ANALYSIS OF THE IMPACT OF PRIVATISATION ON THE DEVELOPMENT OF LABOUR LAW IN SADC WITH A FOCUS ON SOUTH AFRICA

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DECLARATION

I, Luyando Martha Katiyatiya hereby declare that this dissertation is original and has never been presented in any other institution. I also declare that any secondary information used has been duly acknowledged.

DEDICATION

To my family, You inspire me to succeed in life.

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TABLE OF CONTENTS

CHAPTER 3: INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK GOVERNING LABOUR RELATIONS

CHAPTER 4: PRIVATISATION AND ITS IMPACT ON LABOUR IN SOUTH AFRICA

LIST OF ABBREVIATIONS

SOEs	**State Owned Enterprises**
IMF	**International Monetary Fund**
WB	**World Bank**
SADC	**Southern Africa Development Community**
ECOWAS	**Economic Organisation of Western African States**
ILO	**International Labour Organisation**
EU	**European Union**
ESC	**European Social Charter**
UDHR	**Universal Declaration of Human Rights**
ICESCR	**International Covenant on Economic Social and Cultural Rights**
ICCPR	**International Covenant on Civil and Political Rights**
OECD	**Organisation for Economic Cooperation and Development**
SSA	**Sub-saharan Africa**
GDP	**Gross Domestic Product**
IBRD	**International Bank for Reconstruction and Development**
IDA	**International Development Association**
IFC	**International Finance Corporation**
MIGA	**Multinational Investment Agency**
FDI	**Foreign Direct Investment**
TNCs	**Transnational Corporations**
MNCs	**Multinational Corporations**
TELKOM	**Telecommunications Company**
DENEL	**South African Defense Company**
ESKOM	**Electricity Cooperation**
COSATU	**Congress of South African Trade Union**

NEDLAC	**National Economic Development and Labour Council**
ANC	**African National Congress**
RDP	**Reconstruction Development Program**
GEAR	**Growth Employment and Redistribution**

SUMMARY

Structural adjustment programmes like privatisation do not operate in a vacuum. They are brought into operation through role players like International Monetary Fund, the World Bank, the State and Transnational Corporations/Multinational Corporations and other non-state actors. The operations of such programmes have been received with hostility from the trade unions and the public at large in South Africa and SADC in general. The implications of privatisation on labour reveal that there is an inter-relationship between labour and privatisation thus affecting the development of labour law. With the involvement of private service providers issues of safeguarding of workers' rights arise.

Analyses around privatisation have been on-going for more than two decades. They have mainly discussed privatisation from an economic point of view and on the decorum of shifting control from the State to private hands. An analysis of whether privatisation has an impact on the development of labour law and enjoyment of labour rights remains hardly researched.

This study attempts such an analysis. Is privatisation undermining labour laws? How much protection should be placed on the rights of workers? Is it expendable when it comes to getting foreign investments and pursuit of structural development programmes? Who is responsible for the labour regulation during and after privatisation? Do the respective states and non-state actors ever consider the impact it would have on labour rights and the protection of workers? Is there a universal standard for labour regulatory framework in privatisation? If not is it possible for such a framework to be in place? Does privatisation impose any challenges to the traditional labour regulatory framework? And finally: what can be done? Can privatisation process itself be restructured in a manner which allows a well built monitoring and regulatory mechanism to ensure it works coherently with the labour laws rather than interfere with or violate the rights of workers?

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND STUDY

Privatisation has become an integral component of the globalisation process, implying the taking over by private parties of several services and functions traditionally covered by the state. Privatisation programs have spread around the world within the last decades. Following the view expressed by W.L. Megginson, one of the most relevant scholars in this field, "privatisation has been a major force in world politics and economics for the past 25 years, and has dramatically reduced the role of state owned enterprises in both developing countries".[1]

Privatisation (sometimes referred to as "denationalisation" or especially in India, "disinvestment") is the process of transferring property from public ownership to private ownership and /or transferring the management of a service or activity from the government to the private sector.[2] It involves a process where the government gradually and progressively eliminates their involvement in direct service provision while maintaining responsibility and authority over key functions such as standardization, certification and accreditation.[3] Privatisation does not only refer to a transfer of ownership (direct sale of state assets) but also passing on of government functions to private companies (a process referred to as out-sourcing or contracting-out). Even the running of State Owned Enterprises (SOEs) on market-like basis is a form of privatisation, known as commercialisation. Privatisation thus comes in very different forms, which unions and other civil society have to understand if they want to engage with this process.[4]

In order to privatize and draw possible private sector investors, the state must first reform its SOEs and services to make them financially feasible. The private sector is not up to buying up all assets which the government is willing to let go. The private sector carefully consider such, as telecommunications tend to get fully sold off, while less profitable SOEs (such as water) tend to be subject to "public-private partnerships" with the state retaining ownership

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[1] W.L. Megginson, "Privatisation in perspective: the last twenty years", in *Teoria y Politica de privatisaciones: su contribucion a la modernisacion economica. Analisis del caso espanol* (Madrid: Fundacion SEPI, 2004) 45.
[2] www.google.co.za/url?sa=1&q=http://en.wikipedia/wiki/Privatisation.(accessed 23 August 2007).
[3] www.delivery.org/guidelines/policy/pg-4-2.htm.(accessed 23 August 2007).
[4] As above.

while entering into some kind of service contract with a private company. Also, because privatisation is sometimes in disagreement with the national development goals, governments may be hesitant to entirely sell off certain utilities (like water and energy) and may as an alternative prefer to enter into partnership arrangements with the private sector.[5]

However, privatisation should be understood as a principle dynamic (i.e., both cause and effect) of globalisation.[6] It is not simply one means among others for making government more efficient or for growing the private sector. Nor is it just a reflection of current political trends and a swing of the regulatory pendulum from liberal to conservative. Rather, the increasing reliance on "the new governance" is indicative of a changing relationship between the market and the state. It is characterised by a fusion of public and private values, rhetoric and approaches, a fusion that is itself integral to the fusion of global and local economies. Privatisation is the result of these fusions.[7]

The fusion, in effect, increases the exposure of the state to external economic and political pressures that tend to accelerate globalisation, in large part, because private actors fully exposed to the global economy now carry out the delegated tasks.[8] The global political economy places great pressures on all entities – public and private – to be cost effective if they wish to be competitive. This encourages such delegations on the part of the state and it raises concerns over whether the cost savings that result from such public delegations to private entities occur at the expense of democratic processes, realisation of labour and human rights as a result affecting the legitimacy and individual justice.[9]

During the previous decades fundamental structural change has taken place on a global scale, including in Southern Africa. This process of change has primarily taken the route of liberalisation, privatisation and deregulation of nation-state economies and a general commitment to trade liberalisation: - i.e. the removal of tariff as well as non-tariff barriers. A well accepted idea of the states has been to promote a general supposed lack of national capital and savings with Foreign Direct Investment (FDI), which has drove many – if not all – Southern African Development Community (SADC) countries to implement special laws,

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[5] Herbert Jaunch, "Privatisation African Experiences" <www.alrn.org/modules.php?op=modload&name=News&file=article&sid=234(accessed 22 August 2007)
[6] See Koen De Feyter & Felipe G'omez Isa , *Privatisation and Human Rights in the Age of Globalisation*, Intersentia Antwerp- Oxford 2005 (eds.) p 103.
[7] As above.
[8] As above.
[9] As above.

acts and decrees that will promote such a policy. Such implementation has led to the flexibilities of labour laws in these countries to accommodate FDI and the selling of SOEs to the private sector. This seems to have occurred and still is at the expense of workers and the change in the modes of production.

The International Monetary Fund (IMF), World Bank (WB) and other supporters continue to claim that privatisation benefits a country's development by bringing about greater economic efficiency; the experiences so far show a different picture. Pursuant to privatisation in South Africa, Congress of South African Trade Union (COSATU)[10] has indicated that privatisation (including commercialisation) often leads to substantial job losses. Private management quickly closes down less profitable operations, typically those that serve the poor. They do not take political or social responsibility for the survival of the workers who lose their jobs. Furthermore, where companies plan to list shares, they often want to look lean and cash rich – and subcontracting or downsizing help in achieving that aim, although sometimes at substantial long-term cost to the company and the country.[11]

The current development in the SADC region gives reason for grave concern. Many countries in their quest to attract needed foreign investment are willing to offer potential investors conditions that undermine laws and ILO core conventions, which result in:

- Low minimum wages
- Violations of human rights and Trade Union Rights
- No obligations to contribute towards employees social benefit

This, together with the widespread use of tax exemption and expatriation of profit to attract investors, leads to impoverishment of workers without generating income or capacity building to develop the countries and the welfare of its citizens. Services of general interest (water, energy, infrastructure, transport, health and education) play an important role in the development of countries and the welfare of its citizens. The demands for privatisation or

[10] South Africa trade union which was launched in December 1985 after four years of unity talks between unions opposed to apartheid and committed to a non racial, non sexist and democratic South Africa. <www.cosatu.org/aboutcos.htm (accessed 27 August 2007).

[11] COSATU Position Paper on Privatisation Tabled at NEDLAC, 30 July 2001, Resources Mobility <www.cosatu.org.za/docs/2001/privatpp.htm#dp (accessed 27 August 2007).

restructuring of the SADC economies means loss of jobs, undermining of the availability of these basic public services and result in closure of local production.[12]

The research has preferred SADC as a region for the study to explore a common and distinct pattern across variance. Privatisation is a common pattern being undertaken by governments and has been undertaken by various Asian and European countries like the United Kingdom, which is a forerunner in the privatisation regime dating back to the 1970s.[13] Privatisation became a common phenomenon in the last two decades of the 20th century. In 1984, the first British state-owned utility, British Telecom, was privatised. At that point in time, it was the largest initial public offering made on any stock exchange. Over the next ten years, almost all state owned industries were subjected to privatisation.[14]

Most Southern African countries on the other hand, started to take part in the regime at a later stage with South Africa in the 1980s under the apartheid government and the current government is in the process of privatising its major SOEs.[15] Consequently, it should be noted that privatisation takes one deeply into domestic legal systems: into constitutional and administrative law, but also into laws regulating the functional of the labour market. Labour rights protection needs to be organised in the specific legal context of the relevant country where privatisation occurs, and thus requires intimate knowledge of the relevant domestic legal system. The design of labour rights protection needs to respond to the specific domestic legal context. In this way, this study seeks to reflect on how privatisation has impacted on the development of labour law in SADC with a focus on South Africa.

1.2 PROBLEM STATEMENT AND SUBSTANTIATION

The traditional labour law strategy of fostering worker power to counter the power of employers over the workplace and the labour market and to establish a high level of minimum labour standards and entitlements is no longer an effective means for more justly

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[12] See statement to the SADC-EU Ministerial Meeting from the SADC-EU Civil Society Conference, 3-5 November 2002, Copenhagen, Denmark and the Civil Society meeting in Maputo 5-8 November, www.kulu.dk/Nyheder/SADC-EU_Maputo_Statement.doc(accessed 20 February 2008).

[13] Nazia Ali and Saurabh Suman Sinha, Advocates, "Privatisation in India and UK: Mixed Success. Different Constraints" http://news.indlaw.com/uk/focusdetails.asp?ID=78(accessed 28 August 2007).

[14] As above.

[15] Are located in four critical sectors of our economy: transport, telecommunications, energy and the high technology defence industrial sector and the enterprises respectively are:- TRANSNET, TELKOM, ESKOM and DENEL.

distribution of income and resources.[16] This strategy is problematic because the nature of employment has changed.[17] The conventional employment relationship of stable long-term, full time, family wage earning work tied to a particular employer and establishment no longer represents the situation of most workers. Such trends have been exacerbated by changes in economy that has demanded countries to open up their respective economies to liberalisation under structural adjustment programmes that encourage governments to fund privatisation programmes, ahead of welfare and public services.[18]

Even though there have been significant benefits from privatisation in Africa and South Africa in particular, the exercise has impacted negatively on the labour force and the regulatory framework. The role of labour laws seems to have been diluted by privatisation as the labour dichotomy is being fragmented with the massive entry into workforce of previously excluded groups – racial minorities, new immigrants, guest workers and atypical employees who do not have protection under the law.[19] Such developments place the present regulatory framework in position not to have direct control or failing to exercise control over labour force in the private sector. On the other hand, it ought to be commended that there has been an increase in the production levels of some goods and utility services for instance, electricity and water.

Even in that regard, unfortunately, the number of people losing their jobs is going up as public enterprises are being privatised and labour laws seem to be reluctant in protecting the affected labour force. This has been the case when in South Africa the privatisation of Telkom; a telecommunications company resulted in over 15 000 job losses due to retrenchment and outsourcing. Since 1994, South Africa's public service has lost over 100 000 jobs, partly because of privatisations and outsourcing.[20] In the speaker's notes during May Day celebrations in 2001, it was stated, "... the job loss blood bath continues unabated and poverty is still rising. We have lost a million jobs in the past decade, and one in three workers is now unemployed..."[21] With such an alarming number of job losses due to the changes brought by privatisation it impacts negatively on the well being of the workers and

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[16] Joanne Conaghan, Michael Fischl, and Karl Klare (eds). *Labour Law in an Era of Globalisation: Transformative Practices and Possibilities.* New York: Oxford University Press, 2004, pp 578.
[17] As above.
[18] See Raymond Markey, Ann Hodgkinson, Jo Kowalczyk (2002), *Gender, part-time employment and employee participation in Australian workplaces.* Employee Relations, Vol. 24 Issue 2 pp 129- 150.
[19] See as above n. 11.
[20] Herbert Jaunch, as above n. 5.
[21] See May Day 2001: Speakers Notes- 1 May 2001 "Struggle for Jobs and Against Poverty" article found at< www.cosatu.org.za/speeches/2001/1May200.htm(accessed 23 August 2007).

this is also an indirect way of fuelling the informal sector as people find ways to survive and getting back into the production system, subsequently, increasing the number of workers outside the protection of the labour laws.

Many foreign investors see former public utilities as a golden fleece, a ready-made monopoly for private profit.[22] The logic of the borderless world is that nobody is in control, except perhaps, the managers of multinational corporations[23] whose responsibility is to their shareholders who invest in the company with the highest returns.[24] There is a considerable degree for the concern even with the regard to the respect of employment conditions by private companies. In Britain, Wackenhut's parent company, Group 4 Securicor, is the subject of an undercover BBC investigation[25] into its handling of a contract to monitor sex offenders "revealing rapists, killers, and pedophiles left unmonitored as a result of a faulty equipment and poor work practices." In South Africa, Wackenhut- the largest employer on the continent with 65,000 employees- "has been investigated and sued for things like reserving 'white only' toilets; advising employees to consider lesser positions because of pregnancy; perpetuating hostile work environments, and overall poor pay and working conditions."[26]

Accordingly, this compels us to think on bigger questions: is it desirable in the light of past occurrence to go into a privatisation system? With all these developments over the years, are the labour laws standing up to their purpose or they have been taken over by privatisation? Moreover, according to Cheadle[27] labour law should not be seen as rights but as a shield. Can the labour laws in South Africa be regarded as providing a shield for the workers? Have the labour laws in SADC been shielding the workers from the negative impacts of privatisation.

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[22] www.embassy.org.nz/encyc.htm (accessed 03 August 2007).

[23] A corporation or enterprise that managers productions establishments or delivers services in at least two countries. Very large multinationals have budgets that exceed those of many countries. Multinational corporations can have a powerful influence in international relations and local economies. Multinational corporations play an important role in globalisation; some argue that a new form of MNC is evolving in response to globalisation- e.g. the 'globally integrated enterprise'.

[24] Tom Feys, "Labour Standards in Southern Africa in the Context of Globalisation: The Need For a Common Approach: (1999) 20ILJ pg1445.

[25] www.bbc.co.uk/insideout/eastmidlands/index.shtml(accessed 9 April 2008).

[26] "Privatisation leads to Fraud, Mismanagement and Employee Abuse at Wackenhut" by Mike Posted on 20 May 2007, http://trenches.wordpress.com/2007/05/20/privatisation-leads-to-fraud-mismangement-adn employee-abuse-at-wackenhut(accessed 9 April 2008).

[27] Halton Cheadle, University of Cape Town Law Review, September 2004.

With these questions and more (identified in section 1.4 below) this study focuses on the impact privatisation has had on the development of labour law.[28]

Despite of the negative social implications of privatisation, the international financial institutions like the WB and the IMF as well as industrialised countries are still pushing the policy. Most African governments have fallen prey to the dogma of economic liberalisation and sometimes have vested personal interests in the privatisation process. It is critical that mass-based organisations, which represent important social groups such as trade unions, women's organisations and community based organisations begin to call the governments and legislatures to pursue policies and labour laws in favour of those who are excluded and marginalised. Changing- or in some cases reversing – privatisation policies is certainly not one of the key issues that we need to confront and there is much to learn from the experiences with privatisation in Africa[29] and in other developed countries.

Due to the multinational companies holding the economy brought in by privatisation the worker's well being is under threat. Workers are the most vulnerable to redundancy when multinational companies seek to make cuts or move jobs to low wage economies to pursue bigger profits. There has been a recently indicated need for stronger labour laws. Governments have a task to act now to introduce stronger job protection after thousands of closures and job losses have been announced all over the region over the years.

Privatisation has been chosen as an issue for this research because of the intensity of its impact in labour matters in the world as a whole. This study is aimed at addressing the impact of privatisation on labour laws in SADC region with specific reference to South Africa. It will also highlight the need for the government and private sector holders to address labour force concerns, particularly the position of the ordinary worker after privatisation process.

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[28] The Labour laws in South Africa are based on the following Statutes:- The Constitution of the Republic of South Africa No. 108 of 1996; The Labour Relations Act 65 of 1995; The Basic Conditions of Employment Act of 1997, The Employment Equity Act No.55 of 1998, Compensation for Occupational Injuries and Diseases Act No. 130 of 1993; The Skills Development Act No. 97 of 1998; The Unemployment Insurance Act No. 63 of 2000.

[29] As above n.19.

1.3 RESEARCH OBJECTIVES

1.3.1 Broad objectives

- To establish how privatisation as a structural adjustment program influence the development of labour law in SADC generally and South Africa in particular, considering its impact on the economic and social changes.
- The research will serve as a response to the need to develop effective labour regulations and strategies, which allow labour law to serve as a shield for workers who are adversely affected by the negative impacts of privatisation.

1.3.2 Specific aims

- To establish whether privatisation undermines the development of labour laws.
- To assess the position of the workers and the union in labour legislative matters with regard to privatisation.

A privatisation regime usually puts workers in an unfavourably position where they have to constantly worry about job security. The most powerful tool workers uses are the unions. Now with factors such as: i) authoritarian supervision on the shop floor ii) an adversarial/hostile relationship between management and unions at the shop floor iii) absence of workplace democracy iv) inadequate worker participation structures and volatile industrial relations. The unions can only do so much when the tables start to turn. There is need for legislation to be enacted which cater for the challenges and make a provision to bring the desired results by all parties involved and such needs to be done for the sake of development of labour law.

- To identify the major challenges which are currently affecting the labour regulatory framework with regard to privatisation.

1.4 RESEARCH QUESTIONS

The research will be focused on the following questions:-

a) Is privatisation undermining the labour laws

This study will proceed to prove that privatisation, as part of world stability forces in favour of capital, is one of the reasons for the brutalization of work and the undermining of trade union and labour laws as a whole that we are now facing in the developed and developing world.

b) How much protection should be placed on the rights of the labour force? Is it expendable when it comes to getting foreign investments and pursuit of structural developments programmes? Should the labour force be put in jeopardy so as to get one quick fix, which in the end proves to be detrimental to the labour force?

The present study will prove that most African governments tend to go for any opportunity that avails itself which give a "fix" to some of their challenges as a result they have fallen to the demand of the WB and IMF to pursue this kind of programmes as conditionalities for receiving loans.

c) Who is responsible for the labour regulation during and after privatisation? Do the respective states, donor agencies and private sector holders ever consider the impact it would have on labour rights and the protection of workers?

Furthermore, the study will point out that the state is the sole regulator and monitor of labour issues and that parties identified in the question tend not to seriously consider the social implications of privatisation.

d) Is there a universal standard for labour regulatory framework in privatisation? If not, is it possible for such a framework to be in place?

The research will additionally prove that such a framework is not in place at the moment and that a universal standard for labour regulatory framework in privatisation could be difficult to attain and reasons for such will be elaborated in chapter 3 of this study.

e) What can be done? Can privatisation process itself be restructured in a manner which allows a well built monitoring and regulatory mechanism to ensure it works coherently with the labour laws rather than interfere with or violate the rights of workers?

1.5 METHODOLOGY

The research will be literature based using the qualitative method. Qualitative research is a well-established academic tradition in anthropology, sociology, history and geography.[30] Qualitative methods are usually understood to include qualitative interviews, direct observations and case studies. There are other methods like quantitative and participatory methods, which are used in research studies. Participatory methods are a diverse and flexible set of techniques for usual representation and stakeholder involvement characterised by a set of underlying ethical principles.[31] There is no one set off techniques to be mechanically applied in all contexts for all participants. There is on the one hand a set of visual tools to be flexibly applied to assist the synthesis and analysis of information which can be used in group settings and also a part of individual interviews.[32] Participatory methods have the potential to bring together information from a diversity of sources more rapidly and cost effectively than quantitative or qualitative methods alone.[33]

The researcher has chosen the qualitative method mainly due to the fact that there is more of an emphasis on individual information. This makes it possible to ask much more sensitive probing questions which people would not like to answer in public forum. Also, because qualitative methods are also often necessary to investigate more complex and sensitive impacts which are not easy to quantify or (where quantifications would be extremely time consuming and costly).[34]

According to Morse, qualitative methods "smooth out" those contradictions and are in themselves a mysterious combination of strategies and collection of images of reality.[35] The process of doing qualitative research presents a challenge because procedures for organising images are ill-defined and rely on processes of interference, insight, logic and luck, and eventually, with creativity and hard work, the results emerge as a coherent whole.[36]

The research will make use of case studies and available literature, which include library materials like:-

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[30] Linda Mayoux,"Qualitative Methods", www.enterprise-impact.org.uk/word-files/QualMethods.doc(accessed on 6 September 2007).
[31] Participatory Methods, as above.
[32] As above.
[33] As above.
[34] As above n. 29.
[35] Janice M. Morse, *Critical Issues in Qualitative Research Methods*, 1994.
[36] As above.

a) Textbooks in which the researcher will extract relevant information from the texts analyse it and apply it to address the various aspects of the research problem.
b) Legislation, which will be examined as a primary source of information. Since the research aims include evaluation of the impact of privatisation on the labour laws, it is therefore inevitable that the research will examine relevant labour legislation as it aims at identifying the major challenges, which are currently affecting the labour regulation framework with regard to privatisation.
c) Hard and electronic sources accessed on internet will be utilised. A lot of information can be accessed on the internet considering the fact that internet has become a useful source of information in legal research.
d) Law journals, reports and working papers are other important sources of information. Some of the key issues to be covered by the research are derived from reports from the WB and the IMF. There are several publications made by the International Labour Organisation (ILO) that are very informative on the subject matter.
e) The researcher will also make use of case studies of privatisation and its impact in certain African countries and the world at large. A case study is a written or recorded, detailed analysis of some targeted stress factor(s), for the purpose of noting success or failure to use as a benchmark for education, research, and/or planning.[37] Case studies give a broad coverage on the subject matter by revealing the practicability or reality of the matter. The major criterion to be used in selecting countries for the research is the availability of published information.

1.6 LITERATURE REVIEW

Literature review is a critical look at the existing research that is significant to the work one is carrying out. It provides the context of one's research by looking at what work has already been done in one's research area. It reflects works consulted in order to understand and investigate the research problem.

Literature reviews that privatisation is a challenge to labour rights in our time. Among the challenges is the legal environment the labour is in, in the design and implementation of privatisation programmes because important parts of the legal instruments are not in place

[37] www.longwoods.com/website/eletter/glossary.HTML(accessed 10 October 2007).

properly or not in place at all.[38] The legal environment firstly, refers to basic laws and regulations relating to the operations of enterprises, governing and – more importantly – facilitating their establishment, working and exit; laws concerning commercial behaviour. Secondly, it refers to macro-economic laws governing matters such as foreign capital, foreign exchange, taxation, monopoly practices, process wages and employment issues.[39]

Thirdly, it refers to laws specifically dealing with privatisation. There can be several sub-divisions here: for example, overall laws on sectoral or specific-enterprise privatisation; laws on specific techniques of privatisation such as employee buy-outs or voucher distribution; laws governing the utilisation of divesture proceeds.[40] It is evident from the literature that many developing countries, including SADC countries and South Africa specifically, find themselves constrained in the design and implementation of privatisation programmes because important parts of the legal instruments described above are not in place.[41]

Furthermore, from a perspective, fully regarding labour rights as human rights, the vulnerability to violations always increase as a consequence of decision to privatise, because human rights law has so far insufficiently developed to respond to a situation in which private actors take responsibility for providing services essential to human rights. More work needs to be done on rethinking the actions required from States, on solidifying human rights obligations of private actors.[42]

Forthright attention to the maintenance of regulatory capacity after privatisation is fundamental. Legislation requiring advance consultation of the workforce on the basis of satisfactory and sufficient information about the intended privatisation process is imperative. The State needs to retain the regulatory authority to protect the labour rights of the workers and the human rights of the users of the service, and in particular groups that are vulnerable.

Bayliss is of the view that privatisation is widely associated with labour layoffs and retrenchments and – contrar y to World Bank objectives – one might expect poverty to increase as a result.[43] If privatisation is not going to increase poverty it must be assumed that

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[38] See V.V Ramanadham, *Constraints and Impacts of privatisation*, Routledge, 1993 pg 6.
[39] As above.
[40] As above.
[41] As above.
[42] See Koen De Feyter & Felipe G'omez Isa , as above n.5 pp 7- 8.
[43] Kate Bayliss, "The World Bank and Privatisation. A flawed development tool." www.psiru.org/reports/2000-11-U-WB.doc(accessed 5 May 2008).

either there is a labour market capable of absorbing laid off workers and /or that such losses are short term and subsequent expansion under private ownership will compensate for initial losses. Sadly, neither of these seems to apply.[44] In Ghana for example, the ILO estimated formal sector unemployment to be in the region of 70 percent.[45] Also in Ghana, the author's own research indicated that several years after privatisation employment in enterprises had failed to expand significantly to offset the initial layoffs of privatisation.[46]

From a broad perspective, Chunakara argues[47] comprehensively that when states are driven to privatise, the privatised enterprises are expected to create work and increase productions. He also argues that although the shift may increase production the results differ in developed and developing world. To say that there is a vast disparity in levels of employment and prosperity. However, what the shift bring are very profitable multinational companies which are protected by the state from social accountability.[48]

Studies on critical issues with regard to the impact of privatisation on the development of labour law are somewh at limited; there is a gap as illustrated by the literature review. Privatisation has been evidently analysed using an economic approach which has not taken into consideration the potential labour rights implications that flow from it. There is therefore a need for more knowledge from a labour law standpoint.[49] It is for this view that the study serves to breach the need thereof. The institution of privatisation affects the regulation of labour relations and issues. Using South Africa as a case study in particular, accordingly examines both the positive and negative impacts of privatisation on labour law and labour relations. It discusses the privatisation process vertically, linking the global, regional and national perspectives. The study is focused on an analysis of the extent to which SADC in general and specifically South Africa after privatisation of SOEs and the prevalence of MNCs in its economy, has complied with its constitutional obligations and international standards on the respect, promotion, protection, fulfilment and development of labour law.

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[44] As above.
[45] As above, at footnote 40.
[46] As above n. 43.
[47] George Mathews Chunakara, "Globalisation and its impact on Human rights" (ed). www.religion-online/showbook.asp?title=(accessed 5 May 2008).
[48] As above.
[49] It is very surprising that when one examines the available literature on privatisation, the labour rights dimension is absolutely missing. There are some analyses on the effect of privatisation on distribution of wealth, but not from a labour law perspective.

1.7 SCOPE

1.7.1 Chapter division

To achieve the objectives of this study, the discussion will cover a broad scope under the following chapters:-

Chapter one lays down the general introduction and layout of the entire thesis. This layout includes the background of the study, statement of the problem, research objectives, research questions, methodology, literature review, scope and the chapter divisions.

Chapter two gives an overview of privatisation and its inter-correlation with employment conditions and services. Under the overview study, patterns of privatisation used so far in Africa will be discussed as well as the regulatory mechanism, the role players: WB and IMF (as architects of privatisation) and also the State and the Transnational corporations. Relationship between privatisation and labour is also dealt with in regard to conditions and services.

Chapter three deals with the international and regional legal framework governing labour and privatisation. In this chapter, the birth and development of the labour rights will be discussed. The meaning, purpose, sources and enforcement of the international standards will also be outlined as well as regional standards (SADC). SADC standards will also be evaluated against UN and ILO based standards.

Chapter four deals with South Africa as a case study. This chapter gives an elaboration on privatisation programme in South Africa from a historical perspective. The various labour statutes relevant to the subject matter will be dealt with. The impact of privatisation on South African labour force in regard to positive impact and benefits thereof will also be discussed.

Chapter five consists of the conclusion and provides possible solutions and suggestions on what needs to be done in terms of interventions and the way forward.

1.7.2 Limitation

The study will focus on SADC region in general and focus on South Africa specifically with regard to privatisation and its impact on the development of labour law. Privatisation is a

global phenomenon and serves as a challenge to labour rights in our time. Due to the fact that this study is a mini- dissertation; the focus is limited to SADC in general and South Africa specifically.

Another limitation is with regard to methodology. The downside of qualitative research is that it usually allows only small numbers of subjects to be studied because data collection methods are so labour intensive. It is also often criticised for being subject researcher bias, difficulty in analysing qualitative data rigorously, lacking in reproducibility and generalising findings (i.e. findings may not be applicable to other subjects or settings). The subject matter of the study would attain great justice if an empirical research was part of the methodology and if more time and financial resources were at the researcher's disposal.

1.8 CONCLUSION

The chapter serves as an introductory outline of the whole study. A brief background to the study has been given to give an overview of what privatisation entails and its relationship to the subject matter. A problem statement has also been discussed to show the magnitude of the problem that privatisation impacts on the development of the labour law. The research objectives have been laid and so has the research questions in which the researcher will ponder upon as the study progresses. The methodology has been identified which is qualitative. A review of existing literature has been made to give the position of the subject matter. Consequently, the chapter gives the scope of the study with regard to the chapter division and the limitation. The next chapter will give an overview of privatisation and its inter-correlation with labour.

CHAPTER TWO

AN OVERVIEW OF PRIVATISATON AND ITS INTER-CORRELATION WITH LABOUR

2.1 INTRODUCTION

The emergence of privatisation of SOEs in today's economies opens up interesting debates about the impact of privatisation and the relationship of this phenomenon to a culture of labour rights. The decentralised of the state, a process driven fundamentally by neo-liberal politics that have been spreading throughout Africa and the world in the last decade or so impacted on the role that the state traditionally played in the provision of services. In a way, a gradual process has been consistently taking place by which state services have been contracted to the private sector, totally privatised or relinquished by the state. The privatisation of public service/SOEs varies from society to society. Although private sector participation in the provision of services has become a new orthodoxy, many remain concerned about its social implication and regulation of the "new order" of employment relations by labour law.

This chapter is a general outline of privatisation and its inter-correlation with labour relations and labour laws and addresses the following questions: What is privatisation? Why privatise? What are the privatisation patterns and methods, which have been used in Africa? The chapter will further give a brief outline of the legal framework/regulatory mechanisms and the role players in the promotion and advising on the execution of the privatisation exercise and other structural adjustment economic policies. Subsequently, the inter-correlation between privatisation and labour will be discussed through the analysis of the implications.

2.2 NATURE AND CHARACTERISTICS OF PRIVATISATION

2.2.1 What is privatisation?

Privatisation is readily associated with the transfer of ownership of an institution or of a service from a public to a private actor. In addition, the term 'privatisation' is often used to describe a process simply involving the removal of public authorities from the operation of an

institution or a service, even when the state retains ownership.[1] A prison or an electricity network may remain state property, but if the management is contracted out to a private body, a type of privatisation occurs. Inevitably, the (partial) transfer of responsibility to a private actor implies an increased application of market principles to the service.[2]

Often the withdrawal by public authorities from the provision of the service is not complete. A level of state involvement remains. Even if health care is privatised, some public funding of medical care for some categories of people will be provided. In practice, public and private operators may well share tasks.[3]

However, as defined by WB, privatisation refers to "a transaction or transactions utilizing one or more of the methods resulting in either the sale to privatise parties of a controlling interest in the share capital of a public enterprise or of a substantial part of its assets", or " the transfer to private parties of operational control of a public enterprise or a substantial part of its assets" [4]and for the sake this study this meaning will be used.

2.2.2 The drive to privatise

Starting from the 1970s, and increasing momentum throughout the 1980s and 1990s, has been the global trend away from state ownership and control towards privatisation.[5] Jaunch points out that there were two main reasons for this change in policy: Firstly several of the SOEs were inefficient, poorly managed, unable to sustain themselves, and therefore had to be subsidised by government. Secondly, there was the growing dominance of "neoliberalism" as a model (and ideology) of economic development.[6] "Neo-liberalism" has its roots in regimes of Margaret Thatcher in the UK and Ronald Reagan in the USA that dismantled their welfare states in response to a global economic crisis in the 1970s.[7] The neo-liberal ideology is driven

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[1] Koen De Feyter & Felipe G'omez Isa , *Privatisation and Human Rights in the Age of Globalisation*, Intersentia Antwerp- Oxford 2005 (eds.) pg 1.
[2] As above.
[3] As above.
[4] Pamacheche and Koma, "Privatisation in Sub-Saharan Africa- an essential route to poverty alleviation",in *African Integration Review Volume 1 No. 2* pg 4.
[5] *The Big Privatisation Debate- African Experiences*, a paper prepared by Herbert Jaunch, Labour Resource and Research Institute (LaRRI) for the Namibian, 13 November 2002.
[6] As above.
[7] As above.

by the belief in the "free market" as the best regulator and engine of economic growth while the state's developmental role in the economy is reduced.[8]

Policy makers have had a variety of objectives in mind for privatisation which include:-

- First, with widespread evidence of poor economic performance of many public enterprises, privatisation has been seen as a means of improving economic efficiency which will be reflected in lower consumer prices and improved product quality;
- Second, faced with large net financial deficits in the public enterprise sector, privatisation has been perceived as a means of reducing fiscal deficits, by increased tax revenues on enterprise output, reduction in central government transfers to the enterprise sector, and receipts from privatisation sales and;
- Third, privatisation has been used as a means to shifting the balance between public and private sectors and promoting market forces within the economy.

2.2.3 Arguments for and against privatisation

Arguments for Privatisation

The following pointers are part of the arguments brought forward by those in support of the privatisation as a structural development programme.[9]

- Private companies, especially those from the developed world, have the management and technical expertise to ensure the efficient and dependable production and distribution of the service in question be it electricity, water, solid waste disposal or transportation. Unlike the ministries and departments that have traditionally been in charge, private companies do not tolerate overstaffing, under trained personnel and obsolete technology.
- Private companies have privileged access to financing, thanks to their long associations with private banks and supplies, and official export credit agencies in their own countries.

[8] As above.
[9] See Jerome Donavan, "Don't Want to Privatise? Then Corporatize (But Do it Right)".

- Once the rules of the game- the contract governing the project in question have been established, private companies are less vulnerable than cumbersome government agencies to political interference and whimsical rule changes.
- Privatisation has a beneficial knock-on effect for the host country. A successfully privatised utility emits a seductive "demonstration effect" to other potential investors, encouraging them to invest, too.
- Perhaps most important, private companies bring to the enterprise the "discipline of the market place"- the practised ability, born of necessity, to respond quickly to customer complaints about shoddy service and shareholder complaints about anaemic financial returns. Unlike inefficiency of government bureaucracies, private companies have both "met a payroll" and made a profit.

Furthermore, proponents for privatisation argue that SOEs should be in the hands of the private sector for following reasons:[10]

- **Performance**. State-run industries tend to be bureaucratic. A political government may only be motivated to improve a function when its poor performance becomes politically sensitive, and such an improvement can be reversed easily by another regime.
- **Improvements**. Conversely, the government may put off improvements due to political sensitivity and special interests — even in cases of companies that are run well and better serve their customers' needs.
- **Corruption**. A monopolized function is prone to corruption with decisions that are made primarily for political reasons, personal gain of the decision-maker (i.e. "graft"), rather than economic ones. Corruption (or principal-agent issues) during the privatization process - however - can result in significant under pricing of the asset. This allows for more immediate and efficient corrupt transfer of value - not just from ongoing cash flow, but from the entire lifetime of the asset stream. Often such transfers are difficult to reverse.

- **Accountability**. Managers of privately owned companies are accountable to their owners/shareholders and to the consumer, and can only exist and thrive where needs are met. Managers of publicly owned companies are required to be more accountable

[10] *Arguments for and against privatization* were taken as an extract at http://en.wikipedia.org/wiki/Privatsation (accessed 20 May 2008).

to the broader community and to political "stakeholders". This can reduce their ability to directly and specifically serve the needs of their customers, and can bias investment decisions away from otherwise profitable areas.

- **Civil-liberty concerns**. A company controlled by the state may have access to information or assets which may be used against dissidents or any individuals who disagree with their policies.
- **Goals**. A political government tends to run an industry or company for political goals rather than economic ones.
- **Capital**. Privately held companies can sometimes more easily raise investment capital in the financial markets when such local markets exist and are suitably liquid. While interest rates for private companies are often higher than for government debt, this can serve as a useful constraint to promote efficient investments by private companies, instead of cross-subsidizing them with the overall credit-risk of the country. Investment decisions are then governed by market interest rates. State-owned industries have to compete with demands from other government departments and special interests. In either case, for smaller markets, political risk may add substantially to the cost of capital.
- **Security**. Governments have had the tendency to "bail out" poorly run businesses, often due to the sensitivity of job losses, when economically, it may be better to let the business fold.
- **Lack of market discipline**. Poorly managed state companies are insulated from the same discipline as private companies, which could go bankrupt, have their management removed, or be taken over by competitors. Private companies are also able to take greater risks and then seek bankruptcy protection against creditors if those risks turn sour.
- **Natural monopolies**. The existence of natural monopolies does not mean that these sectors must be state owned. Governments can enact or are armed with anti-trust legislation and bodies to deal with anti-competitive behavior of all companies public or private.
- **Concentration of wealth**. Ownership of and profits from successful enterprises tend to be dispersed and diversified -particularly in voucher privatization. The availability of more investment vehicles stimulates capital markets and promotes liquidity and job creation.

- **Political influence**. Nationalized industries are prone to interference from politicians for political or populist reasons. Examples include making an industry buy supplies from local producers (when that may be more expensive than buying from abroad), forcing an industry to freeze its prices/fares to satisfy the electorate or control inflation increasing its staffing to reduce unemployment, or moving its operations to marginal constituencies.
- **Profits**. Corporations exist to generate profits for their shareholders. Private companies make a profit by enticing consumers to buy their products in preference to their competitors' (or by increasing primary demand or their products, or by reducing costs). Private corporations typically profit more if they serve the needs of their clients well. Corporations of different sizes may target different market niches in order to focus on marginal groups and satisfy their demand. A company with good corporate governance will therefore be incentivised to meet the needs of its customers efficiently

Arguments against privatisation

Opponents of privatization argue that it is undesirable to transfer state-owned assets into private hands for the following reasons:[11]

- **Performance**. A democratically elected government is accountable to the people through a legislature, Congress or Parliament, and is motivated to safeguarding the assets of the nation. The profit motive may be subordinated to social objectives which may hinder performance.
- **Improvements**. The government is motivated to performance improvements as well as running businesses which contribute to the state's revenues.
- **Corruption**. Government ministers and civil servants are bound to uphold the highest ethical standards, and standards of probity are guaranteed through codes of conduct and declarations of interest. However, the selling process could lack transparency, allowing the purchaser and civil servants controlling the sale to gain personally.
- **Accountability**. The public does not have any control or oversight of private companies.

[11] As above.

- **Civil-liberty concerns**. A democratically elected government is accountable to the people through a parliament, and can intervene when civil liberties are threatened.
- **Goals**. The government may seek to use state companies as instruments to further social goals for the benefit of the nation as a whole.
- **Capital**. Governments can raise money in the financial markets most cheaply to re-lend to state-owned enterprises.
- **Lack of market discipline**. Governments have chosen to keep certain companies/industries under public ownership because of their strategic importance or sensitive nature.
- **Cuts in essential services**. If a government-owned company providing an essential service (such as the water supply) to all citizens is privatized, its new owner(s) could lead to the abandoning of the social obligation to those who are less able to pay, or to regions where this service is unprofitable.
- **Natural monopolies**. Privatization will not result in true competition if a natural monopoly exists.
- **Concentration of wealth**. Profits from successful enterprises end up in private, often foreign, hands instead of being available for the common good.
- **Political influence**. Governments may more easily exert pressure on state-owned firms to help implementing government policy.
- **Downsizing**. Private companies often face a conflict between profitability and service levels, and could over-react to short-term events. A state-owned company might have a longer-term view, and thus be less likely to cut back on maintenance or staff costs, training etc, to stem short term losses. Many private companies have downsized while making record profits.
- **Profit**. Private companies do not have any goal other than to maximize profits. A private company will serve the needs of those who are most willing (and able) to pay, as opposed to the needs of the majority, and are thus anti-democratic.
- **Privatisation and Poverty**. It is acknowledged by many studies that there are winners and losers with privatization. The number of losers —which may add up to the size and severity of poverty—can be unexpectedly large if the method and process of privatization and how it is implemented are seriously flawed (e.g. lack of transparency leading to state-owned assets being appropriated at minuscule amounts by those with political connections, absence of regulatory institutions leading to

transfer of monopoly rents from public to private sector, improper design and inadequate control of the privatization process leading to asset stripping.[12]

2.3 PATTERNS OF PRIVATISATION

Privatisation, under the guidance of IMF and the WB and other donor agencies, has been part of most SADC countries as a structural development programme. It has mainly affected all sectors of the economy leading to a direct impact on people. Privatisation process involves many patterns or forms. They include direct sales of shares, leases and concessions, pre-emption rights sales, public flotation, management contracts, management or employee buy-out liquidation, de-monopolisation, mass privatisation[13] and others.

Privatisation activity has grown, in terms of both number and value of transactions. In Africa, privatisation was introduced in the 1980s and 1990s, usually as part of Structural Adjustment Programmes (SAPs). In return for loans from the IMF and the WB, African countries were forced to implement neo-liberal economic policies, which included privatisation. However, economic development is a complex process that depends for its success on effective contributions from both the public and private sectors of the state. In general, public sector activities are undertaken to meet community objectives, whereas private sector activities are more narrowly focused on the prospects of profit.[14] The privatisation of public service/SOEs varies from society to society. In as much as the preceding sentiments are important labour is also a major component for the development of the economy and in addition, it is one of the three means of production, which include capital and land.

In spite of the fact that accurate statistics on privatisation activity in SADC are lacking, the number of sales in Africa has risen greatly over the past years (from the 1980s to 2000). By June 2000 3,387 transactions were reported to have been completed with a sales value over US$ 7.14 billion as shown in Table 1 below. Information is not complete for many countries; White (2000) estimated that privatisation activity in Africa is more likely to have been in the order of 4,000 finalised deals with a total value of some US$ 8 billion.

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[12] Dagdeviren (2006) "Revisiting Privatisation in the Context of Poverty Alleviation" in *Journal of International Development*, Vol 18, pp 469-488.
[13] See Fudzai Pamacheche and Baboucair n.3 above.
[14] Roth G, 1926 World Bank. *The Private Provision of Public Services in Developing Countries.* New York; Oxford Uinversity Press, c1987. *Foreword.*

Table 1: Privatisation Transactions in Africa.

YEAR	NUMBER	SALE VALUE IN $ MILLIONS
1979 – 1984	10	1.0
1985	10	7
1986	18	1.8
1987	20	10.2
1988	60	14.5
1989	220	685.1
1990	171	71.3
1991	168	155.5
1992	265	216.1
1993	230	131.7
1994	365	537.6
1995	482	423.3
1996	426	757.9
1997	241	2248.6
1998	126	1194.0
1999	82	311.6
2000(6 months)	33	354.2
Year not reported	460	27.2
Total	3387	7142.1

Sources: *World Bank Africa Privatisation Database, World Bank (2003) and Campbell White and Bhatia, (1998), White , (2000) and Nellis (2003).*

A passing examination of the Table indicates that privatisation transactions peaked during 1994 and 1998, while the number of reported divestiture transactions has fallen steadily since 1995, a reflection of the maturity of the programme in several countries. The next table shows the privatisation methods that were used in Africa.

Table 2: Privatisation Methods Applied in Africa

Methods	Number of Transactions
Sales of Shares	1,286
Public flotation	91
Competitive tender	912
Existing Share holders	157
Non- competitive	85
Management/Employee Buyouts	34
Sales by open Auction	7
Share Dilutions	6
Debt/Equity Swaps	10
Joint Ventures	39
Sales of Assets	539
Competitive Basis	501
Non- competitive	38
Liquidations	552
Transfer at Nil Value	12
Transfer to Trustees for follow on divesture	19
Restitutions	48
Leases	126
Concessions	4
Management contracts	53
Mergers	2
Methods not reported	450
Total	3,146

Source: *World Bank Africa Region Privatisation Database; White (2000).*

2.4. REGULATORY MECHANISM

2.4.1. Current legal framework

There are different types of regulation and the requirement for such is taken from the need to protect national interests especially in sectors that affect the well-being of the people. This engrosses the labour sector and the rights thereof. Economic regulation and social regulation are but two examples. Economic regulation focuses on the key issues of price, quality of service/products and competition in a range of industries. Social regulations include those statutes and rules that are intended to protect citizen health and safety, maintain minimum environmental standards or promote human rights. It is for the purpose of this study to show how privatisation has impacted on social regulation of labour.

At the international level, regional (SADC) or domestic (South Africa) there are no minimum labour standards set for structural adjustment programmes like privatisation *per se*. The international community has not developed any regulatory legislative framework with regard to privatisation nor has the SADC region. But some of the standards which exist are relevant to structural adjustment programmes in terms of the protection, respect and promotion of the workers' rights affected by the exercise. Privatisation violates some of labour rights including the right to work, right to collective bargaining, right to occupational health and safety, right to organize just to mention a few. These rights and others are provisions in some international and regional legal frameworks governing labour.

At international level, there are international labour standards set by ILO which are relevant to privatisation and these include: Convention on Freedom of Associations and Protection of the Rights to Organise, Convention on the Right to Organise and Collective Bargaining, Convention on Forced Labour, Convention on the Abolition of Forced Labour, Convention on Discrimination (Employment and Occupation), Convention on Equal Remuneration and Convention on Minimum Age.[15]

While at that level, there are also standards set by the UN which are also relevant to privatisation and other structural adjustment programmes and there are: International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966, International

[15] See chapter 3of this study pgs 45 to 46 for full citations of the treaties.

Covenant on Civil and Political Rights (ICCPR) of 1966, Universal Declaration of Human Rights (UDHR) of 1948, Convention on the Elimination of All Forms of Racial Discrimination (1969), Convention on the Elimination of All Forms of Discrimination against Women (1979), Convention on the Rights of the Child (1989), Conventions on the Status of the Refugees (1954) and the Convention on the Status of Stateless Persons (1960).

At regional level (SADC), there is the SADC Social Charter of 2003. It incorporates a range of labour rights (identified in 3.4.2 below) that are also relevant to structural development programmes in regard to protection of workers.

South Africa on the other hand, has developed several labour statutes after attaining its democracy in 1994. This was set about by the new government to transform the whole legislative framework of labour relations to give effect to the obligations contained in the 1996 Constitution and to bring it into line with international standards of the ILO. Recognising the importance of international labour standards and the obligations imposed by the Constitution the ANC government espoused a labour legislative framework which is also relevant to privatisation and it includes the following Acts:- Labour Relations Act 66 of 1995, Basic Conditions of Employment Act 75 of 1997, Employment Equity Act 55 of 1998, Occupational Health Safety Act 85 of 1993, Compensation for Occupational Injuries and Diseases Act 130 of 1993, Unemployment Insurance Act 63 of 2001, and Skills Development Act 97 of 1998 .

It should be noted that for the above mentioned legislative framework to have effect in protecting the workers in structural adjustment programmes the role players or architects of privatisation should uphold the purpose and underlying principles of these instruments. However, the subsequent chapters will further discuss the international, regional and domestic legislative labour frameworks.

2.4.2. The role players

a) World Bank

It is an international organisation created at Breton Woods in 1944 to help in the reconstruction and development of its member nations. Its goal is to improve the quality of

life in the poorer regions of the world by promoting sustainable economic development.[16] It is like a corporative, where its 185 member countries are shareholders. A Board of Governors, who are the ultimate policy makers at the WB, represents the shareholders. Generally, the governors are member countries' ministers of finance or ministers of development. They meet once a year at the Annual Meetings of the Boards of Governors of the WB group and the IMF.[17]

The term World Bank refers only to the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). The term "World Bank Group" incorporates five closely associated entities that work collaboratively towards poverty reduction: the World Bank (IBRD and IDA), and three other agencies, the International Finance Corporation (IFC), the Multinational Investment Guarantee Agency (MIGA) and the International Centre for Settlement of Investment Disputes (ICSID).[18]

It has played a key role in the implementation of privatisation in law-income countries. Looking at the WB website and supporting literature, it seems that privatisation- primarily, if not extensively – is expected to reduce poverty through the development of the private sector and private sector development is central to poverty reduction. This is how the WB policy framework links privatisation with poverty eradication. Privatisation is promoted because of the perceived weaknesses of public ownership and poor record of accomplishment when it comes to enterprise reform. The WB takes a strong stance on privatisation as opposed to enterprise reform because efforts at reform, which stopped short of privatisation, are considered unsuccessful.[19]

One of its purposes has been to lend funds at commercial rates and to provide technical assistance in order to facilitate economic developments in poorer member countries. In recent years, it has been criticised for its lending practices, particularly due to the perception that recipients of aid have not been participants in determining their own needs.[20]

b) International Monetary Fund

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[16] www.globaledge.msu.edu/resourceDesk/glossary.asp(accessed 19 June 2008).
[17] See www.worldbank.org (accessed 10 May 2008).
[18] As above.
[19] As above.
[20] www.icons.unmd.edu/reslib/display_glossary#world_bank (accessed 10 May 2008).

The IMF is an international organisation of 185 member nations. The establishment of such was to promote international monetary cooperation, exchange stability and order arrangements, foster economic growth and high levels of employment and to provide temporary financial assistance to countries to help ease balance of payments adjustments. Since the IMF was established, its purposes have remained unchanged but its operations – which involve surveillance, financial assistance, and technical assistance –have developed to meet the changing needs of its member countries in an evolving world economy.[21]

c) The state

A 1999 UN paper on *Privatisation of public sector activities* by the Department of Economics and Social Affairs describes the role of the governments in the context of privatisation as one that shifts from producing and delivering services to enabling and regulating.[22] This paper points out that these tasks are more difficult and complex than the tasks government had before, and require new skills:

> *Governments need to be able to analyse markets conditions, set policy frameworks, draw up, negotiate and enforce contracts, regulate monopolies; coordinate, finance and support producers; enable community self-provision; and provide consumers with information on their options and remedies.*[23]

d) Transnational corporations

Transnational corporations have become one of the key vehicles for structural development programmes and globalisation. On the other hand, some of their activities are raising serious doubts from the viewpoint of human rights, particularly economic, social and cultural rights and the right to development.[24] In this sense, Mary Robinson, former United Nations High Commissioner for Human Rights, while presenting a report on *Business and Human Rights*, insisted that "corporations should support and respect the protection of internationally proclaimed human rights within their sphere of influence and make sure they are n ot complicit in human rights

[21] www.imf.org/external/about.htm(accessed 10 May 2008).
[22] Koen De Feyter & Felipe G'omez Isa, as above n. 4 pp 1-2.
[23] As above.
[24] See M.T.Kamminga, *Holding Multinational Corporations Accountable for Human Rights Abuse: A Challenge for the E.C,* in P. Alston (ed), *The EU and Human Rights*, Oxford: Oxford University Press, 1999 pp 553-569.

abuses".[25] Not unrelated to this preoccupation are certain scandals involving several transnational corporations abusing the most basic labour rights, exploitation of child labour, interfering in the internal affairs of certain states, serious environmental consequences related to their production activities, etc.[26]

2.4.3. Public responses to IMF/WB policies

The preceding outline of the activities of IMF and the WB shows that the main objective of these institutions is the realisation of economic development in developing nations all-inclusive. The IMF and WB as well as many African governments who believe that this policy will help solve financial problems and efficiency in parastatals as investment possibilities with high returns are still promoting privatisation. On the other hand, community organisations and especially trade unions have pointed out the negative social consequences of privatisation in Africa.

There has been so much hostility towards privatisation, despite of the potential benefits the process has or maybe the programme is merely glorified by those in support of it. Generally, privatisation is viewed with much scepticism across Africa by all segments of society. African intellectuals and officials have a tendency to view the public sector as the promoter and defender of indigenous interests and to believe that privatisation will empower and enrich foreigners at the expense of indigenous people.[27]

African trade unions and workers' representatives equally despise privatisation, citing the possibility of job losses or worsening terms of service. A case in point was the protest marches organised by the Zambian Congress of Trade Unions calling on government to rescinding its decisions to privatise the Zambian National Commercial Bank. Zambia a SADC country ran a privatisation programme described by the WB in 1998 as the most successful in Africa. However, many Zambians perceived privatisation as very negative, hence putting pressure on the government to rethink its policy. The case against privatisation was based on the following perceptions:[28]

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[25] *Business and Human Rights: A Progress Report* (Geneva: OHCHR, January 2000) pg 2.
[26] Hadji Guisse, *The Impact of the Activities of Transnational Corporations on the Realisation of Economic,Social and Cultural Rights*.Working document prepared pursuant to Sub- Commission resolution 1997/11, UN Doc E/CN.4/Sub.2/1998/6.
[27] Fudzai Pamacheche and Baboucarr Koma, above n.13.
[28] As above.

- The programme had been imposed and micromanaged by international financial institutions, without sufficient attention to requisite policy and regulatory frameworks and without adequate involvement of Zambian citizens;
- It would result in the closure of many firms previously run by Zambians
- It would exacerbate the problem of unemployment
- It would increase the incidence of corruption and
- It would benefit the rich, foreigners and those politically well connected.

The IMF threatened Zambia with losing one billion dollars worth of debt relief if it did not go ahead to privatise the Zambian National Commercial Bank, the country's biggest bank.[29]

South Africa's trade union federation COSATU staged national strikes in August 2001 and October 2002 to demand an end to privatisation, especially where it concerned basic services and national infrastructures. A memorandum by COSATU was submitted to the Department of Public Enterprises. The memorandum cited among other things that for workers privatisation has spelled job losses, in a country where unemployment is already the main economic problem. Unemployment rose from 16 per cent to 25 per cent between 1995 and 1999, and has probably risen since then. And that is only using the narrow definition of unemployment. Using the extended version that counts the discouraged workers this figure rises to 38 per cent.[30]

Over a hundred thousand job losses can be traced to commercialisation and privatisation in the state-owned enterprises, the public service and local government. Where jobs have been outsourced, workers have been moved outside their bargaining unit and faced reduced pay, benefits and job security. [31]

The majority of those who face retrenchment are lower skilled Africans from the rural areas – workers who will not easily find new jobs. For every worker who loses a job, a minimum of five and up to ten people lose their livelihood. [32]

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[29] "Zambia demo over IMF privatization pressure" article found at www.union-network.org/unifinance.ns(accessed 20 July 2008).
[30] Speakers' Notes and Memorandum over Privatisation- 16 August 2001 found at www.cosatu.org(accessed 29 July 2008).
[31] As above.
[32] As above.

In addition, in its September Commission, COSATU argues that the state has an obligation to extend the provision of basic services to those who were previously marginalised. The state should improve stuffing levels, train civil servants and develop effective management to improve its institutional capacity:

> *A reduced state cannot meet the needs of social transformation and development and is inappropriate in a society with our levels of unemployment. We propose the goal of a public sector enlarged to the extent required to effectively deliver universal services to all our people..... Policies should focus on producing more wealth and more better job opportunities meeting the need of all citizens and allowing for the participation of workers to determine the conditions of their economy and priorities of economic policy.*[33]

The influence of the IMF and the WB has been insightful in South Africa in terms of shaping policies and promotion of privatisation. The United Nations Development Programme has also joined with the WB in the form of the Urban Management Programme, which promotes private sector participation in services in the region. However, Orthodox privatisation literature tells us that welfare gains from the policy are maximised where the enterprise is in a competitive market. Where this is not the case, proper regulation is required. Thus, regulation should be a key part of a privatisation programme. Even WB sponsored research points to the importance of regulation in achieving welfare gains from privatising monopolies. Presumably implicit in the privatisation policies is an assumption that there is effective competition or regulation. However, in many developing countries – particularly Africa- there is virtually no effective regulation, even where a comprehensive privatisation policy has been adopted. The WB has paid little attention to regulation in Africa.[34]

2.5. RELATIONSHIP BETWEEN PRIVATISATION AND LABOUR: ANALYSING ITS IMPLICATIONS

The relationship between privatisation and labour has several implications. These implications are inherent part of the change in situation from public to private domain. The implications are very vast and some are beyond the scope of this study. Among the

[33] Mail and Guardian 06-13 August 1997.
[34] As above n.11.

implications that privatisation has on labour the following will be dealt with and these implications are concerning social welfare; economic; effects on workforce; regulation; wages; provision of services; employment conditions of public servants and productive employment opportunities.

2.5.1 Social welfare

Privatisation attempts to shift responsibility for social welfare out of public domain into the arena of private contract. This shift is in keeping with the neo-liberal agenda of shrinking the public welfare away from the national government. During the privatisation process, states often have make opportunity cost decisions implying that there is a clash between the macro-economic objects they are perusing.[35] So we raise questions such as, does the state privatize the educational system at the expense of the health sector? And what would be the impact of such initiatives? All of these are a result of the neo-liberal ideological attack on government policy making and the idea of a redistributive role of the government. In addition, privatisation of the state functions, as well as structural adjustment programs inflicted a severe blow to public social security programs.[36]

2.5.2 Employment conditions of public servants

Privatisation advocates for the mobile displacement of public workers opportunely entering an expanding private service sector. Critics, on the other hand, contend that privatisation is a political decision that enables firms to boost profits by depressing the wages and benefits of service workers.[37] This debate however, is not only about economic distribution. At issue is the philosophical question over the role of the state in shaping labour markets. Should the state, on the grounds of efficiency, privatise services and thereby subject employees to the institutional and legal environment found in the private labour market, regardless of the negative effects on worker wellbeing? Alternatively, rather should the state endorse gainful employment, fair conditions, and reasonable expectations for the job security, first by

[35] Katherine V.W Stone *Flexibilisation, Globalisation, Privatisation. The Three challenges to Labour Rights in Our Time.* A working paper found at www.papers.ssrn.com (accessed 16 August 2008).
[36] See, Report of the Special Rapporteur on Adequate Housing as Component of the Right to an Adequate Standard of Living, Mr Miloon Kothari, submitted pursuant to Commission Resolution 2000/9,UN Doc. E/CN.4/2001/51, pg 58: 'Nearly all countries at all levels of development have undertaken macroeconomic reform programmes during the past two decades, strongly influenced by market forces and policies of international financial institutions (IFS). These reforms and domestic policy decisions regarding liberalisation, deregulation and privatisation have, to varying extents, constrained the exercise of monetary and fiscal policy options for social purposes, including provision of adequate housing.
[37] Kuttner 1997; Zullo 2002.

promoting high standards within public service and second by refusing to privatise unless private contractors meet comparable standards?

While this question could be framed as a choice between the rights of a few public workers to enjoy, "above markets" labour conditions against the right of taxpayers to cost – effective services, such as arbitration ignores historical role of the standards and working conditions in the private sector. Moreover, there remains a vested public interest in ensuring that "labour efficiency" does not translate into harsh forms of exploitation that exacerbate demands on public and private social support systems. In this way, the employment consequences of privatisation potentially touch both private sector workers and citizens who finance social welfare programmes.

Once it is recognised that privatisation fails in cases where marginal gains in service efficiency occur at the expense of quality jobs, safe guarding the well-being of public employees by incorporating any projected erosion in working conditions into the privatisation decision becomes responsible policy. Guidance on this issue requires a comprehensive understanding of the changes that take place when services shift from public to private control. Research indicates that most dislocated public workers are rehired by private contractors, are assigned within government or manage to secure jobs in the private sector labour market.[38] Although worker's ability to obtain new employment is reassuring, little is known about the quality of their new jobs and specifically the changes in working conditions for those public employees who survive the transition to private management. Available information in this regard indicates that privatisation exerts downward pressure on remuneration implying that privatised service workers suffer a deadline in economic status.[39] Further evidence reflect that privatisation is more frequent when labour management relations are contentious which can be a punitive reply to union demands.[40]

2.5.3 Regulation

The prevalence of privatisation leads to a shift from state to private regulation. The impulse for the shift is justified by a free market ideology that commemorates contract over regulation. One area where such has occurred is in the adjudication of labour rights

[38] Dudek and Comapany 1989; GAO 2001.
[39] Chandler 1994;Pack 1989;Pendelton 1999, Stevens 1984.
[40] Chandler and Feuille 1994.

violations.[41] Increasingly, employers are requiring employees to waive their rights to a public forum that is crafted and often controlled by the employer. Labour law is thus becoming a body of law that is interpreted by private arbitrators outside of the public eye. As employers move more and more disputes about labour rights out of public fora, the resolution of employment disputes become invisible and the decision-makers become unaccountable. There also fails to develop a body of publicly kno wn jurisprudence that can provide a normative basis for the affirmation of labour rights by others.[42]

2.5.4 Workforce

The public sector unions have had a range of reactions to contracting- out. In general, the unions feel that improvements have taken place on the basis of personnel being flexible. Yet there have been more temporary jobs and internal transfers are common. By and large, the increased productivity has arose from cutting the number of workers by various means. A smaller number of personnel than previously has for the most part shoulder the same workload.

Competitive tendering particularly threatens the position of low-wage workers in SOEs.[43] According to a study of the modernisation of public service in Europe, 77 % of jobs lost because of compulsory tendering for local authority services has been held by low-wage workers who were women.[44] In studies carried out, there was a fall by 22% in women's employment and pay rates of jobs held by women tended to fall. Women tend to be paid less than male employees after privatisation for doing work of equal value, in order to complete with tenders from the private sector.[45]

Innovations such as competitive tendering obviously undermine public sector workforce, which universally is paid a lower wage than the private sector and is defensive about its security.[46] Under a system of privatisation and contracting out, profits from services depend

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[41] As above n.32.
[42] For critiques of the use of private dispute resolution in employment relations see Grodin; Schwatz; Katherine V.W. Stone , *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of 1990s* 73 Denver Univ.L. Rev 1017 (1996).
[43] See David Hemson, *Privatisation, Public – Private Partnerships and outsourcing: The Challenge to Local Governance,* Transformation 37 (1998) pg 10.
[44] As above.
[45] As above.
[46] As above.

on cutting costs. With privatisation, the relative freedom from a public obligation to provide fulltime employment has led to significant increased use of temporary and casual labour.[47]

In Tanzania, implementation of the public sector reform program has resulted in loss of jobs for about 27,000 employees on the government payroll. The civil service reform program has given rise to mandatory retrenchment of more than 70,000 public servants. The fear of job losses leads to resistance to privatisation. Trade Unions make employment the number one issue in the privatisation deal. Collective bargaining is imposed and the levels of end of service benefits set. A close picture of the impact of privatisation on labour requires data on total job loss during privatisation period. To get net losses, one needs to take into account new recruits, and represent a percentage of employment level at privatisation. Mwandenga (2000) points out that negative divestiture results seem to hinge primarily on the number of retrenches. According to him, this factor calls for further research to quantify the exact amount of loss of job opportunities since there are cases where divestiture led to an increase in job opportunities. In some cases some of the retrenched workers were redeployed.[48]

2.5.5 Economic

Workers' apprehensions about privatisation are consistent with standard economic analyses, whereby new private owners reduce the firm's labour costs in response to harder budget constraints and stronger profit-related incentives.[49] Discussions of this efficiency effect of privatisation, however implicitly assume that the firm's output remains constant or at least does not increase the firm's market share as well as total quantity demanded for the industry, and the new private owners maybe more entrepreneurial in marketing, innovation and entering new markets.[50] In such cases, the firm's output will tend to rise, and of this "scale effect" dominates, then privatisation could cause a net employment increase.[51]

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[47] As above.
[48] *Tanzania's experience with Privatisation policies. A Case Study*, 2000 article by African Forum and Network on Debt and development, www.afrodad.org(accessed 2 October 2008).
[49] John S Earle, *Employment and Wage Effects of Privatisation. Evidence from transition Economies*.Employment Research, January 2006 article found at www.upjohninst.org/publications/newsletter/JSE_106pdf(accessed 23 August 2008).
[50] As above.
[51] As above.

2.5.6 Wages

The implications of privatisation for wages are also ambiguous. New owners may reduce wages as part of general cost cutting out policy, but if the firm expands, it may have to offer higher wages to attract new workers.[52] New owners may also be more likely to adopt skill-based technologies, resulting in a compositional shift towards higher-paid workers.[53] Depending on the relative strength of such factors, wages may either rise or fall as a result of privatisation.

2.5.7 Productive employment opportunities

The immediate effect of most privatisation instances is loss of employment. This is because not only there tends to be substantial overstaffing in public enterprises but also because new owners typically prefer to begin with less than ideal levels of employment to allow for greater flexibility in both the number of workers and the contracts under which there are employed. In addition, when the units concerned are closed down or substantially cut in terms of operation, there are the linkage and multiplier effects of such reduction to be considered. Employment conditions could be adversely affected in upstream and downstream units (linked, for example, by subcontracting) as well as the local community through the indirect demand effects of workers' income.[54]

2.5.8 Provision of services

The issue of provision of services is important as a lot of recent privatisation is in fact directed towards public utilities, which make available the specific needs of the people (basic infrastructure services including power, water, sanitation, etc). Here the benefits of privatisation must be balanced against the potential costs, specifically in terms of reduced access and elevated prices for consumers.[55] Recent experience, both in India (Orissa) and elsewhere (e.g California, South Africa, Latin America), has indicated that in the case of natural monopolies such as power and water distribution, the assumption of contestable markets is not enough to prevent private companies from indulging in monopolistic or

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[52] As above.
[53] As above.
[54] Jayati Ghosh, "Privatisation and Poverty Reduction: What are the Links?", 3 August 2002 article found at www.macroscan.org/eco/aug02/eco030802Privatisation_Poverty(accessed 14 August 2008).
[55] As above.

otherwise undesirable behaviour of various sorts.[56] It has also been found that regulatory mechanisms maybe inadequate to prevent practices which effectively prevent the poor and disadvantaged from accessing basic services. Such inadequacy can be due to high prices or discontinuing of services because of non-payment.[57] Since there are large positive externalities in such service provision (and indeed many would argue that access to water and power are among the basic socio-economic rights of all citizens, including the poor),there is a case for ensuring that such services remain available to all.

Consequently, it is imperative that restructuring of SOEs be pursued with balance against the above discussion on the implications of privatisation on labour. It is clear that the above-mentioned implications adversely affect labour in every respect including remuneration, job security and general protection by the law thus having an influence on the development of labour law. In this way, labour legislative frameworks should be in a position to counter balance the effects against worker protection.

2.6 CONCLUSION

With the preceding analysis, it is clear that an ideological torrent praising its merits has gone long with privatisation. The nature and characteristics of privatisation has been dealt with reflecting what is privatisation and the drive behind this structural development program. The arguments for and against privatisation laid in the chapter clearly shows privatisation is mostly viewed from an economic approach and various patterns of privatisation have been used in Africa. However, privatisation has been implemented and affecting labour in the existence of a regulatory framework. The framework is not privatisation *per se* as pointed put but it is relevant when considering the protection of workers' rights. The next chapter will discuss the international and regional legal frameworks governing labour and privatisation.

[56] As above.
[57] As above.

CHAPTER THREE

INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK GOVERNING LABOUR AND PRIVATISATION

3.1 INTRODUCTION

Taking from the preceding chapter, one can bring to a close that recent changes in the global economy have not come about in the manner envisaged a generation ago. Production and distribution are being organised in accordance with decentralised and private sector patterns coordinated by the market, rather than in a centralised manner by interventionist governments.[1] Though this would indicate a reduced role of governments, privatisation implies merely a shift in economic activity from the public to the private sector with composition of ownership.[2] More broadly however, it creates new processes and priorities for governments. Through their policymaking and regulatory roles can governments augment the private sector's capability to counter to the demands of a globally integrated economy? More over with rising economic interface between unions, there is an increasing need for international intermediaries.

This chapter provides an overview of labour law and generally addresses the current international and regional instruments governing the protection, respect, promotion and fulfilment of labour rights. It also covers the enforcement and application of these instruments through the obligations of states and non-state actors as provided for under various labour and human rights instruments. An evaluation of international and regional instruments will be done as well as the issues surrounding regulation of the labour in the economy. The discussion will act as a yardstick for analysing and evaluating international and regional labour law standards against privatisation.

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[1] Rubens Ricupero, "Privatisation, the State and International Institutions" in Journal of International Affairs Vol 50, 1997. pg 1.
[2] As above.

3.2 UNDERSTANDING LABOUR RIGHTS: THEIR BIRTH AND EVOLUTION

Given the diverse and potentially volatile composition of the economically active sector of the population, harmonious labour relations are of particular importance. Poor labour relations between employers and employees, as well as between employees themselves, may result in severe financial loss to companies, disruption of the industrial sector involved and even disruption of the national economy, leading to unemployment, socio-political and economic problems. However, labour law constitutes protection of a core of not only socio-economic rights, but also fundamental human rights.[3] These rights can be inclusive in the right to work and rights in work. A central denominator of work- related human rights, in terms of their object, or content, appears to be 'labour' (work).[4] In its traditional, but constricted sense, labour has been perceived as a means of earning a livelihood, in other words a means for economic survival solely. As early as the dawn of the twentieth century another important, and more global, perspective gained ground- an interdependence between labour conditions, social justice and universal peace.[5] Furthermore, modern perceptions have commendably enhanced the concept of labour as a human value, social need and a means for self realisation and development of human personality.[6]

The first trend was initially reflected in lofty but significant generalities of the Preamble to the Constitution of the ILO of 1919 which considered that 'universal and lasting peace can be established only if it is based upon social justice' and that there is the possibility that 'conditions of labour involving such injustice, hardships and privation to large numbers of people was to produce unrest so great that the peace and harmony of the world are imperilled'.[7] Thus the International community started dealing with labour issues in an organized and regular manner after World War 1, largely for reasons attributable to neither a

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[3] It should be noted that the research is for the position that labour rights are also human rights. Human and labour rights are fundamental liberties that protect the employee individually or and collectively against intrusive conduct/exercise of the employer's power (the state or non-state actors or third party actors) and also against intrusion from other individual employees.

[4] Krzysztof Drzewicki, *The Right to Work and Rights in Work,* Eide A, Krause C. & Rosas A (eds) 1995. Economic,Social and Cultural Rights: A Text Book. Martinus Nijhoff Publishers: Netherlands pg 169.

[5] As above.

[6] As above.

[7] See Constitution of the International Labour Organisation and Standing Orders of the International Labour Conference, 1992, p.5.

charity nor enlightened rationality of governments, but clearly to their fears of further revolutionary unrest which was sweeping virtually over all of Europe at that time.[8]

However, there is a major principle which is one of the fundamental principles of International labour law: "labour is not a commodity". This is because of the Philadelphia Declaration of the 1944 in which the revised Constitution of the ILO used this phrase as the first principle on which the organisation is based. This principle has been widely acknowledged. For instance, article 23 paragraph 3 of the UDHR proclaims that every worker has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. The following section will discuss the international standards.

3.3 INTERNATIONAL LABOUR STANDARDS

3.3.1. Meaning

International labour legislation came out well before any instigation of comprehensive international standard setting of human rights, which merely dates back to the seminal periods of the United Nations (UN). The international labour legislation became one of the main functions of the ILO. Although certain attempts had been made, and achievements recorded, in the field prior to 1919, they were nonetheless limited to only some categories of workers and were fragmentary in the objective scope of the protection afforded. These were the endeavours towards the abolition or limitation of such evils of rapid industrialisation as slavery and slave trade, child labour, exploitation of women, long working hours, dangerous working conditions, and poor health care. In that period success was achieved with the abolition of trading in slaves by the General Act of the Conference of Berlin in 1885 and slavery by the General Act of the Brussels Conference in 1890. The Conference in Berne in 1906 succeed in the adoption of two conventions, one limiting night work for women and the other banned the use of white phosphorus (a substance which caused a fatal disease known to workers as 'phossy jaw') in the manufacture of matches.[9]

The ILO lays down international standards in respect of labour law by means of its conventions and recommendations. Conventions are instruments designed to create

[8] As above n. 6.
[9] For more on these actions see A.H. Robertson & J.G. Mellis, Human Rights in the World. An Introduction to the study of the International Protection of Human Rights, 1992, pp. 14-16; and J. Mainwaring, The International Labour Organisation. A Canadian View, 1986, pp. 10-11.

international legal obligations for the states which have ratified them. Recommendations are not designed to create obligations but to provide guidelines for the government action. In the 50 years 1919 – 1968 the International Labour Conference adopted 128 conventions and made 132 recommendations. The conventions and recommendations of the ILO have created an "international labour code". It has been contended that this led to the creation of an "international common law" on human rights.[10] The conventions and recommendations have laid down specific standards for the working conditions and the way of life of workers, e.g. the limitation of working hours; weekly periods of rest; paid holidays; employment of women and children; unemployment insurance; safe and healthy working conditions.

3.3.2. The relevance of international labour standards

There are ideas advanced in favour of international standards in the field of labour. The oldest idea pointed by Valticos is international competition. Other ideas of social justice, consoled action of peace came to the fore. Other differing functions and aims were later accredited to international standards. The purposes of the international labour standards are discussed under the subsequent headings.[11]

a) International competition

The argument for the idea was that international agreements in the field of labour would help prevent international competition from taking place to the disadvantage of workers, and would constitute a kind of code for fair competition between employers and between employers and employees.

b) Consolidation of peace

It has been appointed out that measures of social justice, which among other things, for trade union rights – are bound to strengthen democratic regimes, which are more likely than authoritarian governments to be peace loving. Social peace within countries may also sometimes be related to international peace.[12]

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[10] Nicolas Valticos: "The International Labour Organisation: Its contribution to the Rule of law and the International Protection of Human Rights in Journal of the International Commission of Jurists, December 1998

[11] See Kachelhoffer G.C. et al 1988 *Labour Law.* University of South Africa: Pretoria. pp.361- 363.

[12] "Purpose of International labour law" , www.itcilo.it/actrav-english/telearn/global/ilo/law/labour.htm.(accessed 10 May 2008).

The preamble to the constitution of the ILO states ".... universal and lasting peace can be established only if it is based on social justice;... conditions of labour exist involving such injustices, hardships and privation to large numbers of people producing unrest so great that the peace and harmony of the world are imperilled...". This reflects how important consolidation of peace is to the international community.

c) Social justice

The driving force behind the idea of international labour law was the notion of social justice. In the field of labour, the humanitarian concern originally appeared in the force of conditions of great hardship imposed on the workers by industrialisation.[13]

d) Source of inspiration for national action

International labour standards can serve as a general guide and as source of inspiration for governments by virtue of the authority which attaches to texts adopted by an assembly composed of representatives of governments, employers and workers of nearly all countries of the world.[14]

e) Consolidation of national legislation

Even when the labour legislation or practice of a country has reached a certain level, it may be desirable for the country to ratify a convention that provides for a standard corresponding to existing national situation. This is because, even if no substantial change is called for, ratification of the respective Convention could contribute to the consolidation of national labour legislation by acting as a guarantee against backsliding.[15]

3.3.3. Sources

a) The ILO

The ILO's governing body has identified eight conventions as "fundamental", covering subjects that are considered as fundamental principles and rights at work. While the ILO Conventions are not ranked in terms of their order of importance, there is an underlying hierarchy, which can be discerned. In the first category are Conventions dealing with freedom

[13] As above.
[14] As above.
[15] As above.

of association and collective bargaining (Conventions Nos. 87 and 98), elimination of forced and compulsory labour (Conventions Nos. 29 and 105), elimination of discrimination in respect of employment and occupation (Conventions Nos. 100 and 111), abolition of child labour (Conventions Nos. 138 and 182). In the second category are technical standards, which establish norms to improve working conditions. These core conventions were identified and given prominence in the Conclusion of the World Summit for Social Development in 1995.[16] The ILO further substantiated the core conventions in 1998 by the Declaration on the Fundamental Principles and Rights at Work, which calls on its member countries to comply with the four principles, regardless of whether they have ratified the relevant conventions or not. It also identified a role for international organisations such as the WB, in promoting respect for core labour standards.

There are additional standards that substantiate the aspects of these core labour standards, such as those on workers with family responsibilities, protection of migrant workers, working hours for young workers and industrial relations. Other labour standards cover such subjects as occupational health and safety (OHS); employment promotion, including mechanisms (employment exchanges, etc.); minimum wages and payment of wages; social security; labour administration (including labour inspection); and specific economic sectors or occupations (seafarers, dockworkers, nursing personnel, home workers, plantation workers, etc.).

The following are the ILO instruments and their specific established standards:-

- **Convention on Freedom as Associations and Protection of the Right to Organise**[17]

Establishes the right of all workers and employers to form and join organisations of their own choosing without prior authorisation, and lays down a series of guarantees for the free functioning of organisations without interference by the public authorities.

- **Convention on the Right to Organise and Collective Bargaining**[18]

[16] See Copenhagen Declaration on Social Development.
[17] No. 87 of 1948.
[18] No.98 of 1949.

Provides for protections against anti-union discrimination, for protection of workers' and employers' organisations against acts of interference by each other, and for measures to promote collective bargaining.

- **Convention on Forced Labour**[19]

Requires the suppression of forced or compulsory labour in all forms. Certain exceptions are permitted such as military service, convict labour properly supervised, emergencies such as wars, fires, earthquake, etc.

- **Convention on the Abolition of Forced Labour**[20]

Prohibits any form of forced or compulsory labour as means of political coercion or education, punishment for the expression of political or ideological views, workforce mobilisation, labour discipline, punishment for participation in strikes, or discrimination.

- **Convention on Discrimination (Employment and Occupation)**[21]

Calls for national policy to eliminate discrimination in access to employment, training and working conditions, on grounds of race, colour, sex, religion, political opinion, national extraction or social origin and to promote equality of opportunity and treatment.

- **Convention on Equal Remuneration**[22]

Calls for equal pay for men and women for the work of equal value.

- **Convention on Minimum Age**[23]

Aims at the abolition of child labour, stipulating that the minimum age for admission to employment shall not be less than the age of completion of compulsory schooling, and in any case not less than 15 years (14 for the developing countries).

[19] No. 29 of 1930.
[20] No. 105 of 1957.
[21] No. 111 of 1958.
[22] No. 100 of 1951.
[23] No. 138 of 1973.

b) Other Standards

The UN does not deal with labour matters as such it recognises the ILO as the specialized agency responsible for taking appropriate action for the accomplishment of the purposes set out in its constitution. However, some UN instruments of more general scope have also covered labour matters.

A number of provisions concerning labour matters are contained in the ICESCR[24] and the ICCPR[25] which are legally binding human rights agreements. Both were adopted in 1966 and entered into force 10 years later, making many of the provisions of the UDHR[26] effectively binding.

The United Nations General Assembly has adopted a number of legally binding Conventions concerning labour matters. The most important ones are the Convention on the Elimination of All Forms of Racial Discrimination (1969), Elimination of all Forms of Discrimination against Women (1979), Rights of the Child (1989), Status of the Refugees (1954) and Status of Stateless Persons (1960).

3.3.4 Enforcement

Whether at the local level or international level enforcement of laws, standards, and norms relies on three basic tools – supervisory mechanisms, and technical assistance. [27] Until the Burma forced labour case[28] lodging complaints. In recent years the ILO has moved to strengthen all three of these tools.[29]

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[24] Article 8 (1) (b) protects the right to form and join trade unions, Article 8 (1) (c) protects the right of trade unions to establish national federations or confederations and most significantly , Article 8 (1) (d) protects the right to strike, provided it is exercised in conformity with the laws of the particular country; Article 6 protects the right to work; Article 7 protects the rights in relation to working conditions.

[25] Article 22 protects right to freedom of association; Article 26 protects the right not be discriminated against.

[26] Article 23 (4) protects right to freedom of association; Article 7 protects the right not to be discriminated against; Article 23 (1) protects right to work ; Article 20, Article 24 protects rights in relation to working conditions.

[27] See Kimberly Ann Elliot, " The ILO and Enforcement of Core Labour Standards" article found at www.iie.com (accessed 14 October 2008) pg 2.

[28] The ILO imposed sanctions under Article 33 of its Constitution for the first time in 2000, against Burma. The sanction was imposed after Burma had repeatedly failed to comply with minimum standards and not abolished forced labour. It is worth noting that there was no rule of law in Burma and that individuals were arrested, convicted and sentenced to periods of imprisonment for failing to perform forced labour. See Kimberly Ann Elliot, as above pg 6.

[29] It should be also be noted that UN also makes use of the three tools.

Under the supervisory mechanism tool, the ILO has extensive mechanisms for supervising the application of conventions, including both a routine reporting – and – review process and ad hoc procedures for handling complaints by worker compliance. Article 22 of the ILO constitution requires member governments to report regularly on conventions they have ratified, while Article 19 may be cited to request periodic reports from members explaining why they have not ratified a particular convention and describing what they are doing under their national laws to achieve the goals of the convention.

With the technical assistance tool, in the Declaration of Fundamental Principles and Rights at Work, in addition to increasing transparency there is enforcement by identifying right of way for technical assistance. The most effectual and sustainable means of improving implementation of core labour standards is to provide technical and financial assistance to countries that want to improve enforcement but be deficient in the resources to do it. The third tool lodging complaints has its provision in Article 26 of the ILO's constitution. The provision is reserved for the most serious cases and complaints, and unlike Article 24, representations may be made only by official ILO delegates.

3.4 REGIONAL STANDARDS: SADC PERSPECTIVES

SADC came into existence through its founding Treaty with the aim to promote economic and social development, and the establishment of common ideals and institutions, among other objectives.[30] SADC is made up of fourteen member countries with diverse stages of development but predominately underdeveloped. As a result, social and economic growth and development across the region are heterogeneous, with some countries attaining high growth rates and others achieving very low growth rates.[31] In spite of the economic imbalances among its member states and the relatively small size of the market (only comparable to Belgium or Norway), in the African context SADC's aggregate Gross Domestic Product (GDP) to United States Dollar 226.1 billion is more than double that of Economic Community of Western African States (ECOWAS) and is equivalent to more than half the aggregate GDP(Gross Domestic Product) per capita in the whole of Sub-Saharan Africa(SSA).[32] Driven by the need to rapidly reduce poverty, like other SSA regions, SADC

[30] See generally article 5.
[31] Deputy Minister Aziz Pahad Media Briefing 17 April 2008 on Cooperation between the UN and regional organizations in particular the African Union, in the maintenance of international peace and security. Article found at www.dfa.gov.za/docs/speeches/2008/paha041.html (accessed 20 May 2008).
[32] As above.

has embarked on the implementation of a number of reform measures aimed at promoting macroeconomic stability and higher growth combined with the improvement in the delivery of social science. [33]

The main avenues for FDI in SADC are privatisation and public-private provision of infrastructural services. In this regard, are there any regional labour standards in SADC taking into account the implications of privatisation on labour discussed in the previous chapter? [34]

3.4.1 Meaning and relevance

Regional standards are a duplication of international law. These standards are found through a context of a regional organisation established by way of a treaty, which can be bilateral or multilateral in nature. In these agreements there are standards set which distinguish themselves from moral rules as being at least potentially designed for authoritative interpretation by an independent judicial authority and by being capable of enforcement by the application of external sanctions. These characteristics can make them legal rules enforceable in a particular region.

One of the main reasons for the existence of regions is integration or harmonisation. The choice of harmonisation models depends on the subject matter for harmonisation as well as the degree of uniformity that is desired and feasible. The highest possible form of integration is, of course, uniform laws throughout the region and unified institutions dealing with supervision, enforcement and adjudication. Interesting to note is that regionalism provides a possibility to establish standards which are more progressive than worldwide standards. When the ILO was formed, certain standards were set without taking into account Africa and its unique nature. Another reason is to provide for more extensive reciprocal advantages.

3.4.2 Source(s)

a) SADC Social Charter

The protection of labour rights has become part and parcel of international labour law not only at the universal level but also regional level. In SADC, the most important instrument which recognises labour rights is the SADC Social Charter. The objectives of this Charter

[33] As above.
[34] As above.

clearly outline the importance of the recognition of labour related rights as stated in Article 1 of the Charter:

The objective of this Charter shall be to facilitate, through close and active consultations among social partners and in a spirit conducive to harmonious labour relations, the accomplishment of the following objectives:

a. *ensure the retention of the tripartite structure of the three social partners, namely: governments, organisations of employers and organisations of workers;*

b. *promote the formulation and harmonisation of legal, economic and social policies and programmes, which contribute to the creation if productive employment opportunities and generations of incomes, in Member States;*

c. *promote labour policies, practices and measures, which facilitate labour mobility, remove distortions in labour markets and enhance industrial harmony and increase productivity, in Member States;*

d. *provide a framework for regional co-operation in the collection and dissemination of labour market information;*

e. *promote the establishment and harmonisation of social security schemes;*

f. *harmonise regulations relating to health and safety standards at work places across the Region; and*

g. *promote the development of institutional capacities as well as vocational and technical skills in the region.*

The Social Charter incorporates a range of labour related rights including the right to freedom of association and collective bargaining[35]; the realisation of Conventions of the International Labour Organisation by all member states[36]; improvement of working and living conditions[37] and others. It also serves as a step towards integration in the region. The regional integration process in progress in Southern Africa is a long term strategic endeavour by SADC countries to overcome the legacy of colonisation and apartheid and bring about development in the

[35] Article 4.
[36] Article 5.
[37] Article 11.

region. No country can develop in isolation or at the cost of others. Such approach should not be pre-empted or diluted for the sake of private holders, multinational companies or foreign investors. In this regard, the study will add to the growing body of comparative writing in finding more ways of integrating SADC in dealing with common issues together and harmonisation of policies.

At regional level, SADC, the implementation and enforcement of the charter lies with the national tripartite institutions and regional structures.[38]

3.5. APPLICATION

These international and regional standards impose obligations on the state and non-state actors as a way of application of these standards. The two subsequent sections will discuss these obligations in relation to privatisation as a structural adjustment programme.

3.5.1 By State Organs

There are obligations imposed on states by ILO Conventions and United Nations Instruments. These obligations provide the individual and collective workers with a range of guarantees related to labour rights. Each of these rights carries with it corresponding obligations by the state. Examining the nature and extent of state's obligations under the international and national labour rights standards is vital in order to understand what we can and should expect from the states, and what this means for how our rights can be best ensured.

Privatisation, as per results so far leads to, among other developments, unemployment and there is the right to protection against unemployment. In this regard, the very first international formulation of this right appeared in the UDHR. Under its Article 23(1) 'Everyone has the right.... to protection against unemployment'. In such explicit and typical human rights language, this right has both appeared in any subsequent binding instrument on human rights. Rather its core message has been indirectly translated into rules providing for obligations of conduct by states to declare and pursue active policies designed to promote full, free, high, stable and productive employment, as is the case, albeit with diversified

[38] See M.P. Oliver et al, *Introduction to Social Security* (2004) Durban Lexis Nexis for the discussion on SADC regional structures and the restructuring of SADC institutions. pp 184 – 187.

variations, of the provisions in the ICESR[39], European Social Charter (ESC)[40] and the ILO Conventions Nos 2 and 122. Although this evolution has led to identification of specific governmental duties for policies to combat unemployment, it has contributed to ignoring a 'rights' perspective. This is to say that the content of the right to protection against unemployment has been more extensively developed from a viewpoint of obligations of states than of an 'active' human rights approach, instead of setting more of an intertwined co-existence between the two approaches.

As far as obligations of states to actively counteract unemployment are concerned, there is much confusion about their legal significance. It is often overlooked that they are normally formulated as prescriptive rules (for example to adopt and pursue a specific policy) while in their content they reveal a diversified degree of obligations of conduct.

However, the obligations imposed on the state by the ILO instruments and the Human Rights Instruments particularly the ICESR are at three distinct altitudes: the primary, secondary and tertiary.[41] These altitudes give rise to the imposition of positive and negative duties on the states. At primary stage the state has a duty to respect which essentially entails negative state action which requires the state not to interfere unduly with a person's fundamental rights.[42] This is known as negative enforcement by the courts. On secondary altitude, fundamental rights place a positive duty on the state to protect its citizens from political, economic and social interference with their stated rights.[43] This obligation does not, as such require the state to distribute money or resources to individuals but instead requires the setting up of a framework, wherein individuals can realise their rights without undue influence from the state. This also includes protection against third party (i.e. non-state actors) rights violations.

At tertiary level, the state is required to promote and fulfil every person's rights.[44] Beneficiaries have the right to require positive assistance, or a benefit or service from the state. The nature and scope of these obligations placed on the state depend on the wording or

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[39] Article 6 (2).
[40] Article 1(1).
[41] See discussion on "Negative and positive obligations: the duty to respect, protect, promote and fulfil" *by* M P Olivier, N Smit & E R Kalula, in *Social Security: A legal Analysis*, Lexis Nexis, Butterworths 2003 pp 77 - 80
[42] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights par 11 par 6; O'Regan 1999 *ESR*2. However, positive action may be required where interference with a fundamental right has taken place: sufficient remedies should then be provided by the state to deal with such interference.
[43] As above n. 38.
[44] As above.

phasing of the fundamental right in question, as well as the internal and external limitations of the right and in its relationship with other fundamental rights. "Promotion" means that the relevant legislative, executive and judicial frameworks for the realisation of, for example the right to protection against unemployment must be in place and must be effective. "Fulfilment" in this contexts refers to the adoption by the state of its planned polices for employment, including promotion of programmes for vocational retraining, their active or passive nature, whether they address groups of persons or regions particularly affected by unemployment, or arrange for indispensable mechanisms of consultations with organisations of workers and employers.[45]

The nature of all these obligations hardly allows for their reformulation as a corollary of potential right to pro-employment policies, but nevertheless the obligations in question impose on states a series of fairly clear duties, the implementation of which can be successfully supervised by domestic social partners and international supervisory bodies.[46]

Dealing with privatisation, the obligation to protect is the most relevant one since it requires states to prevent violations of economic, social and cultural rights by third parties. States have to ensure such rights are consistently protected once private actors take over the services. States have to "ensure that privatisation.... does not constitute a threat to the availability, accessibility, acceptability and quality" of the services delivered. Thus, state have to exert due diligence in monitoring the operation of services by private bodies. This obligation of due diligence is required by the Maastricht Guidelines when stating that:-

> *The obligation to protect includes the state's responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights. States are responsible for violations of economic, social and cultural that result from their failure to exercise due diligence in controlling their behaviour of such non state actors.*[47]

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[45] Krzysztof Drzewicki, as above n.8 pp 184- 185.
[46] As above pp 185.
[47] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997), in Human Rights. Maastricht Perspectives (Maastricht: Maastricht Centre For Human Rights, 1999) 22 pg 18.

3.5.2 By Non-state actors/ Private sector holders

An orientation that is heavily state-centred fails to take into adequate account the changing environment, at both the national and international levels, where non-state actors- such as corporations, fundamentalists groups and armed opposition groups – are having and increasing impact on the enjoyment of labour rights. The history of international labour law indicates that labour rights were intended to protect the individuals against excessive use of state power. The key conventions and treaties make explicit provisions that only states hold human rights obligations. The ICESCR, for example, states "each state party to the present covenant undertakes to take steps....". In this way, international human rights law thus does not oblige private actors (whether corporations or others) to act in particular ways and therefore they cannot be brought to account directly through labour rights law. How then is it possible for the activities of such private parties to be reviewed as to hold accountability for any human rights violations?[48]

It is paramount to note that the obligations of non- state actors under national law may not be the same as they are under international law. Section 8 of the South African Constitution, for example, places specific human rights obligations on private parties. However, there are exceptions to this general rule that international law is not applicable to private actors.[49] While corporations are generally considered non-state actors, state owned corporations are considered to be part of the state.[50] They and their employees are therefore under the same international law obligations as the state. The criteria for determining when a company is a part of the state depends on the particular jurisprudence in question[51] and also on the pattern of privatisation used for the enterprise.[52]

In domestic law, it has long been accepted that legal persons such as companies have legal obligations- for instance under labour and environmental law- and they may be held liable for breaches of these obligations. As a matter of fact, companies cannot be imprisoned but in most states they can be sentenced to other criminal sanctions such as fines.[53] The state however, is responsible for its nationals by making sure private actors respect, fulfil and

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[48] "Obligations of States and non state actors", article on a module illustration outline found at www.law.wits.ac.za/humanrts/edumat/lhrlp/circlemodules/module9.htm.(accessed 20 August 2008).
[49] As above.
[50] As above.
[51] As above.
[52] See Chapter 2 of this study for discussion on the different types of privatisation patterns.
[53] As above n.48.

promote labour standards. This was solely affirmed by the African commission when it held that:

> *"Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties."*[54]

3.6 EVALUATION

Experience in a variety of areas suggests that the ILO is right to focus on positive efforts to work with countries to improve enforcement of labour standards. But the ILO also has the constitutional authority to respond to egregious violations when necessary and has shown that it can do so. The real test of ILO's credibility, however, will come overtime as we see whether Burma[55] is a precedent or an anomaly.

While unquestionably doing well in many areas, the ILO has always had struggles in getting its point across. For example the Former Communist countries had taken what the ILO has to offer in a very selective approach: they adopted the social protection and unemployment prevention measures sincerely, but they interpreted "freedom of association" in their own particular way. The developing countries too, have had reservations about tolerating the ILO's point of view in many cases often they do so because of steep poverty- many still dispute that they cannot afford to restrict child labour, for instance- but also because the putting in place of a so-called "western" view point has been at odds with authoritarian attitudes carried over from earlier times, before "democracy" became a byword.[56]

The standard scene has changed in recent years, and so has the basic vision that animated their adoption. The perception of international regulation of working conditions has lost some argument over the last few years. Matching with the rise of opinion that deregulation is the solution to many economic issues indeed, no one could argue with the positive effects deregulation has had in many areas, but like most policies, it tends to be taken as the entire solution to a problem when it is only a share of it. Although there is now a positive rebound in thinking, both national governments and international financial institutions have

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[54] IACHR, Report of the situation of human rights in Ecuador, OAS Doc. OEA/ser.L/V/11.96 (1997) par 57
[55] See Kimberly Ann Elliot, as above n.27.
[56] See Lee Swepston, ILO's 75 Anniversary, "The Future of ILO Standards", Monthly Labour Law Review September 1994 pg 17.

sometimes lost sight of the idea that the focus of economic reform should be people, not the economy itself.[57]

This is of course, a manifestation of the natural human tendency to concentrate on a simpler concept at the expense of a more complex one, but the possible damage to human beings caused by the removal or lack of enough regulatory protection has perhaps been too widely ignored.[58] The human cost of wholesale deregulation can be high. It cannot be argued, for example that the use of government service to provide employment might lead to inefficiency, and the rigidities in the labour market can stifle economic creativity and flexibility in some countries. Over regulation of the economy can have terrible costs if, for example bureaucracy makes its only way to do so in so-called "informal" (or unregulated) economy.[59] While at it, privatisation also fuels the informal sector evident from the retrenchments and layoffs associated with it.

The ILO's side on this discussion is that the side that is represented by international labour standards – can be abandoned too easily. At the extreme, the cost of moving into the informal economy can be that workers have no protection whatsoever against the abuse the ILO was created to control: child labour, long working hours, no limit except the market on the level of wages, and no protection against workplace hazards.[60] Even where law is present, lack of enforcement can turn what is supposedly the formal sector into a close duplicate of the informal sector. If the laws are preserved in the books, but there are no labour inspections, will employers continue to provide safe and healthy labour conditions? If the legislated minimum wage is abandoned, or if it is allowed to fall so low that it tolerates no relaxation to living costs, will a worker be able to feed himself/herself and a family by putting in what we have considered a "normal" work day?[61]

There is a sense of balance which needs to be struck. The arguments at the national level find their meaning in the ILO. There are many who believe ILO standards are too complex, too restrictive, too expensive for employers – and this might be true if all standards were applied

[57] As above.
[58] As above, pg 19.
[59] As above.
[60] As above.
[61] As above.

directly and to all situations, without distinction. But the standards were not intended to function that way.[62]

However, according to Tajgman, " more than in any other sub-region of the African continent, international labour standards in Southern Africa are relevant and stand a chance of implementation, yet practice indicates a certain reticence in the use made of the international system of labour standards".[63] He explains the relevance of international labour standards for the Southern Africa by referring to the following factors: a) the outstanding level of formal and private sector employment by comparison to other African nations; b) the democratic winds in the region c) the fact that major sub-region issues, such as equality of opportunity, human resource development and migration, are dealt with in international standards, d) de facto regional integration in SADC region, suggesting coordinated labour practices; and e) the need for 'levelling the playing field' through international standards with the advent of democracy in South Africa, increasing the danger of brain drain from neighbouring countries to South Africa.[64]

Moreover, the sub-region's economy is relatively strong, it has institutional capacity, international standards have substantially influenced labour law reform in the region and it has viable social partners. Despite all these favourable factors, however, there is a low level of ratifications of ILO conventions and little commonality among the conventions ratified by each country. Kalula points out that in the regional context, although the countries of the region are members of the ILO and formally committed to its ideals, most governments lack the will to ratify, and more important, implement international standards [65] and this could be a contributing factor to why the region lacks sources for regional standards pertaining to protection of labour rights.

However, there have been sentiments that labour management issues should remain for local determination within the framework of national law and practice. Blanplain[66] forwards the reasons for such and they include:

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[62] As above.
[63] Tajgman D, "International Labour Standards in Southern Africa" in *Southern Africa Labour Monographs* 4/94 Labour Law Unit UCT pg 1.
[64] See Tajman as above pp 1-2.
[65] Kalula E *In Search of Southern African Comparative Labour Law Perspectives* (1993) 14 ILJ (SA) 322 at 331
[66] Blanplain, R, *The OECD guidelines for multinational enterprises and labour relations,* 1979-1982 pp 201-203.

a) Internationalisation of industrial relations is not an accepted concept in principle or in practice. During the debates in the OECD and in the ILO, the international concept failed to get recognition. Formal international consultation has not become a way of industrial life in any country.

b) National Sovereignty

The requirements for information disclosure and consultation at the international level would also impinge on the sovereignty rights of national governments to establish labour relations laws and practices according to their own national, economic and social objectives.

c) Diversity of industrial relations systems

Each country has its own industrial relations climate dependent on its stage of development as well as on the economic, political, social and cultural structures and social/economic objectives.

d) Diversity of trade union structure

The trade unions have their own structures, they have different ideologies, goals and aspirations. International consultations could accentuate these differences and could add to the sometimes conflicting interests between unions within a country, as well as in other countries. Employers are not the appropriate channel through which trade unions should seek to challenge government objectives in a country other than the one to which they belong.

e) Limits to the role of trade unions

Trade unions have no sole right of representation at the national level, let alone at the international level. Furthermore, the extent of trade union membership varies widely from country to country. Relationships between trade unions and employers are considered within national law regulations and practices which also vary from country to country. There is no international framework defining the way in which trade unions should discharge their responsibilities or conduct their relationships with employers, other unions or governments.

f) Internationalisation of industrial relations is not in the interests of good management practices and good local labour relations.

Employees' interests are best served only when labour management negotiations are conducted in a local context. Procedures for information disclosures and consultation at an international level would conflict with sound practices of management such as decentralisation and strengthening responsibility of local managements. The essential relationships between management and employees are at the local level within the entity concerned. The best way of promoting mutual confidence is to develop effective local management channels of communication and consultation and to ensure that local managers are closely involved in the decisions which affect their employees. Direct access of employee representatives to a foreign corporate body could only reduce the authority and credibility of the national management.

3.7 CONCLUSION

The endeavour to realising the respect to uphold labour law or labour standards in any economic situation ensures that workers have access to resources and opportunities to be part of the economic growth of the state and be able to attain the production levels needed in a particular working environment. It ought to be commended that structural development programmes (privatisation) constitutes the most redoubtable intimidation to labour standards. Labour rights deal with the material welfare of workers and as a result, the realisation of such rights is vital to the success of any attempt to create a working environment based on labour rights.

The chapter has discussed the various ILO instruments and also highlighted some UN instruments that are relevant to the protection of labour rights. At regional level, the most relevant source of labour standards which is SADC Social Charter was conferred together with an evaluation of the instruments against the issues surrounding labour standards internationally and regionally. However, these instruments are vital for the protection of the vulnerable worker in privatisation exercises and all parties involved have the obligation to uphold these rights thus the government and in certain situations, private persons and parties can be held accountable if they do not respect, protect, promote and fulfil these rights.[67]

[67] Sandra Liebenberg & Karrisha Pillay, *Socio-economic Rights in South Africa,* A resource book published by the Socio-economic Rights Projects, Community Law Centre, University of the Western Cape, South Africa 2000,pg 12.

Against this benchmark, the next chapter will give an analysis of privatisation in South Africa.

CHAPTER 4

PRIVATISATION AND ITS IMPACT ON LABOUR IN SOUTH AFRICA

4.1. INTRODUCTION

Privatisation has generally been over sold as a solution for all economic ills, often understood and all too often imperfectly implemented.[1] This holds sway in South Africa where the programme has right from the onset been highly controversial and contentions. There is also increasing recognition of the importance of regulatory framework to counter pervasive market failures as a result of natural monopolies, information failure, externalities, social concerns[2] and the protection of labour rights. In South Africa where the literature is gradually evolving, not much is known about the post- privatisation transition from a labour perspective and there is a need for such.

Against this background, this chapter will try to explore the privatisation exercise in South Africa. The chapter will give a historical background of the regime dating back as far as the 1980s and will further give the legislative framework pertaining to labour in South Africa. In addition, the chapter will point out the impact the privatisation has had on labour both negative and positive impacts.

4.2. HISTORICAL BACKGROUND

In the late 1980s the apartheid regime made known its intention to take on a major privatisation drive. It announced its intention to privatise some of major parastatals, including ESKOM, Iron and Steel Corporation (ISCOR) and Phosphate Development Corporation (FOSKOR).[3] The postal service, the telecommunications services (TELKOM) and railway lines were also scheduled for privatisation. This move towards privatisation was prompted by a number of factors including:- [4]

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[1] Afeikhena J. *Privatisation and Regulation in South Africa: An Evaluation* 3rd International Conference on Pro-Poor Regulation and Competition: Issues, Policies and Practices, Cape Town- South Africa 7-9 September 2004.
[2] As above.
[3] Thayer Watkins, "Privatisation in South Africa", San Jose' State University Department of Economics article found at www.applet-magic.com(accessed 20 August 2008).
[4] Editorial Notes "No to Mindless Privatisation!", Issue 141- Second Quarter 1993 article found at www.sacp.org.za(accessed 18 August 2008).

- The state enterprises were incurring losses that had to be covered from government revenues.
- The needs of state enterprises for capital expansion had to be met from the limited credit sources of the state.
- The proceeds from the privatisation sales would alternate the government shortage of funds.
- The low efficiency of the parastatals was a source of continued criticism of the government.
- The sale of government-owned housing to the tenants would give those tenants a stake in preserving private property in the future.

As a preliminary to privatisation the National Party government in the 1980s reorganised the Ministry of Transport, Posts and Telecommunications and it became The South African Transport Services (SATS) which in 1990 became a corporation called Transnet. Transnet was made up of six divisions employing over 100,000 people, SPOORNET: Railways; PORTNET: Ports; AUTONET: Road transportation; SAA (South African Airways): the national airline; PETRONET: Petroleum Pipelines; PX: Parcel delivery.[5]

The privatisation move, however, encountered heavy opposition from progressive trade union movement. COSATU was supported by the United Democratic Front and by then illegal African National Congress (ANC) and South African Communists Party (SACP).[6] The privatisation plans had to deal with the issue of whether foreign buyers would be allowed to purchase what had been deemed critical South African industries. The above mentioned organisations, with ANC that expected then to achieve political power in the near future, opposed privatisation. These organisations felt that privatisation was merely a ploy to deny them control over the economic resources of South Africa even after they achieved political control.

In the face of this opposition to the unilateral (and eleventh hour) sale of public resources by the white minority regime, the plan was put on hold. However, the commercialisation of key public sector corporation proceeded. Commercialisation involves placing public sector corporations on to a profit-driven basis, and it usually precedes privatisation. Although it fell short of privatisation, this commercialisation programme (which still continues) has had a

[5] As above n.1.
[6] As above.

devastating impact. The major state enterprises accounted for five percent of employment, yet the commercialisation process accounted for a full twenty percent of jobs lost in the formal sector between 1989 and 1993.[7]

However, in the period from 1990 to 1994, privatisation was put on hold because of the political transformation process[8] which led to the ANC attaining political power even to date. The new ANC led government embraced privatisation believing that it would lead to the provision of:-

- increase in government revenue
- inroad for private sector to bring in capital investment, higher technology and know-how which is ordinarily expected to lead to an increase in production.
- improved enterprises to be source of increased taxation product through the improved turnover and salary distribution.[9]
- improvement in the provision and delivery of socio-economic services and utilities like water, electricity, housing, healthcare, employment opportunities
- a general infrastructure upliftment.

A remarkable policy called Reconstruction Development Programme (RDP) was adopted during the transition period (from apartheid to democracy). RDP was a brainchild of COSATU.[10] It marked the first economic blueprint of the new government.[11] It is also an integrated, coherent, socio-economy policy framework which seeks to mobilize all the people and the country's resources towards the final eradication of apartheid and the building of a democratic, non-racial and non-sexist future. The core vision of the RDP lies in the values and methods it proposes to achieve national democratic transformation tasks in the conditions of present national, regional and global circumstances. The RDP has four areas of principles concern:-

a) meeting basic needs
b) developing human resource

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[7] Thayer Watkins, as above n.2.
[8] Petrus Brynard, 'Privatisation in South Africa' article found at www.unisa.ac.za/Default.asp?Cmd=ViewContent&ContentID=11629 (accessed 5 May 2008).
[9] Chirwa D "Privatisation and Socio- Economic Rights; Making Human Rights Work in a globalising world"; *Human Rights Dialogue (Spring 2003),* 29(accessed 04 May 2008).
[10] McKinley D.T, " COSATU and the Tripartite Alliance since 1994", http://general.rau.ac.za/sociology/Mckinley2.pdf (accessed 04 May 2008).
[11] Afeikhena Jerome, as above n.1 , pg 7.

c) building the economy

d) democratising the state and society

These principles are based on the people, provision of peace and security for all and building the nation, linking reconstruction and development, and deepen democracy.[12]

On privatisation, the RDP was ambivalent and stated that:[13]

> *"There must be significant role for public sector investment to complement private sector and community participation in stimulating reconstruction and development. The primary question in this regard is not the legal form that government involvement in activity might take at a given point, but whether such actions strengthen the ability of the economy to respond to the inequalities in the country, relieve the material hardship of the majority of the people, and stimulate economic growth and competitiveness."*

In the various debates on economic policy by labour, business and government, there was an agreement that the state needed to be restructured. The disagreement borders more on the nature of the restructuring. While labour opted for a development state with increased service provision to redress the backlogs of apartheid, Business preferred a leaner and more efficient state. COSATU held demonstrations in response to privatisation proposals by the newly elected government.[14] The conflict between government, business and labour on privatisation appeared resolved in the National Framework Agreement (NFA) signed through the National Development and Labour Council (NEDLAC) in 1995 by COSATU, the Federation of Unions of South Africa (FEDUSA), the National Council of Trade Unions (NACTU) and the government of National Unity. The National framework Agreement (NFA) was the first occasion on which the government and organised labour successfully and negotiated around the policy of privatisation. It marked a change in the policy stance of COSATU. Prior to NFA, COSATU had rejected privatisation but in the NFA it accepted that privatisation could take place in certain instances.[15]

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[12] See "South African Economy: An Overview" article found at www.dti.gov.za/econdb/raportt/southafricaoverview.htm (accessed 7 October 2008).

[13] As above n. 11.

[14] As above.

[15] See ANC daily news briefing , Saturday 15 January 1996 prepared by ANC Information Service article found at 70.84.171.101/~etools/newsbrief/1996/news0615, (accessed 14 November 2008).

On NFA and workers, the Framework Agreement states inter alia:

> *"The ultimate aim of restructuring is to improve the quality of life for all South Africans. Therefore, the underlying approach is that restructuring should not occur at the expense of workers in state enterprises. Every effort must be made to retain employment. Where restructuring potentially has negative effects on workers, a social plan must be negotiated with the relevant unions at the enterprise level which takes account of the workers' interest".*

The above mentioned agreement outlined the various goals of restructuring of certain SOEs and the steps that were to be taken in the process. It set up a number of joint structures of government and labour to discuss strategies for restructuring.

In June 1996, the government released its macroeconomic strategy tagged 'Growth, Employment and Redistribution' (GEAR) which envisaged a broad based privatisation programme although the term privatisation was not used in the document. It outlined the process of restructuring of SOEs, the need for appropriate regulatory policies and the creation of public private partnerships (PPPs) in recognition of the limited capacity of fiscus. According to the document:

> *"The nature of restructuring, as outlined in the framework agreement, may involve the total sale of the asset, a partial sale to strategic equity partners or sale of the asset with government retaining a strategic interest. Work is in progress to address the outstanding issues on the restructuring of the remaining state enterprises. The restructuring will take place in a phased manner so as to ensure maximum value and adequate regulatory frameworks. Specify policy issues and further elaboration will be dealt with by the responsible Ministers".*[16]

The GEAR policy was a combination of the standard IMF and WB stabilisation and structural adjustment polices. The GEAR strategy has been referred to as a 'home grown structural adjustment' programme.[17] Once GEAR became the economic policy of the government, restructuring was conducted in a number of state enterprises. Thabo Mbeki, then Deputy

[16] Afeikhena J. as above 14 pg 8.
[17] Sargie N. "Neoliberalism and privatisation in South Africa" ,in *GeoJournal* Vol 57,May 2002 pg 5.

President announced plans for wide- sweeping privatization programme in late 1995 and this provoked strong protests from labour unions over the threat of job losses and labour's exclusion from the policy decision.[18]

The programme eventually got underway in 1996 though the sales of enterprises actually commenced in 1997. Adelzadeh criticised the GEAR policy for lack of integration and over confidence on the private sector to promote development. His predictions were that the GEAR policy would not boost the growth rate of the economy, it would not lower the unemployment level and that it would not bring satisfactory progress towards the equitable distribution of income and wealth.[19] In 1999, the author revisited the GEAR policy to determine whether its targets were being met. Almost all the GEAR targets were missed (by huge margins in most cases) for the period 1996-1998.

The government, under pressure from the unions, proceeded very cautiously with what is now referred to as the "restructuring of state assets".[20] A policy distinction between "strategic" and smaller "non-strategic" enterprises was initially made by the new government: the partial sell-off of minority stakes in strategic institutions (e.g. the telecommunications sector) was only initiated in 1997, while some of the other smaller "non-strategic" enterprises (e.g. public resorts) were to be sold out of hand once the necessary corporatisation and turnaround strategies had been implemented. Six radio stations owned by the South African Broadcasting Corporation were sold. 30% stake in Telkom was sold to a consortium of United States based SBS Communications (18%) and Telkom Malaysia Benald (12%) at a value of R750 million. The interests are held via an investment holding company, *Thintana Communications LLC.* Sun Air was sold for R97 million to a Black Empowerment: The new stakeholders were Rethabile Group (35%), co-ordinated network instruments (19%) and the National Empowerment Fund (15%) and staff (5%). By August 1999, the company ceased operation. This was followed by the sales of 20% stake in South African Airways (SAA) in 1999 to Swissair for R1.4billion but repurchased subsequently by Transnet in 2002 due to problems in Swissair. [21]

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[18] As above n. 15.
[19] See Adelzadeh, A., "*From the RDP to GEAR: The Gradual embracing of Neo-liberalism in economic policy*".Occasional Paper Series no. 3 NIEP Johannesburg 1996.
[20] As above n. 18.
[21] As above pg 9.

A 20% stake in the Airports Company of South Africa (ACSA) which controls all major airports in South Africa was sold to Italy's *Aeroport Di Roma* and further "Initial Public Offering" of shares was planned. Strategic management partners were appointed for all Aventura Leisure Group, the Alexkor Diamond Mine and the South African Post Office although the management contract with the New Zealand Post Office was terminated in 2001. About R2.5 billion was also raised from the partial sales of Transnet's holdings in cellular telephone operator MTN. Denel, the Defence firm was partially privatised and foreign strategic partners BAE systems and Turbomecca have been introduced. Some of the nation's forest and Mossgas were also sold.[22]

In addition to this, the government significantly reduced grants and subsides to local municipalities and city councils and promoted the development of financial instruments for privatised delivery. Such a stance successfully drove the local government to privatise basic services as a way of generating the revenue which was no longer coming from the central government. Partnerships with multinational corporations resulted in terms of service and management. This was following the WB's advice on privatisation and funding options for municipal infrastructure.[23]

Though, the privatisation exercises went on, South Africans to-date, nonetheless, still have limited access to some human rights provisions like housing, sanitation, water and a clean environment and should be noted that workers are also beneficiaries of such rights together with the rest of the society in South African. Also specifically to labour, the right to work and creation of employment opportunities has been to some extent wanting taking into cognisance the jobs lost due to the exercise. One of the reasons for this has been attributed to the society's profound history of inequality. Due to apartheid and exceptionally skewed pattern of development economically, South Africa has been labelled the second most unequal state globally after Brazil.[24] The following section will deal with the legislative framework in place concerning labour market and how it has been affected by privatisation.

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[22] As above.
[23] See, McKinley D.T. "The Struggle against water privatisation in South Africa (Anti-Privatisation Forum and Coalition against Water Privatisation)" article found at www.apf.org.za (accessed 12 August 2008).
[24] SAMWU: Water for all in South Africa: Policies, pricing and people. Rural Development Services Network. Discussion document for the *Water for all* seminar, Commonwealth people's centre meeting, Durban, South Africa, 10 November 1999, 1, http;//flag.blackened.net/revolt (accessed 12 August 2008).

4.3. NATIONAL LABOUR STANDARDS

4.3.1 Meaning and relevance

The preceding historical outline has been coupled with changes in the legislative framework of South African labour law. Workplaces and labour relations had been adversely affected by apartheid. Racial divisions between skilled and unskilled workers, apartheid wage gaps, poorly educated workers, dictatorial management styles and lack of protection for the most vulnerable workers were just some of the consequences.[25]

When the democratic government came into power new sources of standards were implemented including a new Constitution which recognises labour rights and all subsequent labour statutes had to be in line with the values and obligations of the Constitution. These standards were a way to address the injustices of the past. However, labour legislative framework in South Africa have been said to have ambitious goals, seeking to redress the adversarial heritage and injustices of the old industrial relations system as well as the distorted and inefficient labour market it supported. In so doing, they aim to facilitate the development of a new system able to meet the challenges of economic development[26] part of which includes structural development programmes and other changes brought by globalisation.

4.3.2 Sources

The following sources of labour standards in South Africa, as indicated earlier, are now standards set in legislative Acts specifically for labour.

a) The Constitution

The South African Constitution is the highest law of the Republic and any legislation that is inconsistent with it shall be deemed invalid.[27] The Constitution adopts a human rights friendly approach by giving protection to certain fundamental rights. Such rights are considered to be expression of values on which the legal order as a whole is based.

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[25] Finnemore & Van Rensburg, *Contemporary Labour Relations*.1999 Butterworths- Durban pgs 45 – 46.
[26] See Du Toit D et al. *Labour Relations Law. A Contemporary Guide* (2006) 6th edition. Lexis Nexis, Butter worths, Durban pp 37-38.
[27] S 2 of the 1996 Constitution.

Labour rights are also fundamental liberties. In South Africa, Chapter 2 of the Constitution (the Bill of rights) contains fundamental rights which impact directly or indirectly to employment relationships. These include the right to equality[28], right to religion, belief and opinion[29]; right to freedom of expression[30]; right of assembly, demonstration, picket and petitions[31]; right fair labour practice[32]; right to freedom of association[33] and the right to strike[34]; right to freely choose a trade, occupation and profession[35] and the right to social security[36].

b) The Labour statutes

Nevertheless, South African labour law has under gone transformation since 1994 and the Labour Relations Act, Basic Conditions of Employment Act[37] as well as the Employment Equity Act (EEA)[38] represent three very progressive pieces of legislation. All these statutes were developed to realise the importance of the international labour standards and the obligations imposed by the 1996 South African Constitution Act 108.[39]

The following are the labour statutes in South Africa and their established standards:-

- **Labour Relations Act (LRA)**

It provides the foundation for the regulation of labour matters in South Africa. Amongst others, the LRA regulates the rights to unionise[40], provides a framework for collective bargaining on wages; terms and conditions of employment and other matters of mutual interest, promotes collective bargaining; regulates dismissal law and regulates the resolution of most labour disputes[41].

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[28] Section 9.
[29] Section 15.
[30] Section 16.
[31] Section 29.
[32] Section 23.
[33] Section 18.
[34] Section 23.
[35] Section 22.
[36] Section 27.
[37] 75 of 1997.
[38] 55 of 1998.
[39] See preamble of the 1996 South African Constitution.
[40] Sections 4-10.
[41] Sections 185 – 197.

Apart from persons from the defence force (SDF), South African Police Service (SAPS) and National Intelligence Agency (NIA) all employees and employers in the country fall within the ambit of the LRA. Its point of departure is voluntary collective bargaining. Its primary focus is the industrial relations system: it seeks to move industrial relations along the spectrum from adversarialism towards consensus-seeking around common goals institutionalising conflict as far as possible.[42] Given the interdependence of the statutes, a basis of sound industrial relations and effective voice regulation will be critical in achieving the objective of transforming the labour market in a way that promotes efficiency rather than rigidity. [43]

- **Basic Conditions of Employment Act**

The Act aims to regulate the labour market by providing a floor of minimum standards while, at the same time, creating mechanisms to vary standards in accordance with the needs of economic development.

- **Employment Equity Act**

It requires union and employee involvement in designing the employment equality process in the workplace and setting its goals. Consensus between workers and employers on these issues is seen as the basis for developing occupational diversity in a way that will contribute to efficiency.

- **Skills Development Act**

It seeks to make the transformation of the labour market as coherent as possible by raising skills and productivity levels as well as increasing internal and external labour market mobility. The aim is to make it easier for firms to comply with minimum standards and achieve employment equity objectives. It is envisaged that the common interest of employers and unions in skills development should also contribute to more effective interaction in other areas.

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[42] Du Toit D, as above n.25.
[43] As above.

c) Other Statutes

Other statutes related to labour include Occupational Health Safety Act (OHSA)[44]; Compensation for Occupational Injuries and Diseases Act (COIDA)[45] ; Unemployment Insurance Fund Act (UIA) [46] and Skills Development Act (SDA)[47].

- **Occupational Health Safety Act**

This Act strengthens the employer's common law duty to provide safe working conditions to employees and members of the public against hazards to their health and safety arising out of the activities of a work place.

- **Compensation for Occupational Injuries and Diseases Act**

It provides for the payment of compensation for the loss of earnings in situations where an employee was injured or killed while on duty and where they contracted occupational diseases. It partners with Occupational Diseases in Mines and Works (ODMWA).

- **Unemployment Insurance Act**

It provides for the payment of benefits in respect if unemployment, illness, maternity and adoption as well as dependants' benefits.

It should be noted that the aforementioned statutes (in the others category) focusing on social safety net for workers are beneficiary to workers who contribute and work for employers who are registered. Most importantly, all the acts mentioned above pose a social responsibility on both the state and non-state actors concerning the worker's well being.

4.3.3. Privatisation and legislative framework of labour

The above mentioned statutes provide a legislative framework for the protection for the rights of workers. This framework defines a yardstick for the realisation of the rights of workers and such applies to every worker and employer in any enterprise private or public in South

[44] 85 of 1993.
[45] 130 of 1993.
[46] 63 of 2001.
[47] 97 of 1998.

Africa. The following discussion will try to analyse the aforementioned Acts against privatisation.

Firstly, the LRA protects collective bargaining rights. However, the LRA excludes independent contractors from the definition of employees[48] which have paved the way for non-state actors to utilize so called independent contractors instead of employing workers with full rights and benefits. It is a well established fact that privatised enterprises are profit driven and as a result any loop hole in the law which assists in reduction of costs is well welcomed by a private actor. This is a cause for concern with the proliferation of non-standard employment arrangements in South Africa.

While at it, the definition of employer also has recently been problematic with the use of labour brokers by multinationals and other non-state actors for recruitment purposes. This has resulted in externalisation or triangular employment (company approaches labour broker to recruit an employee to provide a specific service for remuneration for a specific period of time). In this way a legal uncertainty has been created regarding the real employer. The BCEA and the LRA say the labour broker is the employer while in reality, it is the client.[49] The effect is that workers in such employment arrangements are denied many of their basic rights including the right to organise and associate.[50] More recently, in July 2007 the Department of Labour released Draft Regulations[51] with regard to employment services. The regulations define an employer as "any person, including a person acting in a fiduciary capacity, who pays or who is liable to pay any person any amount by way of remuneration as defined in the BCEA and any person responsible for the payment of any amount by way of remuneration to any person not acting as a principal as defined in the UIA and shall include all private employment agencies".[52]

Regulation 2 sets out the procedure for registration as a private employment services agency which ensures that an application must be made in the prescribed manner, and the applicant

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[48] See definitions of employee in the BCEA, SDA, EEA and the UIA. All these Acts define an employee as a "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 person who in any manner assists in carrying or conducting a business of an employer." Curiously no definition of an independent contractor has been given. These definitions of employee in the COIDA which explicitly includes casual employees, labour brokers and domestic workers.

[49] Bezuidenhout & Fakir 2006.

[50] Du Toit D et al as above n.33 pp 38-39.

[51] Draft Private Employment Services Regulations 2007.

[52] Anthe aver der burg, Going *for Broke: A case study on labour brokerage on farms in Grabouw*, www.crls.org.za/docu,emts/labour%20Brokers-report3April08a.pdf(17 (accessed 14 August 2008).

has to comply with various criteria[53] including compliance with labour legislation. This legislation is meant to register and regulate the actions of private employment services agencies, personnel agencies, temporary employment services, labour brokers and labour recruitment agencies. We have yet to see whether these regulations will be passes as final and implemented by the Department of Labour in respect of labour brokers.[54]

The gap in the law relate particularly to the definition of labour brokers in account. Consequently, there are still key challenges with respect to the registration, regulation, and skills development of labour brokers in this non- standard employment relationship. Lastly, there are also deficits in the law with respect to workers in such employment relationship. Such workers fall outside the coverage of labour laws, social security legislation and collective bargaining agreements.[55]

The current BCEA extends minimum standards to much larger number of workers than its predecessor[56] while also improving on previous standards and introducing new ones. It provides a basic floor of rights for all workers as indicted earlier but it fails to offer sufficient protection for vulnerable workers like casuals who are on the rise in private businesses. The Act does not provide minimum wages and requires workers to negotiate their wages with employers. This makes vulnerable workers dependent on the mercy of their employers and many are already below the poverty line. With the rise of multinational companies taking over most of the state owned enterprises, which seek to cut production costs at all means possible the situation is at a verge of getting worse and the legislative framework is somewhat wanting as illustrated in the following statement:

> *"We introduce the Basic Conditions of Employment and the LRA. What do the capitalists do? They retrench, they casualise, they contract out. They do their best to minimise the number of workers who can actually enjoy their hard-won*

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[53] Regulation 2 (2) a-d: a) Proof that the company is registered as an entity in terms of the relevant legislation;
b) proof that the entity is registered with South African Revenue Services for employee's tax; skills development levy, unemployment insurance fund contribution and VAT where applicable;
c) proof that the entity is registered with a bargaining council where applicable;
d) proof that the entity is registering at its lowest level or stand alone level of organisational structure.

[54] as above n.29.

[55] As above.

[56] The BCEA of 1983. The present Act covers approximately 7.15 million employees. Godfrey, Maree & Theron *Conditions of Employment and Small Business: Coverage, Compliance and Exemption.* Development Policy Research Unit Working Paper No. 06/106 88.

rights. They displace workers with machines. After all, machines aren't covered under the LRA or BCEA..... What is the point of having all these progressive laws on paper if the bosses can find ways to avoid them and if we cannot enforce them? If this continues to be the case, then we run the danger of delegitimising our own democratic government and its processes....[57]

In that regard, the negative and positive impacts will be discussed.

4.4. IMPACTS OF PRIVATISATION ON LABOUR

4.4.1 Negative impacts

(a) Reduction of labour

A reduction of labour in privatised enterprises has been a reality. Many jobs have been lost in other various sectors of the economy. Municipalities have been laying off workers especially those at ground level and this has resulted in the depreciation of service delivery in various places around the county.

In 2002, Kelvin, a coal-powered electricity station which provides 25 percent of Johannesburg's electricity had its 50 percent ownership sold to a United States based AES Corporation with an option to purchase the other 50 percent in the future. AES's purchase broke the government's monopoly on electricity provision. The company was granted a licence by the South African government to trade in electricity late 2001. AES lost no time in confirming the fears of South African public sector workers of the impact of privatisation. When the deal was being finalised in July 2001 ANC councillor Brian Hlongwa said that one of the reasons driving the sale was the need to protect 650 jobs at Kelvin. However, as soon as AES took over formal control in December 2001 the massive job cuts began.[58]

(b) None- standard employment

Privatisation is one of the pushing factors that have contributed to non-standard employment also known as 'casualisation'. In South Africa, employers have "non-standardised" work in

[57] This extract was taken from SACP Assessment of 9 years of freedom. Extract from the Address to the National Congress of the National Union of Mine Workers, 8 May 2003 by Blade Nzimande, General Secretary, South African Communist Party found at www.sacp.org (accessed 14 August 2008).
[58] Peter McInnes, "South Africa: Privatised power company sacks workers". Green left Weekly, February 2002. www.greenleft.org.au/2002/482/28705 (accessed 16 August 2008).

an attempt to circumvent labour legislation. There is a perception among owners of capital that the South African labour market is very rigid and inflexible, that it protects the rights of workers extensively (dismissals and retrenchments procedures are said to be onerous).[59]

'Casualisation' is taking hold in South Africa's employment ethos, slashing union membership and sapping bargaining power. This has been exacerbated by the fact that rendering of services seems to be more in the form of subcontracting and outsourcing. Privatisation of transport sector, water services and other basic services by municipalities has led to the creation of a network of small and medium-sized sub-contractors and out-producers. This means that more and more workers are not covered by labour legislation and are not entitled to social guarantees by the state or formal employment benefits such as minimum terms and conditions of work and social security coverage thereby infringing the right to social security. The trucking industry is a good indication of such. Of the 60,000 workers in the industry, more than 16,000 are outsourced.[60] A recent study by COSATU's research unit, NALEDI, delivered figures alarming to labour. The number of casual workers grew more than 270 percent between 1999 and 2002, while the number of permanent jobs dropped by 5,6 percent over the same period, and subcontracted labour surged by 322 percent.[61]

Profit making requires maximising revenues and minimising costs. Contractors reduce costs by hiring cheaper and less well-trained labour, by cutting the quality, quantity or the scope of service or by "service creaming" (serving the easiest to save at the expense of the more difficult or costly recipients).[62] This has been the case with water services in South Africa. Accordingly, the collective impact of water privatisation on the majority of South Africans has been severe. Inadequate hygiene and 'self-serve' sanitation systems have led to continuous exposure, especially for children, to various preventable diseases. There has also been an increase in environmental pollution and degradation arising from uncontrolled effluent discharges scarcity of water for food production. Noting that workers are also consumers or at least are supposed to be beneficiaries of such service delivery ; and that many workers have lost jobs due to privatisation, since in most cases the new owners or

[59] As above n.36.
[60] Nevin Tom, "South Africa: Privatisation is dead-Official", African Business, July 2004, www.allbusiness.com/speciality-businesses/minority-owned-businesses/983988-1.html accessed 20 August 2008).
[61] As above.
[62] William Morrison, *Labour Issues in Public Enterprise Restructuring* A Technical Note. A working paper, publication number 01118063.

managers of these enterprises employ new staff, almost 90 percent of the township residents live on less than R600 per month.[63]

(c) An increase to the informal sector

As the downsizing and retrenchments are taking place in the privatised economic world these labour victims are being slowly incepted into the informal sector. The informal sector has less to none labour law coverage domestically or internationally. Informal sector is hardly affected by the influence of the ILO and its mandatory rules flexible as they maybe.[64] In a way this is so by definition, since an activity is called informal because it is not covered either in texts or in daily practice, by national labour laws- and even less by international standards.[65] Many international labour conventions apply only to wage earners; moreover, even in the case of those which cover workers in the towns and country side legally regarded as self employed, it is sometimes difficult to apply them to these categories. [66]

According to ILO's Expert W. Van Ginneken[67], more than half of the world's population are excluded from any type of statutory social security protection. They tend to be part of the informal economy and are outside the scope of contribution based social insurance schemes or tax-financed social benefits. In low and very low-income countries, 90% of the population is not covered. In middle-income countries, the percentage varies between 20 and 60%. Worldwide, only 20% of the population enjoys adequate contribution based, or tax -based social security benefits.

The International Social Security Association in 1995 summarised effectively the current problems facing the model of social security[68]: cut backs in benefits; privatisation of systems; the need for proficient protection in transitional countries and, the impact of structural adjustments programs in developing countries were amongst those problems. Social (in) security is not any longer only about being exposed to a set of preset social and economic

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[63] Mwebe H, *The Impact of privatisation on socio-economic rights in Africa: The case of water privatisation in South Africa*, LLM thesis, University of Pretoria, 2004, pg 42.
[64] J. M. Servais, *Flexibility and Rigidity in International Labour Standards*. International Labour Review, Vol. 125, No. 2, March-April 1986 pg 199.
[65] As above.
[66] As above.
[67] W. Van Ginneken, *Extending Social Security: Policies for developing countries* (Geneva:ILO, Social Security Policy and Development Branch, ESS Paper No. 13,2003) 7-88.
[68] See International Social Security Association , *Developpements et tendances de la securite sociale dans le monde 1993-1995, La securite sociale dans annees quatre-vingt-dix: la necessite du changement*, Rapport 1, 25th General Assembly (November 1995), Nusa Dua.

risks. It is about the ambiguity that characterises the present time (globalisation, transition, technical change) in a framework where the individualisation of responsibility regarding social risks creates negative effects and questions the " Triple A" social security model.[69]

Even where the international financial institutions are willing to admit how damaging economic restructuring programs have been for people, consecutive adjustment programs that followed the era of the Washington Consensus barley pay lip service to the concept of social protection. The approach it promotes confuses charity and human rights and restraints the scope of the right to social security (including targeted or universal social assistance programs) to situations of emergency[70].

(d) Bargaining power

Privatisation has contributed to changes in management tactics and government regulations which have aggravated the growing imbalance in bargaining power. The threat of unionization has been a major force in supporting higher wages and benefits in the non-union sector. By allowing non-state actors to undercut trade unions through threats and intimidation, structural development programmes hav e given firms substantial additional bargaining leverage over their employees and as a result infringing the right to bargain.

(e) Poverty

A house hold or individual is understood to be in chronic poverty when the condition of poverty endures over a period of time. Different researchers propose alternative time periods as characteristics of chronic poverty (e.g. six months, 10 years), usually taken to mean that the household or individual remains beneath the poverty line. Alternatively, and perhaps more meaningfully, chronic poverty can be understood as a household's or individual's inability, or a lack of opportunity, to better its circumstances overtime or to sustain itself through difficult periods. As such chronic poverty can be a function of the individual's characteristics (e.g. elderly, disabled), or of the environment (e.g. sustained periods of high

[69] "Triple A" stands for accountability, affordability and accessibility of social security protection.
[70] See World Bank, *Beyond Unequal Development: an Overview* (Washington: World Bank Policy Research Working Paper WPS 2091, Andres Solimano, 1998) pp 28-29.

unemployment, landlessness), or both. The extent of chronic poverty in South Africa is not known with certainty.[71]

In this way, privatisation also indirectly fuels chronic poverty in South Africa. In most cases, the 'downsizing axe' or the 'retrenchment spear' lands on the unskilled, semi skilled, those at the bottom level of firms. These are the workers who are bread winners in their households. Once their jobs are cut, chances of them being reintegrated into employment are close to none taking into account the changing working environment, the introduction of new technology and machinery and so forth.

4.4.2 Positive impacts

Privatisation has had positive impacts though minimal and limited in scope. In some cases workers have gained from privatisation because new investment and dynamic expansion have resulted in job creation at the enterprise or sectoral level, and because productivity improvements have led to better terms and conditions of services. Moreover, workers are also consumers and their households benefit from improvements in access and delivery of service.

Some privatised enterprises tend to remunerate workers very well, better than the state. NALEDI research showed that in 1993, the public service lagged behind the private sector in wages.[72] However, there was a considerable variation in the degree to which occupational groups differed with the private sector. The greatest difference in wages was found amongst labourers (unskilled workers) and professionals, where the private sector workers were paid almost 60 percent more than a public service counterpart. Administrative personnel showed the smallest difference. A private sector senior typist earned on average 34 percent more than a public service counterpart. It was not possible to compare management salaries between the public sector and the private sector because of the huge variations in management salaries in the private sector. Furthermore, there was considerable difficulty in defining the equivalent of a chief director of a government department to the one in the private sector. Nonetheless, the

[71] Labour Market Review September 2003, Department of Labour, South Africa.
[72] NALEDI (1995), pg 13.

differences mentioned above might have changed now due to the public service wage agreement.[73]

These benefits are however, outdone by the negative impacts listed above. With the growing number of non-standard workers outside the labour coverage, alarming job losses, many people ensnared in poverty and unemployed, privatisation serves as a challenge to labour law and a human rights issue.

4.5. CONCLUSION

With the above discussion, a clear reflection of the impact of privatisation on labour is noted. Privatisation affects the enjoyment of rights by workers. The protection by the law is not guaranteed to the worker. Instead the protection thereof has been undermined as many workers fall outside of its ambit. In fact privatisation seems to undermine the very essence of the current labour legislative framework- addressing the injustices of the past and the legacy of apartheid it serves as an injustice of the present.

Accordingly, the chapter gave a historical outline of the privatisation regime which clearly showed how it all started during the apartheid era and how it formed part of the economic stance of the present government. The chapter also indicated the various statutes pertaining to labour. The positive and negative impacts of the structural development programme in question were pointed out which serve as an assessment of how the enjoyment of labour rights by the worker has been affected. The next chapter will conclude the study and outline recommendations.

[73] See Kalula et al (1997) *Public Sector Labour Relations in Southern Africa: Development and Trends* Friedrich Ebert Stifung and Institute of Development and Law, University of Cape Town pp 199- 200.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1. CONCLUSION

Privatisation in South Africa from the start has been highly controversial and politically stimulated. At the core of much criticism is the idea that privatisation has been unfair, hurting the poor and beleaguered workers. There is no universally applicable approach to privatisation and given that the attempt to apply a "one size fits all" approach has proven ineffective and counterproductive.

Almost fourteen years after the end of apartheid and the emergence of a democratic government, South Africa has made notable development in addressing the racial discriminations that characterised labour legislation which left the majority of black workers outside the coverage of the law. Principal transformations of judiciary, union movement and other stakeholders have facilitated this development yet much need to be done. The economic climate workers find themselves in after restructuring has been rather daunting in South Africa coupled with reduction of labour, an influx of workers into the informal sector which is difficult to regulate, increase in non-standardised workers, and so forth. Such defeats the protective role of labour law. It undermines the traditional fundamental nature of law in labour. The negative impacts privatisation has had on the current legislative framework in labour shows the need for modernisation of the law. The labour laws have to be aligned with the changing economic environment whether in restructuring of SOEs or other emerging external forces like globalisation. The effect privatisation has on workers shows that the very essence that national laws can still protect the workers with imperative effects is being challenged. The critical factor in the success of any privatisation programme is embracing privatisation in its totality and not on a transactional basis.[1]

Successful restructuring does not require unfettered labour market free of all regulations. Government regulation of employer- employee relationship is important for social, moral and economic reasons. Because the poor are usually highly at risk-averse, asking them to shoulder the entire burden of job displacement may lead them to with draw from the labour

[1] Afeikhena J & Moses R, *The Tortuous Road to Privatisation and Restructuring of State Asset in South Africa: Lessons from African Privatisation Experience*, Forum 2003 Papers.

market entirely. Direct supervision of the employment relation, though it may increase the job security of those already employed does not benefit all workers equally and more importantly creates adverse incentives for workers effort and human capital accumulation.[2]

It is often charged that labour rights are a smoke screen for "protectionism" and that developing nations do not want their workers protected. Surveys show that most people in the world's nations think that labour rights and environmental standards should be part of trade agreements. The resistance comes from elites in both rich and poor nations who have a common interest in weakening worker's bargaining power everywhere.[3]

The government should not drag its feet on the issue of labour rights. It has the obligation to protect, promote and fulfil the workers' rights. The state should not be part to any restructuring proposal of its enterprises that does not provide workers the equivalent protection that it gives investors part to it. At a minimum this means making the core standards prescribed by the domestic laws and the ILO, including the right to join a union and bargain collectively, enforceable with trade sanctions.

From the discussion above, the characteristics of classic labour law have been drastically altered. The main actors underpinning its model of regulation have greatly changed if not collapsed: the unions, legislation, the state and collective bargaining have been consequently affected by privatisation. The central object of labour law- stable subordinate employment has given – way to more diversified ways of employment as employers manipulate the loopholes in the law. In this way, the study has served as a response to the need to develop effective labour regulations and strategies. Revisiting the loopholes allows labour law to shield workers who are adversely affected by privatisation.

How much protection to be placed on the rights of workers is a major issue for concern in SADC countries when the WB and IMF as the architects of privatisation demand that countries pursue this kind of programmes as a condition to receive loans and most importantly when these institutions do not regard promotion of labour rights as a priority.[4] Furthermore, in the world generally, capitalisation is undermining labour laws and

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[2] Djavard Salehi-Isfahani, "Labour and the challenge of Economic Restructuring in Iran", Middle East Report, No.210, Reform or Reaction? Dilemmas of Economic Development in the Middle East (Spring, 1999) pp 34-37.

[3] As above n.1.

[4] See Kate Bayliss, footnote n.42 in Chapter One of this study.

privatisation is part of it. What the world has been facing is the eradication of capital control and fixed exchange rates, the deregulation and liberation of markets, the privatisation of public services, the increases use of competitive tendering and outsourcing, the downsizing of workforce to the complete minimum, and the following increasing labour intensity, and the flexibilisation of labour. This implies a shift in the stability of forces between labour and capital and its taking capital impacting negatively on the workers' rights.

One must realise the limitations of labour law. It might provide the legal basis for the large majority of people to earn a living, but it certainly does not constitute the primary influence in societal welfare.[5] History has shown that the law can be changed and often is changed with reference to labour productivity, the forces of labour market and the effective organisation of workers in trade unions.[6] These factors will also determine to what extent labour law can guarantee the enjoyment of workers' rights. Debates revolving around flexibility in the labour market, unemployment, integration into the world economy and the costs of employment in South Africa are certain to play a role in the success or failure of provisions aimed at safeguarding employee's rights in the event of structural adjustment programmes like privatisation.[7] In this regard, the following recommendations are proposed.

5.2 RECOMMENDATIONS

- **Adjusting the limits of the law**

There are cases which do not fall within the current scope of legislation and such are found in informal sector and privatisation has given way to the growth of this sector. This sector is dominated by women. Legislation can be extended to include categories of employees or sectors that are explicitly or implicitly excluded from the scope of law. This allows every worker to be organised to avoid a fragmented trade union movement.

The LRA protects collective bargaining rights. However, the LRA as pointed earlier excludes independent contractors from definition of employees which paved the way for employers to utilize so called 'independent contractors' instead of employing workers with rights within the law. Due to restructuring, such workers are on the increase and they need to be protected.

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[5] N Smit, *Labour Law Implications of the Transfer of an undertaking*, LLD Thesis, Rand Afrikaans University, 2001 pg 6.
[6] See Davies and Freeland, *Labour and the law* 13.
[7] As above n.5.

The definition needs to be revisited by the legislators. The BCEA on the other hand, does not provide minimum wages and requires dependent on the mercy of their employers. Of course there are sectoral determinations put in place but report has been that a few applications in this regard have been lodged and the reason is being attributed to the strict requirements. Adjustment in this regard is required to avoid employers operating outside the law. The government has to find a way to make privatisation work for every worker in every sector to avoid exploitation.

- **Organising role of unions**

The organising role of unions should extend to mirror the increasing international scope of employers as cross border ownership of enterprises is already a reality in South Africa and SADC in general, following privatisation. However, in addition to dealing with the efforts of that trend unions must grapple with the governmental and corporate decisions that are driving it on a global scale. Restructuring is being driven not only by general economic and social trends, but also more deliberately by international institutions such as WB that both respond and contribute to those trends. Therefore, further important roles for unions are to research and analyse the roles of international institutions in shaping restructuring and its effects on workers and their unions; to represent the concerns and interests of workers and enhance the capacity of worker's unions both to protect their members and influence restructuring policies at national level.

In addition, the following questions are being suggested to the unions to pose on when considering privatisation proposals and shaping their own approaches to restructuring:[8]

a) What roles are the non-state actors to play in the economic and social development, including employment growth, as part of an integrated strategy?

b) How will the levels, patterns and sources of investment in privatised entities be matched to those overall goals and how will they be sustained?

c) How will the performance of the restructured enterprises be transparently evaluated and monitored so that its role in securing developmental goals can be subjected to democratic accountability?

[8] Brendan Martin , *The World Bank, Railways Privatisation and Trade Unions*, Briefing Papers N0. 4/2007.

d) How will the non-state actors be held accountable for honouring their commitments and obligations and what will be done if they fail to do so?

e) How will labour restructuring relate to the overall economic and social goals and investment trends of the private sector?

f) How will workers be equipped with the tools and skills they need to deliver their contribution to the restructured enterprises productively and safely?

g) Insofar as some sections of the workforce will no longer be needed in their present roles, how will they be reabsorbed elsewhere, both within and outside the private sector?

h) How will workers be compensated for jobs lost and those who remain be protected?

Developing such an agenda requires unions not only to share information, provide education and other services and assist affiliates in cross-border organising, essential though they are. They must also build wider alliances to challenge and change policies at international and national levels. Far from being a diversion from organising, such political work can serve well by changing the environment in which organising and bargaining take place.[9]

- **Consultation and communicating with employees is indispensable**

If privatisation is in a way that will have effect on existing jobs i.e., where job losses are contemplated, consultation would be required. This consultation would have to take place in accordance with Section 189 or section 189A of the LRA (depending on the number of employees who might be affected). Section 189A contains minimum consultation and notice periods. *Forecourt Express (Pty) Ltd v SATAWU & Others*[10] is a recent decision of the South African Labour Appeal Court (LAC) where the new employer wanted, immediately after purchase of the business from the old employer, to restructure that business along the lines that had worked for it in its existing business. This meant using subcontractors and labour

[9] As above.
[10] (2007) 2 BLLR. 101 (LAC).

brokers to supply staff, rather than employing people itself, and that it had to retrench most of the existing staff. The union objected and took the new employer to court. [11]

The LAC confirmed that an employer is entitled to run its business as it sees fit provided that it does not change the terms and conditions of employment of its employees without their consent, and that, if it contemplates dismissals, it complies with its obligations under Section 189 of the LRA. The court held that Forecourt had explained its reasons for why it wanted to operate the business differently and that it was not for the court to tell it that it had to continue running the business on the old basis for a period of time before deciding to change. Forecourt was entitled to choose the way it saw as less risky to run its business, i.e., by using labour brokers and sub-contractors and integrating the purchased business with its existing business, thus achieving a competitive edge. Having proposed this model, it was clear that there was no longer any work for the former employees of the old employer and this provided a fair reason to dismiss them.[12]

- **Measures to ease employment reduction due to privatisation**

In many instances, employment reduction is accompanied by a variety of measures to ensure compliance with existing legal or collective agreement required and to avoid industrial conflict and socially or politically motivated criticism. Such measures are often implemented on a voluntary basis, but at times may be compulsory. They include severance pay for workers made redundant, dismissal with compensation, early retirement schemes, training, retraining and redeployment and other measures such as reduced working hours and the hiring of young employees. These measures are often negotiated between governments, companies and trade unions before and during a privatisation or restructuring process. For example, in Spain, employment reductions in the utilities have been based on collective agreements providing for voluntary early retirements, redundancy pay and rejuvenation of the workforce through the hiring of young people. Reorganisation of plants was achieved without

[11] Phillip Berkwitz and Susan Stelzner, "Doing Business in the United States and South Africa: Labor and Employment law", July 27, 2007 article found at www.problemsolved.co.za/newsletter/briefs/US-SouthAfrica/BusinessAlert.pdf (accessed 30 August 2008).
[12] As above.

dismissals and accompanied by retraining and redeployment, according to information from the FIA- UGT.[13]

- **Enhancing of social dialogue**

As fast pace of change cannot-and should not – be brought to an end, the social partners need to be on top of it. Both serious employers – the great majority in commerce – and unions know that without a social dimension, there cannot be a sustainable development of South Africa as a competitive and flourishing economic nation. The main thrust is that social dialogue on all levels should be the mainstream way to develop employment conditions and manage labour relations. But it goes even further than that, saying that this dialogue must be there at all levels, including the non-state actors. The changing competition scene in commerce does give increasing weight and value to the social dialogue. There ought to be a broader and higher level of participation in restructuring processes, both by the employers and trade unions. NEDLAC should be given support it requires by the government and other stake holders involved as it serves as a platform for social dialogue for business people and trade unions and these non-state actors should be brought to the table as well. Furthermore, any agreements reached by the parties involved should be followed up. It is not enough, of course, to discuss and conclude agreements if they do not touch the reality of the people working in the industry.

Consequently, the study has managed to explore privatisation: what privatisation is and bringing out its relationship with labour to reflect the impact it has on the development of labour law in SADC and South Africa specifically. It has also managed to establish how privatisation has influenced the development of labour law considering its impact on economic and social changes on labour. The major challenges which are currently affecting the labour regulatory framework have been identified and it can be deduced that privatisation is nether good or bad as such. It depends on the framework in which it takes place thus thrusting new demands on countries to bring about regulations having both the private sector holders and the workers in mind. It is hoped that the above study has served its purpose towards filling the gap in literature with regard to the subject matter.

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[13] Nkosana Mfuku. *Privatisation and Deregulation Policies in South Africa*, Thesis, University of the Western Cape School of Government, 2006 pg 92.

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