broad opportunities for employment creation.

The envisaged regulatory framework should be able to bring better reforms on how temporary employment agencies should be regulated. Malan points out that temporary agency work can help to reconcile companies' preference for flexibility with the workers' need for job security. Furthermore, the need for labour flexibility is driven by rapid changes in organisational environments which can best be solved by promoting agency

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1301 Camay, P. and Gordon, A.J. (Eds). 2005. *Poverty reduction through improved regulation*: *Department of Water and Forestry.* South Africa, p 4.

1302 Blanpain, R. & Engels, C. 2001. "The ILO and the social challenges of the 21st century: The Geneva Lectures." *Studies in Employment and Social Policy*. Kluwer Law International. p38.

work as it also leads to employment creation.[1303] However, it should be noted that a regulatory framework can sometimes be counter productive and inflexible to such an extent that the implementation thereof may lead to negative consequences.[1304]

Morgan argues that in recent history of declining dichotomies in legal thought, the regulation/rights dichotomy has remained pervasive in policy making consciousness. In particular, the field of employment and labour law serves as a good illustration of the divide between the administrative impulse to regulate the market and the adjudicative impulse to protect individual rights.[1305] Furthermore, employment law is concerned with both individual relationships and with macro policy. A rights framework in employment law focuses on the individual entitlements of either workers or employers. In contrast, the focus of social regulation of economic markets has been the overall welfare maximisation in the labour market, taking a utilitarian approach to each individual case in order to achieve macro ends. [1306]According to Wubben, the market mechanism is quite often performing not well, by and large; it provides abundant opportunities for maximising one's own interests at the expense of others.[1307]

1303 (ibid.).
1304 Standing (1999: 49).
1305 Morgan (2007: 19).
1306 (ibid.).
1307 Wubben, E.F.M. 2011*. Institutions and Regulations for Economic Growth? Public Interests versus Public Incentives*, p 5.

7.5 Conclusion

The purpose of the comparison was to investigate the extent to which South African and Namibia have common experience and how best the differences between the two countries can be accounted for. It was then shown that the regulatory framework for agency work in Namibia and South Africa is a reflection of their social, economic and political history. Despite the inherent similarities in both Namibia and South Africa's political history, diverging approaches have been adopted as far as the regulation of agency work is concerned. This is sufficient proof that the legal approach and extent of intervention in South Africa demonstrates elements of flexibility and adaptability in the legal system contrary to the inflexibile and rigid of approach adopted in Nambia.

The study showed that the extent of similarities in the regulation of agency work in South Africa and Namibia is only, namely that both countries have adopted a democratic Constitution which guarantees the right to carry any trade, occupation, or profession.[1308] In addition, South Africa and Namibia have adopted the principles set by the ILO's Agencies Convention, although none of them is a signatory to the international instrument. Ironically, both countries are facing relative difficulties in grappling with labour broking regulations.

The key difference between the legislation regulating agency work in Namibia is that the amended Labour Act[1309] which forbids the practice is at odds with the South African

[1308] See Chapter 3 of the Constitution of Namibia and Chapter 3 of the Constitution of South Africa.
[1309] (No 11 of 2007).

Labour Relations Amendment Act which automatically joins the private employment agency as a party to the employment relationship which, in turn, jeopardises employment creation opportunities in the process. The Namibian approach is tatamount to an indirect ban of the labour broking industry contrary to the South Africa approach which regards TES as the employer in cases where TES employees do not perform temporary services for the client which allows TES to engage in any trade or business. On the other hand, if an employee is not performing temporary services for the client, then the client is deemed to be the employer of the employee.[1310]

Thus, it can be seen that South Africa has opted to retain the operations of TES in spite of the fact that the new LRAB includes some restrictions and exceptions for the purposes of flexibility. In light of these observations, the reason for Namibia to opt for an inflexible approach remains unknown.

In South Africa, a compromise had to be reached owing to the fact the social partners could not unanimously agree on some provisions of the Labour Relations Amendment Act during the negotiations at National Development Labour Advisory Council (NEDLAC).[1311] As a consequence, it appears that the LR Amendment Act harmoniously balances the constitutional rights[1312] of labour agencies and the protection of TES employees which extends protection to vulnerable workers employed on fixed term contract or on part-time contract.

1310 (ibid.). 198A (3) (b).

1311 Trade unions pressed for the ban of labour broking, whilst the Union of business of South Africa supports stricter regulation available at http://.imeslive.co.za/politics/2013/06/20/debate-relation-amnemdnet-bill-not-undermining-Nedlac accessed on the 25 June 2013.

1312 Section 22 of the Constitution of South Africa.

CHAPTER 8: CONCLUSION

8.1 SUMMARY OF FINDINGS

The study set out a compararative analysis of the regulation of labour broking activities in Namibia and South Africa using the ILO Convention 181 as a benchmark. The objective of the comparison is to find out whether the regulatory framework adopted by Namibia is appropriate and, if not, whether some lessons can be learned from South Africa. The study explored the approach adopted by the ILO in regulating PEAs with a view to determining whether the standard set by the international body can be used as a benchmark.

8.1.1 Emergence of Non-Standard Employmnet Relationships and the difficulties of regulating them

The first findings are that over the last decade or two, there has been an increasing awareness of the growth and persistence of “atypical” or “non-standard” forms of work. [1313] The concept “non-standard employment relationship” refers to a process which lacks a precise definition although it essentially involves the provision of goods and services in terms of a commercial contract, instead of through an employment relationship. This implies that there is what is termed as “legal distance” placed between the user of the services and the risk associated with the employment relationship, which

[1313] (ibid.).

makes such work arrangement difficult to regulate.[1314] As explained in Chapter 2 of this thesis, non-standard forms of employment relationships are the type of work which deviates from the standard employment relationship, thus entailing part-time work, temporary work and casual work. It also includes seasonal work and work performed by independent contractors, subcontracting and the use of temporary employment services which is the focus of this thesis.[1315] Also shown in Chapter 2, one strategy employers use in order to reduce costs is to outsource less important functions of their firms through externalization by using intermediaries and the casualisation of work.[1316]

Another finding is that modern labour market has been praised for being associated with efficiency, and employers utilise workers on a trial basis as potential applicants for permanent internal jobs, which in turn would allow a user firm to shift less important responsibilities to someone else by way of outsourcing certain functions through intermediaries.[1317] Scholars claim that temporary agency work has become a fast growing business on the international arena.[1318]

This thesis further reaveals that the problem with regulating labour broking activities is the fact that the latter is a form of employment relationship between three parties, namely the worker, the user firm and a labour broker. In such relationship, the worker is not privy to the contract which a user firm and a labour broker have entered into.[1319] The worker has no job security, particularly if the user enterprise decides to terminate the contract; such action will equally terminate the employment contract between the broker

1314 Le Roux. (2009: 18-20).
1315 Chapter Two (see section 2.1.3).
1316 Chapter Two (see section 2.4.7).
1317 Chapter Two (see section 2.1.4).
1318 See Meulders & Tytgat. (1989: 196).
1319 Chapter Two (see section 2.1.3).

and the worker. Without following the procedures provided by labour law, a user firm can terminate the employment contract entered by and between the broker and the worker. This is the case because the contract between the former broker and the user enterprise normally stipulates that the client (i.e., the user enterprise) may dispense with the worker's services either whenever they wish or in certain defined circumstances.[1320] In other words, the worker may be dismissed at will. If the worker is dismissed, there is no guarantee that the latter will be reassigned a new position elsewhere.

Labour broking arrangement is not only confusing as far as workers are concerned and courts have also been wary in distinguishing between an employer and an employee under such a triangular employment relationship.[1321] On the face of it, agency workers seem to be enjoying the protection of labour legislation; however, the protection is more apparent than real.[1322] In spite of the fact that workers in a triangular employment relationship are structurally integrated into the user enterprise's workforce, such an arrangement creates under-class workers at the formal workplace.[1323] A tailor-made legal framework could be appropriate to regulate an employment relationship comprising of more than two parties.[1324]

1320 Chapter Two (see section 2.1.4.).
1321 *Building Workers Industrial Union of Australia v Odco Pty Ltd (1991)* 29 FCR
1322 Chapter Two (see section 2.7).
1323 (ibid.).
1324 Chapter Two (see section 2.7).

8.1.2 Shortcomings of the Present Legal Regime Regulating Private Employmnet Agencies (PEAs) in Namibia

The key shortcoming of the present legislation regulating PEAs in Namibia is the fact that a labour broker is not allowed to be a party to the triangular employment relationship which the three parties have entered into so that a user enterprise becomes the employer. Furthermore, the new law in Namibia imposes unreasonable restrictions on the hiring of agency workers, whereby a user enterprise is forbidden to hire new workers as a strategy to neutralise the effects of an ongoing or imminent industrial action.[1325]

Furthermore, the new Amendment prohibits a labour broker to charge a fee for the services rendered. Once the recruitment process has been finalised, a labour broker is expected to pull out from the envisaged employment relationship. This literally results in ending the business opportunity that a labour broker may intend to carry on.[1326] In modern work arrangements temporary work and short-term employment contracts are common because of technological advancement and free movement of labour. Unfortunately, the amendment under scrutiny disregards this fact by including a provision which states that ”an employee is presumed to be employed indefinitely, unless the employer can establish a justification for employment on a fixed term”.[1327]

Another shortcoming associated with the regime regulating PEAs in Namibia is that the rights of companies to reorganise their business through outsourcing of non-core

[1325] Chapter Three (see section 3.2).
[1326] Chapter Four (see section 4.2.1).
[1327] Chapter Four (see section 4.1.3).

functions of their businesses have been curtailed.[1328] Obviouly, employers would find another way of outsourcing some of their less important functions to third parties through other possible illegal processes.[1329]

Although the Supreme Court ruled that the new amendment does not conflict with the Namibian Constitution,[1330] unfortunately, in reality the contrary is true. In terms of the new law, a labour broker is no longer allowed to enter into an employment contract with a worker as the employer, but rather as simply linking the potential worker and the user firm, this means that the constitutional right of the former has been violated.[1331]

8.1.3 Positive Outcome of the Reform of TES in South Africa

Amongst the key findings in respect of TES regulation in South Africa is the inclusion of the flexible definition of the term 'temporary services'. In terms of the reform the latter is fixed to a period up to six months.[1332] This means that employers could employ an individual for a period starting from the first day up to six months. This time period provides an employer an opportunity to decide whether to employ such an individual on full-time basis or not. In practice, the reform of TES in South Africa created opportunities for those who are searching for jobs to be employed on a part-time basis. In addition, the reform extends protection to vulnerable workers. This catergory of workers include

1328 Chapter Three (see setion 3.2.1)
1329 Such as entering into a business joint venture with a labour broker but the operations remain the same.
1330 Chapter Four (see section 4.2.2).
1331 Article 21(1) (j) of the Namibian Constituiton of 1990.
1332 Chapter Five (see section 5.3.1).

employees who are engaged on fixed-term and part-time contracts as well as employees who earn below the earnings of the threshold.[1333]

Another noticeable finding of TES reform is the introduction of the concept referred to as 'justifiable discrimination,' whereby employers are allowed to treat workers differently based on valid grounds, if there are defensible reasons to do so. This includes employees who are employed on a fixed-term contract for longer than six months, after which they will be qualified to be treated in the same way as employees employed on a permanent basis. However, provided that the employees concern should be performing the same work carried out by permanent employees.[1334] The underlying principle is that part-time employees should not be treated less favourably than a comparable full-time employee doing similar work, unless there is a justifiable reason for different treatment and the promotion of small businesses.[1335]

Further findings relate to the protection of employees who earn an amount not exceeding the threshold prescribed in terms of the relevant legislation, which can be regarded as a way of addressing the scourge of poverty amongst lowly paid employees. These employees are normally the unskilled or semi-skilled individuals who depend on their meagre income. Similar protection is extended to those individuals who are already employed, remain in their jobs, and, in the same vein, employers are encouraged through tax regime to absorb job seekers in their business.[1336]

1333 Chapter Five (see section 5.3.3).
1334 (ibid.).
1335 (ibid.).
1336 Chapter Five (see section 5.4.2).

Unlike the situation before the Amendment of the legislation regulating TES, the Labour Court has been given powers to hear cases brought before it by TES employees. The same holds true with regard to CCMA, where an arbitrator has been given powers to rule on whether or not an employee of TES is covered by a Bargaining Council agreement or sectoral determination. By implication, this means that the previous stance that such agreements were outside the jurisdiction of CCMA is no longer valid.[1337]

8.1.4 Namibia's Legal Regime Regulating PEAs Contracdicts Modern Work Arrangements

One of the findings of this thesis is that modern work arrangements is dominated by non-standard employment relationships, in which a number of temporary employment agencies become large multinational corporations and increasingly organised, which demonstrates the level of growth of the industry.[1338] In contrast, the legal framework adopted by the Namibian government regulating PEAs is prohibitive, thus disregarding modern work arrangements adopted in both developed and developing countries.[1339] There has been an increase in the growth of atypical forms of employment whereby part-time work and temporary employment feature the most.[1340] It is generally believed that today's work arrangement, such as labour broking, serves to prevent the acute shortage of workers in various industries. This is particularly the case in the context of

1337 Chapter Five (see section 5.4.1).
1338 (ibid).
1339 Chapter Two (2.2.4).
1340 Dickens, L. 2009. Problems of Fit: Changing Employment and Labour Regulation 920040." *British Journal ofIndustrial Relations.* Vol. 42(4) , p595.

agency workers involved in various assignments at different workplaces, which give the latter an opportunity to shape their careers, which could be done through quick match of workers and companies.[1341]

The contradiction referred to in this section is manifested by the fact that the services provided by private employment agencies, whereby they supply individuals to third parties for a fee, are proscribed, and a labour broker is prohibited to assume a status of an employee.[1342] This is the case despite the undeniable fact that temporary employment services have for the past two decades or so witnessed a sudden upsurge in the demand for agency work, and these include painting, joinery, and installation of ceilings, carpets, air conditioning and electrical fittings.[1343]

The political decision to proscribe labour broking activities in Namibia, albeit under disguise, is unrealistic, and it is not clear who benefits from such a ban, particularly in light of high unemployment and poverty amongst the majority of Namibians.[1344] This thesis argues that the protection of labour rights extended to agency workers serves as a smokescreen to conceal the key purpose of the legal regime regulating private employment agencies.[1345] The existence of such employment relationships was closely interlinked with the labour market conditions which provided the much needed employment flexibility.[1346]

1341 Chapter Two (see section 2.1.4).
1342 Chapter Three (see section 3.2.2).
1343 Theron & Godfrey. (2000: 24-28).
1344 Chapter Three (3.2).
1345 (ibid.).
1346 See C., Vigneau, 2001. "Temporary agency work in France." *Compara.tive Labour Law & Policy Journal.* Vol. 23(7), p 45.

8.1.5 ILO Convention 181 is not Apposite for Benchmarking for Develoing Countries

ILO Convention 181 (the Convention) appears to be designed for regulating private employment agencies found in developed countries. The reason for this argument is because the Convention concentrates more on the rights of agency workers instead of setting standards as to how to create jobs for the unemployed.

This thesis establishes that the protection of agency workers in the developed world appears to be more advanced, especially that agency workers are entitled to the same labour protection as their counterparts, the full-time employees.[1347] This means that any individual performing work even on temporary basis is entitled to equal treatment in terms of basic working and employment conditions, including pay, holidays and working time. They also have equal access to collective facilities, including canteens, transport services, child care facilities and equal access to training.[1348] The principle of equal treatment in developed countries applies to temporary workers from day one, except where the social partners agree otherwise.[1349]

In fact it is estimated that over three million temporary agency workers across the European Union have a right to equal treatment with permanent employees and benefit from better working conditions.[1350]

1347 Chapter Six (see section 6.2.2).
1348 Article 5 of Directive 2008/104/EC.
1349 (ibid.).
1350 Storrie (2002: 28).

Given the level of poverty in many developing countries, surely the protection of workers' rights applicable in the developed world would not be affordable in Third World countries, including Namibia.[1351]

Another finding of this thesis is that the majority of the unemployed individuals in Namibia and South Africa are mostly un-skilled or semi-skilled. This group of individuals has less understanding about workers' rights and may not concern themselves with whether they are entitled to labour protection or not. When it comes to job seekers, they are more concerned with getting a job and not necessarily with whether, after being employed, they would be entitled to labour rights. This is the case because the scourge of unemployment and poverty in developing countries dimishes the significance of the protection of workers' rights. Putting it differently, a poor person prefers to be employed and have an income to sustain himself or herself, even without the protection afforded by labour law.

[1351] Chapter Three (see section 3.1) and Chapter Four (see section 4.1).

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