AGENCY WORK IN NAMIBIA AND SOUTH AFRICA: LESSONS GAINED FROM THE DECENT WORK AGENDA AND THE FLEXICURITY APPROACH

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Agency Work in Namibia and South Africa: Lessons Gained from the Decent Work Agenda and the Flexicurity Approach[*]

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Namibia has recently introduced policies regarding the regulation of agency work and South Africa is in the process of doing the same. The acceptance by the International Labour Organisation (ILO) of the decent work agenda and the implementation of flexicurity policies by the European Union (EU) was followed by the adoption agency work instruments which recognise the existence of agency work. The approach to the regulation of agency work in the Namibia and South Africa is compared. The contribution considers the question whether Namibia and South Africa can learn lessons regarding the changing role of labour law regulation as developments are unfolding on the international front.

Keywords: *Agency work; decent work; flexicurity; labour brokers; labour hire; Private Employment Agencies Convention; Temporary Agency Work Directive; temporary employment services.*

1 INTRODUCTION

Policy makers of two neighbouring southern African states, Namibia and South Africa, have in the past decade been grappling with the regulation of the contested issue of agency work.[1] Namibia has taken the lead and has recently adopted legislation that strictly controls

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[1] Different terms are used to describe the situation where an agent places an agency worker at a user undertaking. The ILO refers to 'private employment services' and the EU uses the concept 'temporary agency work'. For purposes of this contribution the generic term 'agency work' is used.

agency work,[2] and in South Africa, draft bills have been published which seek to strike a balance between recognising this form of work and providing security to agency workers.[3]

During more or less the same decade the European Union ('EU') adopted an employment policy direction, referred to as 'flexicurity', with the view of improving the EU's labour market-related competitiveness. This policy shift followed the adoption by the International Labour Organisation ('ILO') of the 'decent work' agenda. What lessons (if any) can Namibia and South Africa learn from debates regarding the changing function of labour law and what standards have the ILO and the EU implemented pertaining to the regulation of agency work in particular?

The discussion charts the following sequence: Firstly, the contribution reflects on the traditional role of labour law and evaluates whether its function should be broadened against the backdrop the decent work agenda. Secondly, the notion of flexicurity is considered in the context of the EU discourse. Thirdly, existing ILO and EU agency work instruments are compared. Fourthly, the regulation of employment agencies in Namibia and South Africa are analysed, and in the final instance, thoughts are expressed about what lessons can be gained from the decent work and flexicuriy approaches in the context of the regulation of agency work.

2 LABOUR LAW AND THE DECENT WORK AGENDA

In southern Africa, 'labour law's' point of departure of is still closely linked to a role that was conceptualised by the influential Sir Otto Khan-Freund during the previous century.[4] The courts accept that it is one of the main purposes of labour law to serve as 'a countervailing force' to counter the imbalance in the power relationship between employers and employees.[5] This model accepts that the employer is the bearer of power and labour law

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[2] See the discussion in para 5.2 *infra.*

[3] See the discussion in para 5.3 *infra.*

[4] In *Sidumo & another v. Rustenburg Platinum Mines Ltd & others* (2007) *ILJ (South Africa)* 2405 (CC), para 72, the South African Constitutional Court refers to the following quote of Kahn-Freund as being a 'famous dictum': '[T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. … The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent … in the employment relationship.'

[5] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of South Africa, 1996* (1996) *ILJ (South Africa)* 821 (CC), para 66, held that labour rights, such as collective bargaining, 'is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers'. See R. Le Roux, 'The Purpose of Labour Law: Can it Turn Green?' in K. Malherbe & J. Sloth-Nielsen, *Labour Law into the Future: Essays in Honour of D'Arcy du Toit,* (Cape Town: Juta, 2012) 230, 238*;* P. Benjamin, 'Labour Law Beyond Employment', in R. Le Roux & A. Rycroft, *Reinventing Labour Law: Reflecting on the first 15 years of the Labour Relations Act and Future Challenges,* (Cape Town: Juta, 2012) 21, 22.

has the key function of protecting the weaker party to the relationship.[6] In line with traditional thinking, two mechanisms are recognised that holds the potential to counter this imbalance, namely the setting of minimum employment standards and the endorsement of the process of collective bargaining.[7] The adhesive of this labour law framework is the existence of a contract of employment and the protection of pre-existing workers' rights. However, despite this point of departure, it is worth mentioning that positive gains have been made in so far as legislative rebuttable presumptions have been introduced in Namibia and South Africa which has the effect of broadening the coverage of labour law to workers at the margin of the traditional employment relationship.[8]

To what extent is this traditional role of labour law still suitable to policy makers in Namibia and South Africa? In a recent insightful paper by Paul Benjamin, he points to the fact that dialogue amongst social partners about the function of contemporary labour law has reached a policy 'logjam'.[9] He argues that debates should be informed by a broader notion of 'labour market regulation' and that it is too limiting to cast the function of labour law only to cover the position of those who are already engaged in existing contracts of employment. He points to the fact that local labour policy debates should be broadened to amongst others cover the capacity of individuals to earn a livelihood, the terms under which individuals enter and exit employment and the process by which skills are obtained to gain and re-gain productive work. He adds that the objective should be 'to promote security' as this is the only way in which the unemployed and those in the informal economy and will be included in debates concerning the future of work.[10]

In European context, the regulation of employer employee relations is underpinned by the notion of 'social justice', which in the words of Hugh Collins, relates to the 'distribution of wealth and power'.[11] This notion has a broader base than the term 'labour law' as used in Namibia and South Africa. It includes social security. As pointed out by Mark Bell the justification behind shifts in European labour policy can be better understood against the background of two predominant approaches. On the one hand, the 'social rights' perspective

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[6] In *Sidumo*, fn 4 *supra*, para 74, the Court held that the 'rights presently enjoyed by employees were hard-won and followed years of intense and often grim struggle by workers and their organisations.'

[7] A. Van Niekerk, *et al., Law@work* (Durban: LexisNexis, 2012) 9.

[8] In 2002 South Africa introduced a presumption, based on a basket of factors, regarding who is an employee in section 200A of the Labour Relations Act, 1996 (No. 66 of 1996). In Namibia, section 7 of the Labour Amendment Act, 2012 (No. 2 of 2012), introduced an almost identical presumption as adopted by South Africa, into section 28 of the Labour Act, 2007. The courts have also broadened the reach of labour law. See *Discovery Health v CCMA* [2008] 7 BLLR 633 (LC); *'Kylie' v CCMA* [2010] 7 BLLR 705 (LAC).

[9] Benjamin, *supra* fn. 5, 22.

[10] *Ibid.*, 31

[11] H. Collins, 'The Productive Disintegration of Labour Law', *Industrial Law Journal* (United Kingdom), 26 (1997): 295.

seeks to guarantee and protect fundamental workers' rights, while on the other, the 'labour market regulation' approach aims to balance the interests of workers against economic effectiveness.[12] The one does not exclude the other, but the first model seeks to guarantee certain fundamental social rights. This entails that 'once a fundamental right is at stake … it tends to exclude from consideration any other policies or principles'.[13] In terms of the second approach, economic considerations are legitimate and should be weighed up against the protection of social rights. The latter approach has the broader rationale of finding 'equilibrium between fairness to workers … and efficiency.'[14]

In developing my arguments that follow, I am influenced by the fact that eminent labour law commentators have recognised that much has changed since Kahn-Freund conceptualised the traditional role and functions of labour law.[15] My first argument supports Benjamin, in so far as developing countries, such as South Africa and Namibia, are burdened with unemployment rates that have been persistently high, the skills base is low and large numbers eke out an existence in the informal economy.[16] In these countries the ideal of full-employment remains an elusive vision. The traditional role of labour law presupposes a situation where there is an existing employer-employee relationship and this framework may be too narrow for strategies aimed at migrating the unemployed to the formal job market.[17]

Secondly, in the quest to become more competitive in changing market conditions, employers have devised new forms of flexible working arrangements and labour law has consistently needed to adapt to respond to the changes.[18] Rather than attempting to proscribe undesirable forms of work, only to see new forms to be developed almost

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[12] M. Bell, 'Between Flexibility and Fundamental Social Rights: The EU Directives on Atypical Work', *European Law Review*, 37 (2012): 31.

[13] S. Fredman, 'Discrimination Law in the EU, Labour Market Regulation of Fundamental Social Rights' in H. Collins, P. Davies & R. Rideout (eds), *Legal Regulation of the Employment Relation* (Londen: Kluwer Law International, 2000) 183.

[14] Bell, *supra* fn. 12, 32.

[15] H. Collins 'Justifications and Techniques of Legal Regulation of the Employment Relation' in H. Collins, P. Davies & R. Rideout (eds), *Legal Regulation of the Employment Relation* (London: Kluwer Law International, 2000) 1, 7 and further; A. Hyde, 'What is Labour Law?' in G. Davidov & B. Langille (eds) *Boundaries and Frontiers of Labour Law*, (Oxford: Hart, 2006) 37, 54. Le Roux, *supra* fn 5, 239.

[16] Benjamin, *supra* fn. 5, 34 mentions that 'South African labour law operates within a context characterised by the world's highest levels of unemployment and inequality and the fact that many who work received inferior schooling under apartheid's "Bantu education" system'. See the statistics of the unemployment rates of Namibia and South Africa in para 5.1 *infra*.

[17] Added to this, collective bargaining has limited traction under the unemployed and in the informal sector. Van Niekerk, *supra* fn. 7, 9 confirm that since the days of Kahn-Freund, 'in global terms, trade union membership has declined significantly, and collective bargaining is no longer the significant social institution that it was'.

[18] P. Benjamin, 'Beyond the Boundaries: Prospects for the Expanding Labour Market Regulation in South Africa', in G. Davidov & B. Langille (eds), *Boundaries and Frontiers of Labour Law*, H. Collins 'Justifications and Techniques of Legal Regulation of the Employment Relation', (Oxford: Hart, 2006) 181.

instantaneously, it may be a more effective strategy to recognise alternative forms of work and to establish boundaries within which they are permitted to function.

Thirdly, global trends and policies have changed significantly and it would be almost impossible to divorce Namibia and South Africa from international policy developments. In the post second world war era the ILO initially functioned in a context 'characterised by a policy emphasis on full employment and social welfare'.[19] However, as Bob Hepple alludes, this situation has since changed and the ILO was faced with a number of post-war challenges that threatened its continued existence.[20] Uneven ratification, problems pertaining to the ILO's supervisory machinery and globalisation compelled the ILO to engage in introspection and to react.[21] Hepple mentions that the ILO's response was threefold.[22] It adopted the ILO Declaration of Fundamental Principles and Rights at Work;[23] it revised and integrated its international labour standards;[24] and most significantly, it realigned ILO strategy by embracing of the decent work agenda.[25] The objectives of this policy are well-known. It seeks a balance between the realisation of fundamental rights at work, the promotion of job creation opportunities, effective social protection for all and it encourages tripartism and social dialogue.[26] In sum, the decent work agenda has shifted the ILO's attention from a rights based agenda to one which includes policies that could potentially create jobs and reduce poverty.[27]

Does this mean that the ILO's conception of the role of labour law policy has changed to the extent that Khan-Freund's formulation has become obsolete? The answer must surely be no. Labour law's foundation remains relevant in so far as the decent work agenda seeks to protect fundamental workers' rights and the goal of narrowing economic and power gaps between employers and their workers remain. However, to me it makes good sense to extend the role of labour law in the context of the formulation of Namibia and

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[19] See also S. Cooney, 'Testing Times for the ILO: Instrumental Reform for the New International Political Economy', *Comparative Labor Law and Policy Journal,* 20 (1999): 365, 369 on the 'revived' ILO.

[20] B. Hepple, *Labour Laws and Global Trade*, (Oxford: Hart, 2005), 33-56.

[21] *Ibid.*, 33.

[22] *Ibid.*, 56.

[23] In the preamble to the ILO Declaration on Fundamental Principles and Rights at Work it is stated that the 8 core conventions are of 'particular significance' in maintaining 'the link between social progress and economic growth'.

[24] Hepple, *supra* fn 20, 63 points to the fact that the Governing Body decided that of the 185 conventions, only 71 conventions were up to date and 54 conventions were outdated.

[25] The decent work agenda gained momentum with the publication of the ILO, *Decent Work,* Report of the Director-General, International Labour Conference, 87th Session, (ILO: Geneva, 1999).

[26] G. Rodgers, E. Lee, L. Swepston & J. van Daele, *The ILO and the Quest of Social Justice 1919-2009* (Ithaca, NY: Cornell University Press, 2009) 205-235.

[27] The ILO, *Organising Social Justice,* Report by the Director General (Geneva: ILO, 2004), 16 mentions that 'the principle rout out of poverty is work, and to this end the economy must generate opportunities'.

South Africa's labour policies to concerns itself with methods of responding to changing economic circumstances.

3 FLEXICURITY IN CONTEXT OF THE EU

Since its inception, the role of the EU in the field of labour law regulation has been contested. Initially, the rationale for the EU was based on market integration and it was only deemed justifiable to harmonise labour law as long as it ensured the smooth functioning of the common market.[28] It was deemed acceptable to protect individual member states against unfair competition, by countering the lowering of employment protection, which could result in a race to the bottom. However, there has arguably been a shift in the EU's role from seeking market integration to one focussing on market regulation with the aim of enhancing the EU's competitiveness.[29]

Subsequent to lengthy debates,[30] the EU (like the ILO) shifted its labour policy strategy in 2007 by implementing the flexicurity policy framework.[31] The EU recognised pressures associated with globalisation, low employment rates and a segmented labour market and chose to respond.[32] The idea of flexicurity is underpinned by the idea that a delicate balance should be struck, which seeks to increase flexibility in the labour market, but at the same time, to improve security of workers. The European Expert Group on Flexicurity developed a number of mutually supportive pathways which are intended to support the policy of flexicurity, namely to:[33] make provision for flexible and reliable contractual arrangements to promote the upward transition of non-standard contractual arrangements into a situation of full protection; promote investments in comprehensive lifelong learning; enhance active labour market policies to strengthen the transition of

[28] Bell, *supra* fn. 12, 31.
[29] *Ibid*.
[30] R. Sultan, 'Flexibility and Security? "Flexicurity" and its Implications for Lifelong Guidance', *British Journal of Guidance and Counselling*, (2012): 1, 2-3 mentions that debates about flexibility and security can be traced back to the post-war era, but that the more recent origins can be attributed to the sociologist Hans Adriaansen and the debates in the Netherlands.
[31] EC Green Paper on *Modernising Labour Law to Meet the Challenges of the 21st Century* (Brussels, COM(2006) 708); European Commission *Towards Common Principles of Flexicurity: More and Better Jobs Through Flexibility and Security* (Brussels, COM(2007) 359).
[32] *Ibid.*, European Commission, 3. In the same communication, reliance was placed on analytical evidence of the Organisation for Economic Co-operation and Development ('OECD'), which suggest that strict 'employment protection legislation' ('EPL' in OECD lexicon), reduces the number of dismissals, but especially in respect of small undertakings, also decreases the rate of entry of unemployed persons into work.
[33] European Commission *Flexicurity Pathways: Turning Hurdles into Steppingstones*, (European Expert Group on Flexicurity, Brussels, 2007) 2-3.

workers between jobs; and modernise social security systems to contribute to mobility of workers in the labour market.[34]

The idea of flexicurity is reinforced by the idea that 'job security' is replaced by 'employment security'.[35] Whereas job security aims to protect a worker's current job by means of protection against unjustified or unfair dismissal, employment security has the goal of providing workers with assistance during job transitions by means of life-long training and appropriate social security.[36] A further justification of flexicurity is to reduce labour market segmentation and to improve equal treatment of permanent and flexible workers.[37] Rather than prohibiting flexible forms of work, such work is recognised as a 'stepping stone' into positions with progressive employment protection.[38] The aim is further to reduce the existing divisions between those holding temporary and permanent contracts.[39]

Flexibility refers to different dimensions and includes numerical flexibility (varying the number of workers needed), functional flexibility (varying the content of work and the way in which it is deployed) and wage flexibility (adjusting wages to economic and individual circumstances).[40] When navigating the considerable amount of literature that is available on the topic of flexicurity, a number of significant aspects become apparent that may be useful for policy makers in Namiba and South Africa when considering labour policy reforms.[41]

The first is that flexicurity was not developed as a 'one size fits all' approach for all members of the EU.[42] From the onset the EU accepted that there are significant differences between the levels of social protection and levels of unemployment amongst Member States. For example, two countries that are deemed as success stories of flexicurity,

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[34] See S. Bekker & T. Wilthagen, 'Flexicurity – A European Approach to Labour Market Policy', *Intereconomics*, (2008): 68, 70 where the authors explain that a fifth essential component should be added, namely the development of social dialogue between social partners.

[35] See M. Rönnmar & A. Numhauser-Henning, 'Swedish Employment Protection in Times of Flexicurity Policies and Economic Crisis', *The International Journal of Comparative Law and Industrial Relations,* 28/4 (2012): 443, 449. The authors quite correctly criticise the incorrect use of the terms 'job security' and 'employment security' as it is not in line with the usage of these terms in labour relations and labour economics. For purposes of this discussion, I use the terms as referred to in the EU's flexicurity policies.

[36] European Commission *Flexicurity Pathways, supra* fn 34, 4.

[37] Rönnmar & Numhauser-Henning, *supra* fn. 35, 447.

[38] European Commission, *Flexicurity Pathways, supra* fn 34, 2-3.

[39] European Commission, *An Agenda for New Skills and Jobs: A European Contribution Towards Full Employment*, (Brussels: COM(2010) 682 final), 5.

[40] See N. Lyutov, 'Russian Employment Protection: Analysis from the Perspective of EU Flexicurity Policy', *The International Journal of Comparative Law and Industrial Relations* 28/3 (2012): 335, 337; Rönnmar & Numhauser-Henning, *supra* fn. 35, 445.

[41] To sceptics flexicurity has become a 'buzzword' which is more of a 'wish list' than anything else. See A. van den Berg, 'Flexicurity: What Can We Learn from the Scandinavian Experience?' *European Journal of Social Security,* 11/3 (2009): 245, 246.

[42] Bekker & Wilthagen, *supra* fn 34, 69.

Denmark and the Netherlands, use two quite different models.[43] Denmark is associated with the so-called 'golden triangle',[44] which combines high mobility between jobs, with a comprehensive social security net, and active labour market policies aimed at motivation for the unemployed.[45] The Dutch model is based on the widespread use of non-standard work, combined with the extension of comprehensive social rights to such workers.[46] In respect of fixed-term and part-time workers, the *pro rata temporis* principle is applied strictly in respect of the contract of employment and in respect of social security.[47]

The second point is that European academics raise convincing arguments about the existence of supportive and constructive social dialogue as a perquisite to the implementation of policies that seek to balance flexibility and security.[48] As example, in the Netherlands, the Foundation of Labour played a significant role reaching agreement on flexibility and security as long back as 1996. This consultative body engaged in positive sum bargaining in pursuit of 'win-win' strategies for both employers and employees and this paved the way for the adoption of a flexicurity approach.[49] In the absence of mature social dialogue it may be difficult to implement strategies that aim to balance security with flexibility.[50]

Thirdly, there are indications that flexicurity on its own is a good weather strategy. In a recent four country study conducted by Jason Heyes,[51] he found that all of the countries have introduced austerity measures by cutting back on social spending resulting in 'a reduced emphasis on the security dimension of flexicurity'.[52] However, as Frank Tros points out, despite the fact that the financial crisis has had the effect that flexicurity is being questioned due to less social investments being made - it remains a relevant strategy in

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[43] Lyutov, *supra* fn 40, 337.

[44] See C. Jensen, 'The Flexibility of Flexicurity: The Danish Model Reconsidered', *Economic and Industrial Democracy,* 32/4 (2011): 721, where it is explained that Denmark's success with flexicurity is more relevant to 'blue collar' than 'white collar' workers.

[45] T. Bredgaard & F. Larsen, 'External and Internal Flexicurity: Comparing Denmark and Japan' *Comparative Labour Law and Policy Journal,* 31 (2010): 745, 751. Van den Berg, *supra* fn 41, 262, advances the plausible argument that it took far-sighted employer's and employees' organisations to conclude 'a social contract that combined high levels of social protection and with low job protection.'

[46] Lyutov, *supra* fn 40, 337.

[47] L. Bovenberg & T. Wilthagen, 'On the Road to Flexicurity: Dutch Proposals for a Pathway towards Better Transition Security and Higher Labour Market Mobility', *European Journal of Social Security,* 10/4 (2008): 325-326.

[48] Bekker & Wilthagen, *supra* fn 34, 70.

[49] Ibid 72.

[50] Van den Berg, *supra* fn 41, 262.

[51] J. Heyes, 'Flexicurity in Crisis: European Labour Market Policies in a Time of Austerity' *European Journal of Industrial Relations*, (2013) (forthcoming).

[52] *Ibid* 12. The countries covered by the study are Ireland, the United Kingdom, Germany and the Czech Republic.

Europe.[53] The flexicurity approach was reconfirmed as labour market policy in the 'EU 2020 strategy' and he argues that there are no viable alternative strategies that seek to 'further develop a competitive social market economy with full employment and high levels of protection as formulated in the Lisbon Treaty.'[54]

4 ILO AND EU AGENCY WORK INSTRUMENTS

How did the ILO and EU respond to the regulation of agency work subsequent to adopting the decent work and flexicurity approaches? There can be no doubt that there has been a marked relaxation in ILO policies regarding the regulation of 'private employment agencies' (the term used by the ILO). ILO policy shifted from the position in 1919 when only public employment agencies were encouraged;[55] to 1933 when members were encouraged to abolish private employment agencies;[56] and 1997, since when private employment agencies have been legitimised.[57]

The Private Employment Agencies Convention 1997 (No. 181)[58] (Agencies Convention 1997) recognises two forms of agencies namely, where the agency becomes the employer of the agency worker and where the agency simply acts as a matchmaker between job applicants and employers.[59] It directs that signatories must introduce measures to ensure that agency workers' right to freedom of association and their right to engage in collective bargaining are protected.[60] In addition to this, signatories shall ensure that workers receive 'equality of opportunity and treatment in access to employment' and that such workers may not be discriminated against on grounds such as race, colour, sex, religion, age or disability.[61]

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[53] F. Tros 'Flexicurity in Europe: Can it Survive a Double Crisis' Working Paper presented at the ILERA Congress 2012, Philadelphia.

[54] *Ibid.*

[55] See the ILO Unemployment Convention 1919 (No. 2). The Unemployment Recommendation 1919 (No. 1) stated that members should take measures 'to prohibit the establishment of employment agencies which charge fees'.

[56] The Fee-Charging Employment Agencies Convention 1933 (No. 34). The ILO later relaxed this strict limitation when it adopted the Fee-Charging Employment Agencies Convention (Revised) 1949 (No. 96).

[57] S. van Eck, 'Employment Agencies: International Norms and Developments in South Africa' *The International Journal of Comparative Law and Industrial Relations* 28/1 (2012): 29, 31-35.

[58] Article 2(3) states that it is one of the purposes of the convention 'to allow the operation of private employment agencies as well as the protection of the workers' making use of their services.

[59] Article 1 of the Agencies Convention 1997.

[60] Article 4 of the Private Agencies Convention 1997.

[61] Article 5(1) of the Agencies Convention 1997. Article 12 directs that members shall determine with whom (namely, either the agency or the third party) the responsibilities lie in relation to: collective bargaining; minimum wages; working time and other conditions of work; social security benefits; access to training;

A 2009 ILO research paper highlights the view that economic liberalism and has led to an increasing acceptance of the potential role that agency work could fulfil.[62] The document argues that ratification 'could help to promote and implement the decent work agenda by ensuring protection of the rights and working conditions of agency workers'.[63] However, despite efforts made by the ILO to promote the ratification of the Agencies Convention 1997, only a limited number of countries have adopted it.[64] There are, arguably, a couple of weaknesses in respect of the ILO's Agencies Convention 1997. Even though the instrument proscribes discrimination on the classical arbitrary grounds of discrimination in respect of 'access to employment' it does not specify that there must be equal treatment in working conditions of agency workers and workers of the user undertaking. Furthermore, it does not make direct mention of the fact that agency work should ideally be temporary in nature, or that limits should be introduced in respect of the number of times that such appointments may be repeated.

In 2003 the Lisbon Employment Taskforce[65] recognised that 'the development of temporary agency work is impaired by legal obstacles' in a number of EU countries and they concluded that the 'removing obstacles … could significantly support job opportunities and job matching'.[66] Shortly after the adoption of the flexicurity strategy in 2007, the EU adopted the Temporary Agency Work Directive 2008[67] (the Agency Directive 2008), which has the stated purposes: of recognising 'temporary work agencies'; to provide protection to agency workers; and to establish a suitable framework which could contribute to the creation of jobs.[68] The Agency Directive 2008 is the third of a trilogy of directives which seek to balance

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protection in relation to occupational health and safety; compensation in case of insolvency; and maternity protection benefits.

[62] See ILO *Private Employment Agencies, Temporary Agency Workers and their Contribution to the Labour Market*, Issues Paper, 2009, <http://www.ilo.org/public/english /dialogue/sector/techmeet/wpeac09/wpeac-ip.pdf>, 11 March 2013.

[63] *Ibid*, 1.

[64] T. Bartkiw 'Baby Steps? Towards the Regulation of Temporary Help Agency Employment in Canada', *Comparative Labour Law and Policy Journal*, 31 (2009): 163. In 2013, Fiji was the 26th member of the ILO that had ratified the instrument.

[65] The Lisbon Employment Task Force was established in 2003 with a view to identifying the reforms necessary to achieve the objectives of the European Employment Strategy.

[66] W. Kok, 'Jobs, Jobs, Jobs – Creating more Employment in Europe' (Employment Task Force Report 2003) 29-30. B. Waas, 'A *Quid Pro Quo* in Temporary Agency Work: Abolishing Restrictions and Establishing Equal Treatment – Lessons to be Learnt from European and German Labour Law' *Comparative Labour Law & Policy Journal*, 34/1 (2012): 47, 48 confirms that there has always been marked differences in the regulatory models of agency work in the EU. Germany, the Netherlands and France traditionally had extensive limitations. Denmark, the United Kingdom and Sweden hardly regulated agency work.

[67] Directive 2008/104/EC of the European Parliament and the Council of 19 November 2008 on Temporary Agency Work.

[68] Article 2 of the Agency Directive 2008.

the social rights of non-standard employees on the one hand, and on the other, to leave room for flexible working arrangements as part of labour market regulatory strategies.[69]

The Agency Directive 2008 only covers triangular relationships and it does not apply to instances where the agency acts as matchmaker between job applicants and user undertakings.[70] The Directive states that restrictions on the use of agency work by Member States will hardly be tolerated and it provides that by the end of 2011 any prohibitions on agency work will only be acceptable if it can be 'justified on grounds of [the] general interest' of agency workers.[71] The Directive also stipulates that Member States shall not exclude from the scope of the directive part-time or fixed-term workers.[72]

The main protection included in the Agency Directive 2008, is namely that the principle of 'equal treatment' of working conditions must apply to agency workers.[73] Article 5(1) provides that the working conditions of agency workers shall be 'at least those that would apply if they had been recruited directly by that undertaking to occupy the same job'. There are two notable exceptions to the equal treatment provision. Firstly, it is permissible to exempt agency workers from equal treatment if they are engaged in open-ended contracts with agencies, which remunerate them during gaps between placements with user undertakings.[74] Secondly, it is permissible to deviate from the equal treatment provision in instances where the agency worker is not in an open-ended contract with the worker agency, but where collective agreements have been concluded that regulate the situation.[75]

Article 6 of the *Agency Directive* 2008 guarantees agency workers the right to be informed of, and the right to apply, for vacant positions in user undertakings.[76] This principle can be linked to the argument of the Lisbon Employment Taskforce Report that agency work can serve as a potential 'stepping stone' for job seekers into the labour market.

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[69] See Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on Part-Time Work and Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on Fixed-term work.

[70] Article 3(1)(b) and (c) of the *Agency Directive*, 2008. See M. Schlachter, 'Transnational Temporary Agency Work: How Much Equality Does the Equal Treatment Principle Provide', *The International Journal of Comparative Law and Industrial Relations, 28/2* (2012): 177, 180.

[71] Articles 4(1) and (2) of the Agency Directive 2008.

[72] Article 3(2) of the Agency Directive 2008.

[73] Article 5 of the Agency Directive 2008.

[74] Article 5(2) of the Agency Directive 2008.

[75] Article 5(3) of the Agency Directive 2008. Waas, *supra* fn. 66, 54-60 identifies a number of practical problems associated with collective agreements and the actual protection it provides as applied in Germany. One of the issues is, namely that trade unions are willing to agree to lower salaries for agency workers compared to those workers who have open-ended contracts.

[76] Article 6(1) of the Agency Directive 2008. It also provides that any agreement which may have the effect of preventing agency workers from concluding contracts of employment with a user undertaking after his or her assignment will be declared null and void.

Commentators point to problems associated with the implementation of the equal treatment provision.[77] Bernd Waas alludes to the fact that the equal treatment principle can be disposed of by means of collective bargaining and that in Germany, the Act on Temporary Work allows for a situation where it is sufficient to refer to collective agreements if the parties themselves are not bound by a collective agreement.[78] As a consequence, as long as the employment relationship falls within the area of the collective agreement's ambit, a mere reference to the relevant collective agreement in the temporary agency worker's contract of employment is sufficient to circumvent the equality principle.[79]

Isolated studies indicate that selected categories of job seekers, such as migrant workers and students, do benefit by means of agency work to gain entry into secure jobs.[80] However, there is no evidence that the policy is a magic cure to curb unemployment. Since the 2008 financial crisis unemployment has steadily been on the increase. Statistics indicate that by the first quarter of 2008, EU-27 unemployment was at a relative low rate of 6.7 per cent. In January 2012 it was 10.1 per cent and it grew to 10.8 per cent in January 2013.[81] However, while the unemployment rate rose substantially in most OECD countries, it declined in Germany and remained in the range of 3.5 to 5.5 per cent in countries such as Austria, Luxembourg, the Netherlands, Norway and Switzerland.[82]

5 NAMIBIA AND SOUTH AFRICA

5.1 INTRODUCTION

The legal and social contexts within which Namibia and South Africa's policies are formulated bear a number of similarities. Both countries are member of the ILO, neither are signatories to the ILO's Agencies Convention 1997 and both have a modern constitution

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[77] Schlachter, *supra* fn. 70, 181.

[78] Waas, *supra* fn. 66, 54.

[79] *Ibid.*

[80] M. Rosholm, 'Is Temporary Agency Employment a Stepping Stone for Immigrants' (IZA, Discussion Paper No. 6405 (2012) 1. At 7 the author mentions that agency work 'is particularly effective for immigrants from non-western countries, which may be a consequence of employers having difficulties assessing the productivity of workers with different ethnic backgrounds. … As immigrants perform better than natives, it is plausible to presume that the acquisition of language skills on the job planes the path to regular jobs.'

[81] D. Autor, 'The Economics of Labor Market Intermediation: An Analytical Framework' in D. Autor (ed) *Studies in Labor Market Intermediation*, (Chicago: The University of Chicago Press, 2009) 1-23.

[82] J. Martin, 'Editorial: Achieving a Sustainable Recovery – What Can Labour Market Policy Contribute?', *OECD Employment Outlook 2012*, (2012): 12. See also European Commission Eurostat, <http://epp.eurostat.ec.europa.eu/statisticsexplained/index.php/Unemployment_statistics>, 16 March 2013.

containing a Bill of Rights,[83] which include the rights to equality, freedom of association and the right to engage freely in trade or occupation.[84] As will become apparent in the discussion that follows, the right to engage freely in trade or occupation and the constitutional obligation to take account of international law when interpreting national law,[85] have played a mentionable role in relation to the development of policies regarding agency work in the two countries.

The socio-political contexts also bear some resemblances. Both countries were for many years governed by a minority of predominantly white members of society before piloting their first democratic elections. The white population exercised both political and economic power until the early 1990s when first Namibia, and then South Africa transformed into social democracies under their then new Constitutions. In both countries political power has been transferred, but economic muscle is only gradually crossing racial lines.[86] In addition, these neighbouring countries have been subjected to long periods of structural unemployment. Currently, Namibia has an estimated unemployment rate of 37,6 per cent,[87] compared to South Africa's figure of 36,7 per cent.[88] Added to this, the issue of agency work has been heavily debated and has become a bone of contention in both countries. However, this is where the similarities end. Namibia has a relative small population of 2,2 million people[89] compared to its relatively large neighbour with its 52.98 million inhabitants.[90]

5.2 NAMIBIA

[83] See Chapter 3 of the Constitution of Namibia, 1990 and Chapter 3 of the Constitution of South Africa, 1996.

[84] Sections 10, 21(e) and (j) of the Namibian Constitution and sections 9, 22 and 23 of the South African Constitution.

[85] Section 95(d) of the Namibian Constitution and sections 39(b)-(c) and 232 of the South African Constitution.

[86] Benjamin, *supra* fn. 5, 35.

[87] G. Kanyenza and F. Lapeyre 'Growth, Employment and Decent Work in Namibia: A Situation Analysis', ILO Employment Working Paper No. 81, 2012): ix, 5 and 6 indicate that unemployment has increased from 20.2 per cent in 2000 to 37.6 per cent in 2008. It must be noted that it is difficult to access reliable unemployment statistics for Namibia.

[88] Statistics South Africa, *Quarterly Labour Force Survey*, Quarter 1 2013, vi, http://www.statssa.gov.za/publications/P0211/P02111stQuarter2013.pdf, 14 May 2013. According to the report 25,2 per cent of the unemployed are still looking for jobs. 36,7 per cent represent all of the unemployed, also those who have become discouraged to look for jobs.

[89] Kanyenza & Lapeyre, *supra* fn. 87, 5. This was the estimate during 2010.

[90] Statistics SA, http://www.polity.org.za/article/sa-statement-by-statistics-south-africa-on-mid-year-population-estimates-for-2013-14052013-2013-05-14, 14 May 2013.

Namibia is a late starter in respect of the regulation of agency work.[91] Namibia gained independence from South Africa in 1990 and its first set of post-independence labour legislation came into force in 1992.[92] Even though the Namibian Labour Act 1992 bolstered labour rights of persons in formal employment, the Act contained no provisions regarding 'labour hire' (as it is referred to in Namibia).[93] As if caught off-guard, the incidence of non-standard work grew exponentially during the era of post-independence. According to Gilton Klerck the labour force of the largest labour hire company soared by 600 per cent during a three year period between 1999 and 2002.[94] By the mid-2000s Namibia's agencies placed approximately 10 000 to 16 000 agency workers in the predominantly unskilled market.[95] Non-standard jobs thrived in the intersection between the regulated formal sector and those who are counted as unemployed.[96]

In a significant turn of events, Namibia shifted from the non-regulation of agency work to the prohibition thereof in 2007.[97] This is in stark contrast to developments at the level of the ILO and the EU. There is no indication that policy makers were mindful of the international labour market approach, which seeks to strike a balance between the recognition of agency work and the protection of agency workers. The Namibian Labour Act 2007 stipulated that no person may 'for reward, employ any other person with a view of making that person available to a third party'.[98] Nonetheless, this bar against agency work did not last very long. In 2012 the Labour Act 2007 was amended and it currently recognises 'private employment agencies'.[99] Added to this, the Employment Service Act 2011[100] makes provision for the establishment of a public employment bureau and for the registration of private employment agencies.

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[91] The ILO adopted the Agencies Convention in 1997 and South Africa first attempted to regulate agency work in 1982.

[92] Labour Act 1992 (No. 6 of 1992).

[93] Namibia's Labour Act 2004 contained detailed regulations about labour hire but although parliament passed this Act it never came into force.

[94] G. Klerck, 'Rise of the Temporary Employment Industry in Namibia: A Regulatory Fix', *Journal of Contemporary African Studies*, 27/1 (2009): 85, 89.

[95] H. Jauch, 'Namibia's Ban on Labour Hire in Perspective', *The Namibian*, 3 August 2007; P. Benjamin, 'To Regulate or to Ban? Controversies Over Temporary Employment Services in South Africa and Namibia', in K. Malherbe & J. Sloth-Nielsen (eds.), *Labour Law Into the Future: Essays in Honour of D'Arcy du Toit* (Cape Town, Juta, 2012): 189, 202. Taking account of the fact that Namibia has a population of approximately 2,2 million people, this is a significant number.

[96] Klerck, *supra* fn. 94, 85.

[97] Section 128(1) of the Labour Act 2007 (No. 11 of 2007), published on 12 December 2007.

[98] Section 128(1) of the Labour Act 2007. Section 128(2) did, however, recognise a situation in terms of which a person 'offers services of matching offers'.

[99] Labour Amendment Act 2012 (No. 2 of 2012).

[100] The Employment Service Act 2011 (No. 8 of 2011).

What was the reasoning behind the initial ban and what caused the regulatory U-turn? Agency work became a political hotbed in the run-up to adoption of the Labour Act 2007. In the national assembly members referred back to an era when workers 'were brought in from the North with tickets around their necks saying they are going to be sold'.[101] Some members likened agency work to the years when attempts were made to regulate the slave trade 'to make it a bit [more] humane'.[102] Debates were overshadowed by the country's political history rather than by labour policy issues when the ban was introduced. The about turn to recognition was brought about by a judicial challenge. As mentioned, the Namibian Constitution protects all persons' right to 'practise any profession, or carry on any occupation, trade or business'.[103] In *Africa Personnel Services*[104] an agency challenged the constitutionality of the prohibition and the Supreme Court lifted the ban by declaring the limitation unconstitutional.[105] The Court held that the policy makers' reliance on the immorality of agency work did not justify such a disproportional limitation of the right to freedom to occupation.[106] Influenced by the ILO's Agencies Convention 1997[107] the Court concluded that rather than placing a blanket ban on agency work, the industry could have been regulated.[108]

The Namibian Cabinet responded by publishing a media release stating that it had decided that 'the Constitution will have to be amended to authorise the banning of labour hire or, alternatively, stringent new legislation must be enacted' to regulate such work.[109] Consideration of the option of amending the Constitution is further indication of the extent to which the Namibian government's opinion had hardened against agency work. After this, Namibia promulgated the Employment Service Act 2011 and the Labour Amendment Act 2012,[110] which recognise, but severely limits, the existence of agency work. Namibia currently recognises three categories of private employment agencies. Firstly, agencies

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[101] See *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia & others* (2011) 32 *ILJ (South Africa)* 205 (Nms), para [7].
[102] *Ibid.*
[103] Section 21(j) of the Constitution of Namibia.
[104] See *Africa Personnel Services*, *supra* fn. 101; Van Eck, *supra* fn. 57, 29.
[105] Benjamin, *supra* fn. 95, 205 criticises the initial High Court decision due to the fact that the Court had failed to reconcile its view with the ILO's Agencies Convention 1997.
[106] *Africa Personnel Services*, *supra* fn. 101, at para 67.
[107] Section 95(d) of the Namibian Constitution provides that the state shall foster 'respect for international law and treaty obligations'.
[108] *Africa Personnel Services*, *supra* fn. 101, para 99.
[109] Cabinet of Namibia, *Media Release from Cabinet Chambers*, <http://209.88.21.36 /opencms/opencms/grnnet/MIB/modules/news/news_0018.html?uri=/grnnet/MIB/archive/media/index.html>, 18 March 2013.
[110] Section 1 of the Employment Service Act 2011, as substituted by section 8 of the Labour Amendment Act 2012, defines 'place' to mean 'place, engage, refer, recruit, procure or supply an individual, to work for an employer or a prospective employer'.

rendering services of 'matching' offers and applications for employment; secondly, agency work 'consisting of engaging individuals with a view to placing them to work for an employer which assigns their tasks *and supervises the execution* of those tasks' (emphasis added); and, finally 'other services' relating to job seeking.[111]

Agency workers are protected in three key ways. In instances where private employment agencies 'engage' individuals and 'place' them with a user undertaking, such individuals are regarded as employees of the user undertaking and not the private employment agency.[112] Added to this, agency workers have the same collective bargaining rights as other workers in the employ of the user undertaking.[113] And finally, such workers may not be appointed on terms and conditions of employment that are less favourable than those that apply to other workers who perform similar work at the user undertaking.[114]

Returning to the definition of the second type of private employment agency, it is patent that it seeks to protect workers who work under the 'supervision' of user undertakings. In an interview with a prominent Namibian labour law attorney it has been confirmed that existing agencies are contemplating to place their own mangers at user undertakings to supervise agency workers.[115] This, they argue, could have the effect of removing their activities from the scope of regulated agency work.

In order to prevent a similar constitutional challenge as the one launched in *Africa Personnel Services*, the Labour Act 2007 now contains an exception to the rule that the user undertaking becomes the employer in respect of all agency workers. A user undertaking, supported by both the private employment agency and the affected employee may apply to the authorities to be exempt from the limitation that the user undertaking must be the employer in the triangular relationship.[116] Should such an exemption be granted, the user undertaking and the private employment agency will both be deemed to be the employer of the agency worker.[117]

A number of observations can be made regarding the way in which Namibia is currently regulating agency work. Firstly, policy makers have not been persuaded by ILO or EU policy which accepts that agencies become the employer in triangular relations.

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[111] Section 1 of the Employment Services Act 2011, as substituted by section 8 of the Labour Amendment Act 2012.

[112] Section 128(2) of the Labour Act 2007, as substituted by section 6 of the Labour Amendment Act 2012 and section 1 of the Employment Service Act 2011 as substituted by section 8 of the Labour Amendment Act 2012.

[113] Section 128(3).

[114] Section 128(4)(a)-(b). Section 128(5)(a)-(b) also protects existing workers of the user undertaking. Agency workers may not be placed at an undertaking during a strike or lockout or within six months after workers have been dismissed performing 'similar work or work of equal value'.

[115] Interview with Pieter de Beer, of De Beer Law Chambers, on 23 March 2013 in Pretoria.

[116] Section 128(8), as substituted by section 6 of the Labour Amendment Act 2012.

[117] Section 128(9), as substituted by section 6 of the Labour Amendment Act 2012.

There is no semblance between the EU Agency Directive 2008 which requires that restrictions on agency work will only be 'justified on grounds of general interest' of agency workers.[118] Secondly, the Namibian government is not contemplating the possibility that a balance between flexibility and security could serve as a catalyst to assist workers to enter the job market. Thirdly, it is arguable that the latest amendments may yet be held to be unconstitutional. Agencies have since the 1990s functioned on a model in terms of which they acted as employer of agency workers. In terms of the exception to the rule, it is only possible for a user undertaking to apply and this precludes agencies from initiating the process. Finally, strategies are already being devised to seek loopholes in the Namibian model by, for example, placing managers at user undertakings who will supervise workers of agents to circumvent being classified as a private employment agency. This supports the argument that it may be more appropriate to regulate, than to ban.

5.3 SOUTH AFRICA

During the early 1980s South Africa implemented its first steps to regulate so-called 'labour brokers'. In 1982 the former Labour Relations Act 1956[119] (LRA 1956) was amended to define an agency as any person who for reward procures services of workers to perform work for 'clients' and for which service 'such persons are remunerated by the labour broker'.[120] The LRA 1956 further provided that the agency was 'deemed' to be the employer of the agency worker and all labour agencies had to register with the authorities. The concern at the time was that agency work was structured in such a way that workers were not receiving the protection of statutory wage regulations.[121]

Some thought went into establishing a balance between the protection of workers' rights and labour market regulation during the formulation of post-apartheid labour policy. The country held its first post-apartheid elections in 1994 and in January 1995 a Ministerial Task Team produced an Explanatory Memorandum[122] which was the forerunner to the current Labour Relations Act 1995 (LRA 1995).[123] The Task Team expressed the sentiment that the draft Bill seeks 'to balance the demands of international competitiveness and the

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[118] Articles 4(1) and (2) of the Temporary Agency Directive 2008.
[119] Labour Relations Act 1956 (No. 28 of 1956) amended by Labour Relations Amendment Act 1982 (No. 51 of 1982).
[120] Section 1(3) of the LRA 1956.
[121] See H. Cheadle, 'Labour Relations Amendment Act 51 of 1982', *ILJ (South Africa)*, 4 (1983): 31, 37.
[122] The 'Explanatory Memorandum Prepared by the Ministerial Task Team' *ILJ (South Africa)*, 16 (1995): 278, 280 states that the 'Task Team was assisted throughout by the ILO . . . and . . . world-class experts . . . [helped] the team: Dr B Hepple, Master of Clare College, Cambridge; Professor A Adiogun, University of Lagos, Nigeria; and Professor Manfred Weiss, University of Frankfurt, Germany'.
[123] Labour Relations Act 1995 (No. 66 of 1995).

protection of fundamental rights of workers' and it sought to 'avoid the imposition of rigidities in the labour market'.[124] In addition to this, shortly after the finalisation of the first set of post-democratic labour laws, an ILO Country Review[125] influenced leading South African commentators to develop the notion of 'regulated flexibility'.[126] This concept allows space within which standards can be adapted to suit the needs of workplaces. This South African brand of balanced flexibility and regulation includes a number of mechanisms, of which the most prominent one concerns the selective application of legislative standards on lower and higher earning employees and larger and smaller businesses.[127] At the time when flexicurity was debated in the EU, the South African Government briefed Halton Cheadle to consider the conceptual underpinnings of regulated flexibility as it applied in the 1990s.[128] In a sobering report Cheadle points out that the legislative reforms occurred when no coherent labour market policy had existed. The phased and urgent nature of the reforms resulted in piecemeal negotiations about specific statutes and it prevented the formation of a logical integrated set of labour laws.[129]

Returning to the first set of post-democratic labour legislation, the LRA 1995 introduced the term 'temporary employment service' and unfortunately established a loosely regulated environment within which categories of agency workers are to this day being exploited. Under the current model:[130] the agency is recognised as the employer; the agency and the user undertaking are jointly and severally liable for transgressions of bargaining council agreements and the provisions of the BCEA 1997;[131] and despite using the term 'temporary employment services' there is no protection regarding the indefinite employment of agency workers. Added to this, there is no obligation which requires agencies to register or to adhere to requirements set by the authorities.

Similar to the situation in Namibia, South Africa experienced exponential growth of agency work during the past 15 years.[132] The above mentioned ILO Country Review[133]

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[124] Explanatory Memorandum, *supra* fn. 130, 285 – 286.

[125] G. Standing, J Sender, & J. Weeks, *Restructuring the Labour Market: The South African Challenge: An ILO Country Review*, (Geneva: ILO 1996).

[126] H. Cheadle, 'Regulated Flexibility: Revisiting the LRA and the BCEA' *ILJ (South Africa)* 27 (2006); 663, 668 mentions that the 'concept of regulated flexibility was developed by Paul Benjamin and based on the approach to flexibility outlined in the *ILO Country Review*'.

[127] So for example, the Employment Equity Act 55 of 1998 imposes a duty on employers with 50 and more workers to implement affirmative action measures. Cheadle, *Ibid.*, 669, makes mention of other mechanism such as voice regulation, administrative discretion and soft law.

[128] Cheadle, *supra* fn. 128, 663.

[129] *Ibid*., 666.

[130] S 198(1)-(2) of the LRA 1995.

[131] S 198(4) of the LRA 1995.

[132] P. Benjamin, 'Decent Work and Non-standard Employees: Options for Legislative Reform in South Africa' *ILJ (South Africa)* 31 (2010): 845.

[133] *ILO Country Review*, *supra* fn. 133, 95.

estimated that in 1995 100 000 workers were placed by agencies and in 2010 the National Association of Bargaining Councils estimated that this number had grown to 780 000.[134] A growing collection of research by the Department of Labour and commentators confirms that the current regulation of agency workers is inadequate. Employees placed by employment agencies are paid significantly less than their permanent counterparts at the same workplace;[135] employment agencies have been used to convert indefinitely employed employees to independent contractors of agencies;[136] and, agency workers have widely been employed for indefinite periods.[137]

The South African social partners have been at odds regarding the way forward.[138] Trade unions argue that employment agencies should be prohibited and organised business is in favour of the retention of agencies, but they agree that there is a need for improved regulation. Subsequent to protracted negotiations, an inappropriate package of amendments to the LRA 1995, the BCEA 1997 and the Employment Equity Act 1998 was suggested towards the end of 2010. The amendments proposed to repeal the current section of the LRA which provides that the agency is the employer in the triangular relationship. A new definition of 'employee' was suggested in terms of which a person could only be an employee if such person works 'under the direction or supervision of an employer'.[139] This reminds of the position in Namibia.

The idea to change the definition of 'employee' in order to dash the triangular agency worker relationship was ill conceived. A persuasive Regulatory Impact Assessment Report[140] condemned the proposed amendments and noted that there is a

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[134] Benjamin, *supra* fn. 95, 200.

[135] Department of Labour, 'Synthesis Report: Changing the Nature of Work and "Atypical" forms of Employment in South Africa', (unreported 2004), as referred to in Benjamin, *supra* fn. 95, 196; P. Benjamin, H. Bhorat, C. Van der Westhuizen & S. Van der Westhuizen, 'Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill, 2010, Employment Equity Amendment Bill, 2010, Employment Service Bill, 2010', Report Prepared for the Department of Labour and the Presidency', <http://www.labour.gov.za/downloads/legislation/bills/proposed-amendment-bills/FINAL_ RIA_ PAPER_13Sept2010.PDF>, 10 March 2013, 32-34.

[136] *Ibid.*

[137] Regulatory Impact Asessment Report, *supra* fn. 137, 32; C. Bosch, 'Contract as Barrier to "Dismissal": The Plight of the Labour Broker's Employee', *ILJ (South Africa)*, 29 (2008): 831.

[138] The contrasting views are contained in Parts A, B, C and D of the unpublished *Draft NEDLAC Report on Atypical Forms of Employment* (2009).

[139] Clause 23 of the 2010 Labour Relations Amendment Bill. The South African statutory presumption as to who is an employee (section 200A of the LRA 1995) contains a basket of indicators (such as whether a person forms part of the organisation where work is performed; a person is economically dependent on the person for whom works is performed; and the person is provided with tools of trade) to assist to determine who is an employee. This rebuttable presumption only applies to employees who earn below the threshold amount of R183 008 per annum.

[140] Regulatory Impact Asessment Report, *supra* fn. 137.

'prominent risk … that this would violate the Constitution'.[141] The Report resulted in the Bills being scrapped[142] and a new, more sensible but not flawless, set of amendments were tabled in 2012. The Labour Amendment Bill 2012,[143] which is currently under discussion, builds on the South African approach of regulated flexibility. It recognises agency work and aims to improve especially low-paid workers' security. Added to this, the Employment Services Bill[144] makes provision for the registration and licencing of agencies. The key principles which underpin the 2012 amendments can be summarised as follows:

- The amendments for the first time introduce detailed protection in respect of three types of non-standard work, namely agency work, fixed-term work and part-time work.[145]
- The improved protection is aimed at agency workers earning below the threshold amount of R183 008 per annum.[146] The *status quo* remains in respect of workers earning above the earnings threshold.[147]
- The agency is the employer in the triangular relationship. However, in respect of employees earning below the threshold, the user undertaking is deemed to be the employer of the agency worker if such worker is no longer rendering a 'temporary service', which is less than 6 months of employment.[148]
- Agency workers who are deemed employees of the user undertaking must, on the whole, not be treated 'less favourably' than an employee performing similar work.[149]

Indications are that the amendments to the LRA 1995 will be implemented towards the beginning of 2014. Comparing the Bills to the standards set by the ILO and the EU, there are a number of aspects that are absent which should arguably have been included in the suggested amendments. Firstly, there is no provision which guarantees agency workers the right to be informed of (and the right to apply) for vacant positions in user

[141] *Ibid.,* 5.
[142] C. Carol, 'Just a Temporary Draft', *Financial Mail*, 2 June 2011, 2, states that '[r]epresentatives of business, labour and government … have agreed to step away from the amendments that were published by the Department of Labour in December … [T]he fact that Cosatu was willing to start afresh rather than insist on holding on to the December draft, which banned labour brokers outright, is a positive development'.
[143] [B 16 - 2012] available at <http://www.labour.gov.za/>.
[144] [B 38 - 2012] available at <http://www.labour.gov.za/>.
[145] Section 198A (agency work), 198B (fixed term contracts) and 198C (part-time employment) of the LRA 1995, inserted by section 44 of LR Amendment Act 2012.
[146] *Regulation Gazette*, No 9770, 1 June 2012. At the Rand Euro exchange rate as on 3 May 2013 it amounts to approximately €15 601.07 per annum.
[147] Section 198A of the LRA 1995, inserted by section 44 of LR Amendment Act 2012 only applies to employees earning below the abovementioned earnings threshold.
[148] Section 198A(3)(b) of the LRA 1995, inserted by section 44 of LR Amendment Act, 2012.
[149] Section 198A(5) of the LRA 1995, inserted by section 44 of LR Amendment Act 2012.

undertakings.[150] Secondly, the Bills do not provide protection to agency workers against agreements which may have the effect of preventing agency workers from concluding contracts of employment with user undertakings after the conclusion of their assignments. Thirdly, no provision is made for an exemption pertaining to the equal treatment principle in instances where agency workers receive a guarantee of being paid by their agency between assignments. Lastly, the same emphasis on more protection for lower earning workers is absent in the decent work and flexicurity approaches. This, however, is an aspect which is in line with South Africa's brand of regulated flexibility, which allows for the protection of core rights with some room of flexibility in respect of higher-earning workers.

6 Concluding Remarks

The title of the contribution poses the question whether Namibia and South Africa can gain lessons from ILO and EU labour policy developments. The answer is yes, but caution should be heeded as the socio–economic contexts of countries differ and the EU is in a vastly different stage of development compared to the situation of the countries under discussion.

Firstly, the countries under discussion and the EU are faced with the challenge of growing unemployment rates. The EU has adopted active policy directions which seek to improve the competitiveness of Member States with the view of reducing unemployment. The ILO's decent work agenda, which shifted the focus of labour law from a rights based-methodology to one that also stresses the creation of sustainable jobs, paved the way for changes in labour market policy by the EU. This change is based on a multi-pronged balancing act, which seeks to harmonise the protection of workers' rights within a more flexible labour market environment. This approach is based on a number of pillars which support the strategy, namely social security protection, emphasis on investments in training, social dialogue and flexible working arrangements. It is argued that policy makers and academics in the Southern African region should be encouraged to engage in more debate regarding the merging of strategies which may stimulate job creation in harmony with the protection of workers' rights whenever labour policy is being formulated.

Secondly, agency work has become an accepted (and regulated) form of employment at the international level. Amongst others, agency workers are protected by means of equal treatment provisions and the right to apply for jobs at user undertakings. On the face of it, Namibia has introduced measures which not only protects agency workers, but which also establishes barriers against agency work. Arguably, these restrictions may yet be

[150] Article 6(1) of the Agency Directive 2008.

held to be unconstitutional. South Africa's latest legislative proposals are closer to ILO and EU policy. Protective measures are currently being extended in terms of its own brand of regulated flexibility. Against the background of weak legislative protection granted to agency workers in the past, protection is now being extended to lower earning workers and flexible practices remain in place in respect of higher-earning workers.

Thirdly, the decent work and flexicurity approaches do not offer magical solutions to the alleviation of unemployment and unrealistic expectations should not be harboured. Some countries are more suited for the implementation of market regulatory strategies than others. Evidence indicates that countries are more likely to be able to strike a balance between security and flexibility where there is a measure of responsible social dialogue. In a number of EU Members States flexibility is counterweighted by sound social security protection which serves as a safety net during transitions between jobs. In Namibia and South Africa the improvement of social security platforms, the integration of spending on training and social security and flexible working arrangements should in a harmonised fashion be added to the debate when formulating policies that may improve unemployment rates. Furthermore, there is evidence that the flexicurity strategies adopted in the EU were not effective in curbing the growth of unemployment figures during the era of the 2008 economic crisis.

However, two convincing arguments point in the direction that policy makers have no choice but to continue along the lines seeking the appropriate balance between regulation and flexibility. First, it is impossible to measure what the effect would have been had flexicurity policies not been implemented during the time of the economic crisis in the EU. It is possible that the growth in unemployment could have been higher during the economic crisis had it not been implemented. And second, what is the alternative? Should policy makers merely rely on the protection of fundamental workers' rights without seeking to establish a nuanced policy framework which attempts to harmonise the rights and responsibilities of the major stakeholders in the marketplace. Such an approach, to say the least, would be divorced form realities on the international front and does not seem sustainable.