

# DEMOCRATISING THE EMPLOYMENT RELATIONSHIP

(A conceptual approach to labour law reform and its socio-economic implications)\*

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"My central thesis is this: as our vision projects into the twenty-first century, *the preeminent role and guiding principle of labor law should be to expand and enhance democracy at every level of the experience and organization of work.*"—Karl E Klare.<sup>1</sup>

"Every new vision of improving institutions has seemed utopian to those who took the established order for granted."—Karl Mannheim.<sup>2</sup>

"People resist change with astonishing energy and ingenuity."—Anthony D Manning.<sup>3</sup>

## 1 "Worker participation" and "industrial democracy"

The constitutional debate in South Africa has placed the related issues of *democracy* and *increased production and redistribution of wealth* centrally on the agenda. Democratisation<sup>4</sup> of the employment relationship, it will be argued, is essential to both.

At first sight there has been a certain meeting of minds between employers and organised labour around this question. The demand for greater democracy in the workplace has been raised increasingly from the side of trade unions and the mass democratic movement in recent years while some employers have taken initiatives of their own to involve workers in decision-making.

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\* This article was written in December 1992 and reflects developments up to that point—Ed.

<sup>1</sup> "Workplace Democracy and Market Reconstruction: An Agenda for Legal Reform" 1988 *Catholic University LR* 1.

<sup>2</sup> Quoted in Horvat *The Political Economy of Socialism* (1982) xviii. The reason, according to Horvat, is that such critics have "invariably . . . implied that *everything else remained unchanged*".

<sup>3</sup> *Business Strategy in the New South Africa* (1991) 172.

<sup>4</sup> In what follows it will be attempted to give a more precise meaning to this very general term.

In fact, there is no common understanding of where this road is leading. Indeed, even on the side of labour, "[c]lear strategies have not yet been developed".<sup>5</sup>

Thus the draft Workers' Charter of the South African Communist Party (SACP), put forward at the dawn of the new South Africa (and the twilight of eastern European Stalinism), declared:

"The commanding heights of the economy shall be placed under the ownership and overall control of the state acting on behalf of the people. Such control shall not be exercised in an over-centralised and commandist way and must ensure active participation in the planning and running of the enterprises by workers at the point of production and through their trade unions."<sup>6</sup>

On the other hand, few trade unionists, or even the SACP itself, are arguing in these terms today. Management consultant Andrew Levy comments:

"Five years ago, when unionists spoke about worker control, they meant booting management out of the factory and running it themselves. Now what they mean is *participation*—worker participation at every level."<sup>7</sup>

Indeed, "worker participation" has become a much-debated topic in trade union and academic circles; in addition, various schemes bearing this label have been implemented in a (limited) number of workplaces.<sup>8</sup> This has been part of an international trend. "The debate and developments in employee participation from the 1960s onwards", according to Salamon, have focussed on an approach which he defines as follows:

"a philosophy or style of organisational management which recognises both the need and the right of employees, individually or collectively, to be involved with management in areas of the organisation's decision-making beyond that normally covered by collective bargaining".<sup>9</sup>

Worker participation in this sense may be seen as a form of democratisation to the extent that it makes inroads into management prerogative. But it is, by definition, limited. As Davies & Freedland explain:

"An element of co-ordination can be infused into the employment relationship. Co-ordination and subordination are matters of degree, but

<sup>5</sup> Von Holdt "Worker Control: New Meanings?" 1992 *South African Labour Bulletin* 16(3) 65.

<sup>6</sup> Reproduced in 1990 *SALB* 14(6) 72.

<sup>7</sup> Quoted by Von Holdt 1992 *SALB* 64. Cf the distinction between different forms of "employee participation" drawn by Salamon *Industrial Relations: Theory and Practice* (1987) 295-296; and see the distinction between "self-limiting" and "expansive" approaches to reconstruction of the labour market: Klare 1988 *Catholic University LR* 1.

<sup>8</sup> Cf the debate in *SALB* since 1990; in particular, Torres "Worker Participation and the Road to Socialism" 1991 *SALB* 15(5) 61; Evans "Worker Participation at PGBison" 1992 *SALB* 16(3) 40.

<sup>9</sup> *Industrial Relations* 296. This definition is also used by Anstey in Anstey (ed) *Worker Participation* (1990) 4. See also Anstey *What is Worker Participation?* in *Trends in South African Labour Law* (1992) 89; Hadden *Company Law and Capitalism* 2 ed (1977) ch 13.

however strong the element of co-ordination, a residuum of command power<sup>10</sup> will and must remain."<sup>11</sup>

"Worker control" in the sense used by Levy—or, perhaps more accurately, "industrial democracy"—is a fundamentally different proposition. Here the managerial function is exercised exclusively by employees. They do not "participate" in management; they *are* management.<sup>12</sup> But, as noted already, few in the trade union movement see this as a viable option today. It is true that the "broad objective of worker ownership and control of the economy in a socialist state"<sup>13</sup> continues to be asserted, but mostly as a long-term ideal. More generally, with widespread hopes (and fears) of an elected government, the emphasis has shifted from macro-economic concepts of change to the targeting of particular reforms which such a government might be expected to implement.

At the same Workers' Charter conference where support for the "broad objective" of socialism was reiterated, for example, it is reported that

"[d]emands at the plant, mine or shop level include[d] the election of supervisors; negotiations over investment; the right to full information; and control over managerial staff. There was discussion on whether managers should be elected or not. The point was made that workers need to have some control over the production process."<sup>14</sup>

In the same vein the Union of Democratic University Staff Associations (UDUSA) at its 1992 congress defined "democracy within the university context" as "the opportunity for all directly affected constituencies to participate in and to share, individually and collectively, in decision making at all levels in the university".<sup>15</sup>

Again this was linked to "the broader struggle for democracy in our society" and the prospect of a "future representative govern-

<sup>10</sup> Which is inherent in the legal rights of ownership: see par 7.1 Control and ownership *infra*. Note the discrepancy between the definition of "democracy" and that of "industrial democracy" in Nel & Van Rooyen *Worker Representation in Practice in South Africa* (1985) 22–23.

<sup>11</sup> *Kahn-Freund's Labour and the Law* (1983) 18 24–26. Cf *Media Workers' Association of South Africa v The Argus Printing and Publishing Company Ltd* 1984 5 *ILJ* 23F–G. The same applies, it is submitted, to the "union-empowered model of worker participation" (Banks & Metzgar) or the "new agenda" (Mathews) as explained in Webster "Rethinking Socialism" 1991 *SALB* 15(7) 79.

<sup>12</sup> Cf Salamon *Industrial Relations* 295. For a discussion of the economic and political implications in the South African context, see Davies "Nationalisation, Socialisation and the Freedom Charter" 1987 *SALB* 12(2) 85; Innes & Gelb "Towards a Democratic Economy in South Africa" 1987 *Third World Quarterly* 545. In general see Horvat *Political Economy* in Horvat, Markovic, Supek & Kramer (ed) *Self-governing Socialism* (1975).

<sup>13</sup> Pillay "The Workers' Charter Campaign" [a report on Cosatu's Workers' Charter conference held in November 1990] 1991 *SALB* 15(5) 42.

<sup>14</sup> Pillay 1991 *SALB* 15(5) 42.

<sup>15</sup> *UDUSA News* November 1992. While raised in the public sector context, the concern is also with "participation" by employee "constituencies" in a broader decision-making process.

ment".<sup>16</sup> But what should the nature of that democracy be? Which constitutional and economic policies will be necessary to make room for socio-economic reform on the scale that is both needed and demanded? Will it involve a fundamental restructuring of the economy along the lines suggested by Davies and Innes & Gelb?<sup>17</sup>

## 2 The case for democratisation

The economic rationality of employee involvement in the decision-making process is widely accepted today. Indeed, Anstey argues, the "real imperative" for worker participation has emerged "certainly in developed market economies, out of a need for improved efficiency and productivity", or "render[ing] organisations more efficient and more competitive".<sup>18</sup>

Why should the involvement of employees in decision-making, in contrast to the classic entrepreneurial form of management, lead to improved efficiency and productivity?

This question is answered in part by the empirical development of management theory over the past 100 years.<sup>19</sup> Turn-of-the-century "scientific management", pioneered by Frederick Taylor, regarded workers as units of production to be commanded by management (the "unitary perspective" of industrial relations). The rising power of organised labour, however, compelled employers to resort to more "civilised treatment of workers to avoid disruptive discontent"<sup>20</sup> (the rise of "pluralism"). This has culminated in the modern concept of management's task as "not so much . . . manipulating employees to accept managerial authority as . . . developing a 'partnership' or 'family' of employees, with each member contributing according to his or her abilities and interests to the organisation's

<sup>16</sup> *UDUSA News* November 1992. Or as National Union of Mineworkers president James Motlatsi reportedly told a mineworkers' rally: "[T]he answer to health and safety in mines lay in achieving a democratic government which would pursue a socialist policy and encourage the growth of strong trade unions so that workers could participate in drawing up priorities for their industries" (1992 *South African Labour News* 4(8) 5).

<sup>17</sup> See n 12 *supra*. When dealing with the process that might bring about such a transformation, both articles focussed on the possibilities of state intervention combined with democratic pressure to steer market forces in the desired direction: Davies 1987 *SALB* 12(2) 100-101; Innes & Gelb 1987 *TWQ* 577-581. Significantly, both articles were written before the collapse of the bureaucratically planned economies of Eastern Europe and the powerful reassertion of the "market" ideology internationally. In this light it is perhaps necessary to re-examine the degree to which even the most "cautious" (Innes & Gelb 1987 *TWQ* 579) state intervention will be tolerated by corporate investors without provoking precisely the kind of reaction which the writers were no doubt seeking to neutralise.

<sup>18</sup> Anstey *Trends* 90.

<sup>19</sup> The following highly condensed summary draws on Horvat's discussion (*Political Economy* 174-182); it does not pretend to be exhaustive. Cf Salamon *Industrial Relations* 200-207; Innes & Gelb 1987 *TWQ* 566.

<sup>20</sup> Horvat *Political Economy* 180.

goals".<sup>21</sup> Techniques were developed for "exploiting untapped human resources". Horvat sums up:

"If that means the participation of subordinates, let them participate."<sup>22</sup>

In South Africa today there is also a widely-held view that it makes sense to utilise workers' insight and experience as far as possible in order to increase productivity. As Steve Dewar, group industrial relations consultant of Toyota (SA), explains, it is the philosophy of his company "that every employee has the ability and the right to offer intelligent and useful inputs into decisions at various levels of the organisation".<sup>23</sup> Or as a facilitator in the field of worker participation observed,

"the person doing the job understands it better than anyone else, and therefore there is a need to ensure the devolution of authority and power to lower levels".<sup>24</sup>

But "devolution" need not interfere with overall management control; indeed, it may enhance it. A shop steward explains how his union viewed the introduction of worker participation at PGBison:

"Management wants to [increase productivity], but can't without the participation of the workers. They are co-opting the shop stewards to ensure that late-comings and absenteeism are reduced, wastage cut down on and strike action discouraged."<sup>25</sup>

Levy confirms:

"The new meaning of workers' control is infinitely better than the meaning of 'workers' control' ten years ago. If that is the trade-off for ditching nationalisation and socialism, it's a worthwhile compromise. It's ironic that management will have to give up some of its control in order to keep it."<sup>26</sup>

These same considerations are projected on to the broader social stage. Dekker, writing in 1989, argued that

"[i]f South Africa is to 'short-circuit' certain historical developments in communist countries, then captains of industry should be prepared to accept industrial democracy".<sup>27</sup>

To soft-land apartheid, in other words, it is necessary to ease the tension between capital and labour. Institutionalised worker participation is seen as one element in bringing this about.<sup>28</sup>

Arguably, therefore, a section of South African employers have been pressurised by events to leap-frog straight from nineteenth

<sup>21</sup> Horvat *Political Economy* 181.

<sup>22</sup> *Political Economy* 181. Or as Manning *Business Strategy* 190 puts it: "World class companies tap the energy and ingenuity of all their people."

<sup>23</sup> Anstey *Worker Participation* 248. Significantly, Toyota's "total worker involvement" seems to be confined to the level of the shop floor—a fact that did not go unnoticed by the representative of Volkswagen: Anstey *Worker Participation* 243.

<sup>24</sup> Evans 1992 *SALB* 16(3) 43.

<sup>25</sup> Evans 1992 *SALB* 16(3) 45 where it is added that, as a result of union opposition, negotiations followed until agreement was reached and "the union organisers, as well as the shop stewards, [became] integrally involved in the programme".

<sup>26</sup> Von Holdt 1992 *SALB* (16)3 65.

<sup>27</sup> Anstey *Worker Participation* 160.

<sup>28</sup> Cf par 7 2 *Of processes and plans infra*.



century paternalism to "human resources" management—and are learning to view unions as additional "resources" to be "managed". As Leon Cohen, executive director of PGBison, told the Institute for Personnel Management, the union movement should be regarded "as an important stakeholder that can actively and responsibly contribute to the creation of wealth, employment and a growing economy".<sup>29</sup>

Against this background Anstey argues that labour and management should move towards "the creative development of co-operative endeavour":

"The enormity of South Africa's political, economic and social problems is now well documented. . . . They will demand practical solutions . . . and organised labour and capital will be inescapably involved in this process. Simply, collective bargaining is unlikely to be sufficient to the task. Arguably a developing economy cannot afford ongoing high levels of industrial action and poor productivity. . . . Nation-building will require a capacity for labour-management parties to move beyond the adversarialism inherent in their relationship, to a more open acknowledgement of their interdependence."<sup>30</sup>

This would "[move] the relationship into a range of worker participation options . . . in an effort to achieve optimum levels of organisational performance, and at federation levels sometimes to focus on social policy matters".<sup>31</sup>

It will not be attempted at this point to examine the obvious question of whether, in the violence-torn South Africa of the 1990s, it is realistic to expect employment relations to evolve in the way that Anstey hoped for in 1989; for reasons of convenience this will be addressed separately.<sup>32</sup> It should, however, be noted that the separate and conflicting interests of management and labour place real limits on the degree of partnership or participation that can be achieved in practice.<sup>33</sup> Strangely, this vital question does not feature as much as might have been expected in studies of worker participation. Anstey's own wide-ranging collection of papers<sup>34</sup> is a case in point. Analyses of experiments, ranging from co-determination in Germany to Volkswagen's "holistic approach" in South Africa, deal in detail with structures and objectives but pass lightly over the question of how effective they are in creating a "partnership" of capital and labour.

All the more thought-provoking are comments such as those of Brian Smith, director of human resources at Volkswagen SA:

<sup>29</sup> Evans 1992 *SALB* 16(3) 45–46. Cf Anstey *Worker Participation* 7.

<sup>30</sup> *Worker Participation* 8–9.

<sup>31</sup> *Anstey Worker Participation* 9.

<sup>32</sup> See Addendum: *Methodology and 'isms'*. Cf Innes & Gelb 1987 *LQR* 547–551.

<sup>33</sup> Cf Davies & Freedland *Labour and the Law* 27–28 where the authors remark: "[T]his belief that there are not really two sides of industry . . . [may also] have a powerful influence on the minds of trade union leaders anxious to blur the line between labour and management, attaching exaggerated hopes to 'participation' and elevating 'co-determination' almost to the level of a religious belief".

<sup>34</sup> *Anstey Worker Participation* contains the proceedings of the 1989 Conference on Worker Participation.

"We have not got all the answers—we certainly do not have an easy passage in the labour relations area, but we are committed to this process despite setbacks such as occasional industrial action, and we are determined to move forward with it."<sup>35</sup>

One of the most optimistic papers is that describing the "total worker involvement" at Toyota (SA).<sup>36</sup> Yet prolonged strikes at Toyota's Prospecton plant last year cost the company R680 million in lost turnover and culminated in the dismissal of 6 000 workers as if no "partnership" existed.

This in itself does not invalidate the proposition that "co-operative endeavour" will be a vital ingredient in boosting productivity towards the levels that a new South Africa will need. It also does not weaken the case for democratisation of the employment relationship as a means of transforming a relationship based on conflict into one based on co-operation. It does, however, raise the question of how to achieve it.

### 3 Collective bargaining versus worker participation?

On the face of it, collective bargaining offers an appropriate vehicle for determining or modifying any aspect of the employment relationship at plant, industry or national<sup>37</sup> level.<sup>38</sup> Bozalek, arbitrating, went so far as to say that

"[t]he creation of a different more equal [employment] dispensation is best done through the ordinary process of collective bargaining and the evolution of the relationship between the parties".<sup>39</sup>

In practice, matters are less straightforward.

For Anstey, an inherent limitation of collective bargaining is precisely the fact that it is adversarial. To seek economic solutions, he argues, it is necessary to move from a relationship "confined to annual bouts of adversarial exchange" (collective bargaining) to one which "in addition places greater emphasis on the daily relations of the workplace" (worker participation).<sup>40</sup>

More tentatively, O'Regan suggests that

collective bargaining institutionalises an adversarial approach to labour relations. . . . Although autonomous worker organisation and adversarial

<sup>35</sup> Anstey *Worker Participation* 242.

<sup>36</sup> Anstey *Worker Participation* ch 10.

<sup>37</sup> In the form of agreements between federations of unions and employer organisations.

<sup>38</sup> Cameron, Cheadle & Thompson *The New Labour Relations Act: The Law after the 1988 Amendments* (1989) 99 point out: "The eventual collective deal must reflect the relative strength of the parties. . . . Where labour does not dispose over sufficient power, employers may . . . restructure their businesses, and they may relocate them. Where labour does wield effective power, employers may . . . even be obliged to run their businesses along lines very different from those that they would have preferred if they could act unilaterally."

<sup>39</sup> *University of the Western Cape and University of the Western Cape United Workers Union* 1992 13 ILJ 699 (ARB) 708F.

<sup>40</sup> *Worker Participation* 9.

collective bargaining are essential, it may well be that co-operation within the enterprise should not be entirely excluded by collective bargaining."<sup>41</sup>

The problem with this approach is that it focuses on the *form* of the bargaining relationship: placing the same two actors in a different forum, it suggests, could lead to better results. No doubt there is truth in this but, surely, only up to a point. Experience shows that the same conflicting *interests* embodied by management and labour will surface whether the parties meet in bargaining structures or in participatory structures, or in both.<sup>42</sup>

The root of the problem is the dichotomy between those involved in production—not only as regards the functional division between “management” and “labour”<sup>43</sup> but also the different mechanisms by which they share in the product of their common effort and, above all, their social status and power. This dichotomy can scarcely be removed by holding discussion over production issues in one forum rather than another. Even if worker representatives are “co-opted”, as many trade unionists fear, it seems that the adversarial relationship will be disguised rather than made to disappear.<sup>44</sup>

Both Anstey and O'Regan regard worker participation not as an alternative to collective bargaining but as a means of supplementing it. Beyond a certain point, however, the promotion of worker participation can scarcely avoid taking place at the expense of collective bargaining. This can happen in a variety of ways. In the celebrated *NUM v ERGO* case,<sup>45</sup> the *ratio decidendi* was that

“the employer’s direct dealings with its employees offended against the recognition agreement [with NUM] and was hence subversive of collective bargaining”.<sup>46</sup>

Similarly, borderline issues may arise which a union might regard as part of the bargaining agenda but which an employer might prefer to deal with in other ways—for example, through participatory structures.<sup>47</sup>

<sup>41</sup> “Possibilities for Worker Participation in Corporate Decision-making” *Labour Law* (1991 reprint of 1990 *Acta Juridica*) 113 119.

<sup>42</sup> See par 2 *supra*.

<sup>43</sup> Cf Davies & Freedland *Labour and the Law* 15.

<sup>44</sup> Salamon *Industrial Relations* 303–304 observes that “[t]he management view of employee participation appears to be based on a perception of consensus” while unions tend to stress the “sectional and competing interests” in the employment relationship—in other words, perceiving worker participation as a way of exercising some control over management decisions rather than submerging the differences between them.

<sup>45</sup> *National Union of Mineworkers v East Rand Gold & Uranium Co Ltd* 1991 12 *ILJ* 1221 (A).

<sup>46</sup> Thompson “The Appellate Division’s First Unfair Labour Practice Appeal” 1991 12 *ILJ* 1205. Cf *Food & Allied Workers Union v Sam’s Foods (Grabouw)* 1991 12 *ILJ* 1324 (IC) 1325J–1326B.

<sup>47</sup> With the defeat of the “voluntarist” school of collective bargaining (cf Cheadle, Landman, Le Roux & Thompson *Current Labour Law 1991–1992* (1992) 29–30), the issue of bargaining agents has apparently been settled in favour of registered unions. In fact, it has shifted the emphasis to the question of bargaining topics: which issues is an employer required to negotiate with a representative union? Issues beyond the



The point is that, in the statutory bargaining process, labour disposes over established structures and remedies, including the weapon of lawful strike action, whereas in non-statutory participatory structures it may be in a far less powerful position.<sup>48</sup>

If worker participation reduces overt conflict, in other words, it does so essentially by creating a more favourable environment for management to manage. For this reason alone the participation option is likely to be more attractive to employers than a duty to bargain over the same issues; and there will be every inducement to cultivate participatory structures, if not as an alternative, then at least as a counterweight to their union's "negotiating partners". The result would be a regression from "pluralism" to "unitarism"—in the long term, like all anachronisms, a recipe for conflict rather than co-operation.<sup>49</sup>

The contrast that Anstey really highlights, therefore, is one not so much between different structures but rather between different agendas. It is assumed that "the daily relations of the workplace" forms no part of the bargaining agenda and that, accordingly, a different forum is needed to deal with it. Given the integral relationship between accepted bargaining topics such as wages and production-related issues which are consigned to the "participation" agenda, however, there is surely a strong case for burying rather than institutionalising the formal distinction between the two.

But that will be easier said than done. Employers are likely to resist any move to promote topics of *consultation* to topics of *negotiation*. The collective agreement, as Salamon says, places "a limitation on management's freedom and discretion to act unilaterally". The extent of that limitation, however, will depend *inter alia* on (a) "the degree to which [employees] have power, if necessary, to force the employer to accept such joint decision making", and (b) "the degree to which management is willing to accept the requirement that its decisions must be subject to agreement with employees before they may be implemented".<sup>50</sup>

Practically speaking, in other words, the issue is one of "power play" or struggle. This conclusion (if correct) points to a paradox: the very process of modifying the employment relationship with a view to reducing or ultimately eliminating conflict is premised upon conflict.

#### 4 Collective bargaining: the pluralist approach

The law of collective bargaining encapsulates these theoretical and practical problems. Thompson explains:

legal bargaining agenda can still be dealt with unilaterally or through informal structures; to this extent the contest continues. See par 4-5 *infra*.

<sup>48</sup> Cf Nel & Van Rooyen *Worker Representation in Practice in South Africa* (1985) 33 38-39.

<sup>49</sup> Cf Davies & Freedland *Labour and the Law* 28.

<sup>50</sup> Salamon *Industrial Relations* 272.

"Given that a strike cannot, by definition, constitute an unfair labour practice, unions are at large to threaten strike action in order to induce an employer to bargain over any industrial matter. However, whether there is a *legal duty* to negotiate on any particular issue depends on the court's conception of the collective bargaining process and the ambit of the managerial prerogative."<sup>51</sup>

The emphasis is thus shifted to the "court's conception" of the proper demarcation of managerial prerogative/bargaining topics—in practice, the conceptions of judges and presiding officers with differing political and social values. Obviously this does not mean that the issue is addressed *de novo* in each case. As in case law generally, it is to be expected that certain explicit or implicit principles will be followed. The task is to discover what those principles are.

Two propositions may be advanced at the outset. Firstly, it is clear from various commentaries that an *inherent limitation* on the province of collective bargaining is *assumed* in our labour law. Secondly, this limitation is generally conceived of from what may be termed a pluralist perspective.<sup>52</sup>

On the one hand, the school of labour law associated with Kahn-Freund rests on "a conviction that the true function of the law is to assist in the achievement of a wider social and political purpose, namely the advance of human freedom and the dignity of man".<sup>53</sup> On the other hand, certain assumptions are made as to the means by which this aim should be pursued. In particular, the pluralist approach "postulates that management and labour have at least one interest in common, namely 'that inevitable and necessary conflicts should be regulated from time to time by reasonably predictable procedures'."<sup>54</sup>

Brassey makes clear the implication:

"The deepest purpose of modern labour law is to institutionalise conflict by creating institutions in which employers and employees, through engaging in a struggle in which neither side obtains final victory over the other, eventually elaborate rules of the game which both sides become anxious to protect."<sup>55</sup>

<sup>51</sup> Cheadle et al *Current Labour Law* 39; but cf. par 5 *infra*.

<sup>52</sup> What follows is not an attempt at the ambitious task of categorising pluralism in any definitive way, nor does it deny the different nuances which "pluralism" encompasses. The submission is only that the approach of our courts can best be understood in this general frame of reference (cf. Cameron et al *New Labour Relations Act* ch 5; Rycroft & Jordaan *A Guide to South African Labour Law* 2 ed (1992) 119–129) though not without qualifications.

<sup>53</sup> Clark in Wedderburn, Lewis & Clark *Labour Law and Industrial Relations* (1983) 102.

<sup>54</sup> Jordaan in Rycroft & Jordaan *A Guide to SA Labour Law* 92–93, quoting Davies & Freedland *Labour and the Law* 27.

<sup>55</sup> In Brassey, Cameron, Cheadle & Olivier *The New Labour Law* (1987) 242–243. It does not follow from this, however, that there will necessarily be any equilibrium of power between the two sides. On the contrary, real equality—let alone a unilateral "prerogative" on the side of labour equivalent to the managerial prerogative that pluralism takes for granted—would be completely alien to collective bargaining as we know it.

This approach is markedly different from that which has formed the guideline of this article. Rather than focusing on the goal of democratising the employment relationship with a view to enhancing the productivity of labour, it asserts that the "principal purpose" of labour law is "to regulate, to support and to restrain the power of management and the power of organised labour".<sup>56</sup> Rather than seeking to overcome the dichotomy between management and labour, it accepts this relationship of inequality and conflict as part of the natural order of things.

All this is implicit in that most classic statement of the pluralist philosophy:

"The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship."<sup>57</sup>

It may well be true that the *functions* of "labour" (direct production) and "management" (co-ordination of production) will need to be fulfilled in any economic system; and if this were the whole truth, the present line of inquiry would need to be taken no further. What pluralism fails to establish, however, is that *inequality* of wealth, knowledge and power must necessarily exist between members of society fulfilling these respective functions.

Finally, this whole conception is justified not in terms of economic rationality but, implicitly, by the assumption that social organisation along these lines is conducive to "the advance of human freedom and the dignity of man".<sup>58</sup>

From this standpoint it follows that there must be limits to the sphere of collective bargaining which should not be transcended—not out of concern for economic efficiency but in order to create a level playing field for the contest between capital and labour. While it is incumbent on management to observe the rights of unions, it is equally incumbent on unions to observe the prerogatives of management. The absence of any functional criterion, however, leaves considerable room for uncertainty as to where the line should be drawn. Jordaan makes clear the dilemma:

"A pluralist perspective does not envisage that all work-related matters should be subject to collective bargaining or joint regulation. Yet it is not clear how negotiable and non-negotiable issues (which would remain within management's unilateral rule-making power) should be demarcated . . . [J]oint regulation within a pluralist framework implies (indeed requires) that the parties must keep their conflicting demands at a 'reasonable' level. . . What standard to apply for determining the

<sup>56</sup> Davies & Freedland *Labour and the Law* 15.

<sup>57</sup> Davies & Freedland *Labour and the Law* 18; and not only in capitalist society but in "any type of society one can think of" (27). By implication this denies "industrial democracy" as defined *supra*; it presupposes management as a separate entity from labour and both as independent from the state—in other words, a system permanently based on private enterprise.

<sup>58</sup> Rooted, it is submitted, in Kahn-Freund's mistrust of state intervention in the sphere of collective labour regulation. Cf Wedderburn in Wedderburn et al *Labour Law* 38–42.

reasonableness of employee demands is a moot point, involving as it does not only questions of economic and social policy but also preconceived notions of the proper ambit of managerial prerogative."<sup>59</sup>

Pluralism, in other words, does not question the *existence* of managerial prerogative and its counterpart, the common law subordination of the employee. What it is concerned with is the *parameters* of that prerogative. Conceived of in these terms the employment relationship must remain adversarial, whether mediated through participatory structures or through collective bargaining.

Against this background, how has the Industrial Court interpreted the duty to bargain?

### 5 The Industrial Court and the bargaining agenda

The approach of the court to collective bargaining, as enunciated by De Kock SM, appears to be firmly in the pluralist tradition:

"Financial gain is the mainspring of the employment relationship. Both the employer and the employee seek to balance their respective needs as they have a mutual interest in the continuation of the business concerned. Collective bargaining is one of the recognized ways of balancing their respective interests. It would therefore be fundamentally wrong to see collective bargaining as an activity aimed against and adverse to the employer."<sup>60</sup>

Consistent with this is the view that an employer "is obliged to negotiate actual wages and terms and conditions of employment with its employees".<sup>61</sup> What is encompassed by "terms and conditions" of employment? Despite the seeming generality of the expression,<sup>62</sup> the courts have circumscribed the duty to bargain to a significant degree. Firstly, it is widely assumed (on no very clear authority) that the "general duty to bargain" is in fact confined to wages and working conditions in the narrowest sense. Secondly, certain aspects of the employment relationship have explicitly been deleted from the bargaining agenda.<sup>63</sup> Thirdly and most drastically, certain demands raised in the *course of bargaining on permissible topics* have been disallowed. O'Regan sums up:

"[T]he range of legitimate topics for bargaining, according to the Industrial Court, is not much wider than the terms and conditions of employment [*sic*]. Decisions concerning production processes, long-term planning, investment and similar topics are not legitimate topics of bargaining. . . . The Industrial Court has been unwilling to expand the scope of topics

<sup>59</sup> Rycroft & Jordaan *A Guide to South African Labour Law* 1 ed (1990) 97-98.

<sup>60</sup> *Keshwar v Sanca* 1991 12 ILJ 816 (IC) 818F-G.

<sup>61</sup> De Kock SM in *Steel Engineering & Allied Workers Union v BRC Weldmesh* 1991 12 ILJ 1304 (IC) 1311J. See also *National Union of Mineworkers v Gold Fields of SA Ltd* 1989 10 ILJ 86 (IC) 98C-100D; *SA Woodworkers Union v Rutherford Joinery (Pty) Ltd* 1990 11 ILJ 695 (IC) 700D-I.

<sup>62</sup> In other judgments the subject matter of collective bargaining has been described even more generally as "their relationship" or "[employment] matters": cf. Cameron et al *New Labour Relations Act* 24-25.

<sup>63</sup> Eg, "the content of the disciplinary code and its implementation": *Atlantis Diesel Engines (Pty) Ltd v Roux NO & Another* 1988 9 ILJ 45 (IC) 52H.

through its unfair labour practice definition. Indeed, at times it appears to have undermined the gains made by unions in bargaining."<sup>64</sup>

The incongruity, it is submitted, arises from the pluralist endeavour to extrapolate a theoretical balance (between employers and organised labour) from a *de facto* relationship which is both unstable and unbalanced—that is, prone to conflict and loaded in one party's favour. While exposing some of the mistaken assumptions of contractual theory, pluralism does not challenge its practical conclusions—the prerogative of the employer and the subordination of the employee within a framework of binding terms.<sup>65</sup>

Two illustrations will help to show what this has led to:

(a) *The employer's right to change working conditions unilaterally*

The common law gives the employer a right to alter working practices within the ambit of the terms of the contract but not to vary the terms of the contract unilaterally. This power forms an obvious starting point for democratising the employment relationship. The idea of worker participation is premised to a large extent on the economic desirability of "involving" employees in decisions about working practices but has thus far given rise to no legal duty on employers to do so.

The law of collective bargaining likewise does nothing to disturb the employer's common law prerogative in this respect; indeed, the courts have extended it. In *SA Electrical Workers Association v Goedehoop Colliery (Amcoal)*<sup>66</sup> the dispute arose from the employer's unilateral decision to alter working practices, thereby changing employees' existing rights. It was held that such change could be imposed "in exceptional circumstances",<sup>67</sup> and the following rule was laid down:

"Where an employer wishes to alter an existing right of an employee, then he may do so, provided (1) there is a commercial reason; (2) negotiations have taken place; and (3) should proper negotiations fail, adequate notice has been given."<sup>68</sup>

At common law an employer can only alter an employee's rights with the employee's consent; an employer who acts in the above fashion would commit breach of contract and could be sued for

<sup>64</sup> *Labour Law* 117. Cases referred to are *ACTWUSA v SBH Cotton Mills* 1989 10 *ILJ* 1026 (IC); *Seven Abel CC t/a The Crest Hotel v Restaurant Workers' Union* 1990 11 *ILJ* 504 (LAC); *Pilkington Shatterprufe Safety Glass v CWIU* 1989 10 *ILJ* 123 (IC).

<sup>65</sup> Rycroft & Jordaan *A Guide to SA Labour Law* 2 ed 1–32; Davies & Freedland *Labour and the Law* 25–26. But as Klare "Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941" 1878 *Minnesota LR* 285 293–294 observes in relation to US labour law: "[I]t is widely believed today that the Wagner Act effected a detachment of labor relations from the law of contracts that had previously governed it. This notion is seriously misleading. Contract is alive and well in the law of labor relations."

<sup>66</sup> 1991 12 *ILJ* 856 (IC).

<sup>67</sup> 858H.

<sup>68</sup> 863A. Cf Cameron et al *New Labour Relations Act* 33–35.



specific performance—in other words, restoration of the *status quo*. The Industrial Court, on equitable grounds, denies the employee this remedy.<sup>69</sup>

This was endorsed by the Appellate Division in *NUM v ERGO*<sup>70</sup> where Goldstone JA quoted the following statement of US law with approval:

“The law is clear that an employer may, after bargaining with the union to a deadlock or impasse on an issue, make ‘unilateral changes that are reasonably comprehended within his pre-impasse proposals’. . . . Another formulation is that after impasse is reached in good faith, ‘the employer is free to institute by unilateral action changes which are in line with or which are no more favourable than’ those it offered or approved prior to impasse.”<sup>71</sup>

A mechanism is created, in other words, whereby the employer can overrule the employee’s common law right to refuse to agree to changes in terms of employment. This places a very decided limit on the scope and effect of any duty to bargain that may be imposed on employers. *A fortiori*, there is no duty on employers to negotiate over “changes in working practices” as opposed to changes in the terms of employment.<sup>72</sup>

#### (b) *Limiting of demands in interest bargaining*

An even more drastic limitation on the scope of collective bargaining is the power assumed by the Industrial Court to rule demands out of order. Cameron, Cheadle & Thompson summed up the law in point as it appeared to stand in 1989:

“The legislature has . . . decided that the flexible unfair labour practice instrument should be available to check certain unacceptable *forms* of industrial action, but there are no statutory indications that remedies should be employed to regulate the *nature* of demands, and this is as it should be.”<sup>73</sup>

<sup>69</sup> *In casu* the court also stressed that negotiation involves no duty to compromise but only a “willingness” to compromise: see 860–862.

<sup>70</sup> 1991 12 ILJ 1221 (A).

<sup>71</sup> 1238D–E citing Gorman *Basic Test on Labor Law* 445–446. Albertyn, arbitrating in *Corobrik Natal (Pty) Ltd and Construction & Allied Workers Union* 1991 12 ILJ 1140, says the following at 1146B–C: “Management may not, to my mind, alter the essential features of the employment relationship (wages, hours of work, the duration of annual leave, and other aspects which are subject to annual review by collective bargaining) without the *agreement* of the representative union” (my italics). Presumably this refers to changes during the currency of an agreement, not to changes which the employer may wish to impose during the “annual review”. See Goldstone JA in the *NUM v ERGO* decision *supra* 1239B–C but *cf* *Waste-Tech (Pty) Ltd and Transport & General Workers Union* 1992 13 ILJ 1032 (ARB) 1033I.

<sup>72</sup> *Corobrik Natal (Pty) Ltd and Construction & Allied Workers Union supra* 1146B.

<sup>73</sup> New Labour Relations Act 100, cited with approval by Thring J in *Bester Homes (Pty) Ltd v Cele* 1992 13 ILJ 877 (LAC) 892F. For criticism of early decisions to the contrary, see Cameron et al *New Labour Relations Act* 103–106.

Since then, authority to the contrary has been laid down in a lengthening series of decisions. In *Dunlop Tyres (Pty) Ltd v National Union of Metalworkers of SA*<sup>74</sup> De Kock M ruled as follows:

"It is [not] for the court to interfere in the cut and thrust of collective bargaining. It is therefore impossible to lay down exhaustive guidelines regarding where in the wide spectrum of demands the court should interfere prior to the exhaustion of the negotiating procedures. The court can, however, not abandon that right. It must retain the right to interfere where the demand is unlawful or illegitimate. The parties do not have a right to bargain on any demand irrespective of the nature of that demand. . . The court must decide, on the facts of each case, whether interference is warranted."<sup>75</sup>

*In casu* the demand by NUMSA that Dunlop Tyres should "do all things necessary to become a party" to the Industrial Council for the Tyre & Rubber Manufacturing Industry, Eastern Cape, was held to be "illegitimate".<sup>76</sup>

Shortly afterwards, the supreme court took a similar line in *Barlows Manufacturing Co Ltd v Metal & Allied Workers Union*.<sup>77</sup> At issue was the union's right to conduct a strike ballot among its members employed by Barlows in pursuance of industry-wide strike action in terms of section 65 of the Labour Relations Act<sup>78</sup> at a stage when Barlows was no longer represented on the National Industrial Council. It was held that

"the absence of any evidence to support the conclusion that the purpose of the strike [at Barlows] was to induce or compel the SEIFSA employers [on the industrial council] to agree to the demands of [the union] would appear to be fatal to the legality of the proposed strike".<sup>79</sup>

Goldstone J (as he then was) went on to state:

"In order for a strike to fall within the definition contained in s 1 of the [Labour Relations] Act it must therefore appear from the evidence as a reasonable possibility that its purpose is to induce or compel compliance with its demands and that that purpose may reasonably be achieved."<sup>80</sup>

In *Transkei Sun International t/a Wild Coast Sun Hotel, Casino & Country Club v SA Commercial, Catering & Allied Workers Union*,<sup>81</sup> the question again arose "whether it is impossible for the applicant to meet the respondents' demand, which would render the strike

<sup>74</sup> 1990 11 ILJ 149 (IC).

<sup>75</sup> 155H-I. This may seem to be in head-on conflict with the "non-interventionist" tradition of pluralism; but cf Kahn-Freund's own qualifications in this respect: Wedderburn in Wedderburn, Lewis & Clark *Labour Law* 57-59.

<sup>76</sup> 153E. The reasoning behind this decision is discussed *infra*.

<sup>77</sup> 1990 11 ILJ 35 (T).

<sup>78</sup> 28 of 1956.

<sup>79</sup> 42B.

<sup>80</sup> 42F (my italics). Cf *Photocircuit SA (Pty) Ltd v De Klerk NO & Others* 1991 12 ILJ 289 (A) where the Appellate Division unanimously disallowed a union demand on grounds of illegality: "[the employer] could not be expected to negotiate about a matter which it was specifically prohibited from implementing" (per Preiss AJA 299J-300A).

<sup>81</sup> 1992 13 ILJ 69 (Tk).

illegal".<sup>82</sup> The demand in question was that wage negotiations should take place on a centralised basis in Johannesburg. Applicant contended that this demand was "impossible of achievement" in respect of the 1991 wage negotiations. Counsel for the respondents retorted that it was "improbable only for as long as the companies in question continue to maintain an obdurate and recalcitrant attitude to the centralized bargaining forum".<sup>83</sup> Hancke J held:

"[N]ot only is the present demand for central bargaining premature, but it also does not appear as a reasonable possibility that its purpose may reasonably be achieved in the immediate future. The individual respondents' industrial action was therefore unlawful in the circumstances."<sup>84</sup>

The implications of this line of reasoning are extraordinary. If determined opposition by an employer to a particular union demand makes it impossible to achieve that demand "in the immediate future", then strike action over such demand could *ipso facto* be "unlawful". The union would be disarmed and it is hard to see when, if ever, the demand would cease being "premature". It is submitted that this construction, and the ruling underlying it, fly in the face of the legislature's clear intention that the court should be "absolutely debarred from attempting to regulate the phenomenon of industrial action under s 46(9) by virtue of the fact that the definition of an unfair labour practice exclude[s] any strike or lock-out".<sup>85</sup>

Unfortunately, even more drastic restrictions on the duty to bargain may be in the offing. In *SA Typographical Union v Good Hope Press Group (Pty) Ltd*,<sup>86</sup> the dispute concerned the retrenchment of employees following the sale of the business which employed them. Van Niekerk SM accepted that "[t]here is no absolute duty to offer severance pay"<sup>87</sup> and went on to interpret the law as follows:

"If there was no duty in the present matter to make a severance payment there was likewise no duty to consult concerning the issue."<sup>88</sup>

In *Bester Homes (Pty) Ltd v Cele*<sup>89</sup> the Labour Appeal Court approved this reasoning<sup>90</sup> and extended it to the duty to negotiate. In establishing that failure by an employer to pay severance benefits is not in itself an unfair labour practice, the court accepted that a dispute over this issue "concern[s] a matter of substantive economic

<sup>82</sup> 74C.

<sup>83</sup> 77C-F.

<sup>84</sup> 77H.

<sup>85</sup> Cameron et al *New Labour Relations Act 99*.

<sup>86</sup> 1991 12 ILJ 608 (IC).

<sup>87</sup> 612H.

<sup>88</sup> 613A. The presiding officer went on: "Even if some form of consultation in the present matter was required and did not take place it is not enough for the applicant simply to state that such consultation did not take place; they must go further and show that consultation would have made a difference." This approach has now been rejected in *Mohamedy's v CCAWUSA* 1992 13 ILJ 1174 (LAC).

<sup>89</sup> 1992 13 ILJ 877 (LAC).

<sup>90</sup> 897H.

interest which is properly the subject of a process of collective bargaining".<sup>91</sup> Yet "[g]iven that finding", Thring J went on,

"I have difficulty in understanding how any kind of legal duty could arise which could compel the appellant [i.e. the employer] to consult or negotiate with its retrenched employees on the topic of the payment of severance benefits".<sup>92</sup>

Here we have a "subject of collective bargaining", but one which the employer is not under "any kind of legal duty" to bargain on. The inference is that severance benefits should have been bargained for "at the commencement of . . . employment"<sup>93</sup> and not later—a logical enough proposition in terms of contract but less obvious in the equitable context of the labour courts. The employment relationship is treated as something static, its provision in respect of severance benefits fixed at the time of inception with no scope for subsequent amendment, despite the manifest nature of collective bargaining as a recurrent process designed precisely to alter the terms of employment in the light of the parties' changing circumstances and concerns. To exclude topics from the bargaining agenda *because* they were not placed there at the "commencement" of employment, it is submitted, calls into question the very basis of collective bargaining.<sup>94</sup>

Unfortunately, Thring J went still further:

"It seems to me in any event that it would serve no useful purpose for the employer who . . . refuses to pay severance benefits (and, which is, as I find, in the circumstances, entitled to adopt that attitude), to consult or negotiate on the question. Such consultations or negotiations would amount to a mere charade, a 'going through the motions' of consulting and negotiating."<sup>95</sup>

The effect, it would seem, is to condone failure by an employer to negotiate in good faith over a demand which it "refuses" to comply with, should the court "in the circumstances" order it to negotiate. Again, an employer's obduracy<sup>96</sup> becomes an effective *legal* bar to union demands.

In *Buthelezi v Labour for Africa (Pty) Ltd*<sup>97</sup> the limits of the court's power to regulate bargaining demands were considered. The respondent in this case submitted that

<sup>91</sup> 893F.

<sup>92</sup> 897F.

<sup>93</sup> *Young v Lifegro Assurance Ltd* 1991 12 ILJ 1256 (LAC) 1265H.

<sup>94</sup> This line of reasoning could be extended to patently absurd conclusions—e.g., that there is no duty to negotiate over wage increases in the absence of a prior contractual right to wage increases. In fact, authority to the contrary is overwhelming: see the cases cited by Bulbulia M in *NUM v Gold Fields of SA Ltd* 1989 10 ILJ 86 (IC) 99C-E.

<sup>95</sup> 897F-G.

<sup>96</sup> I am not aware of similar decisions arising from the refusal by a union or employee to compromise.

<sup>97</sup> 1991 12 ILJ 588 (IC).

"one of the factors which the court ought to take into account in deciding whether termination of employment following a strike was justified or not is whether the demand which led to the strike was unreasonable".<sup>98</sup>

The applicants' demand for a wage increase from R124 to R268 per week, it was argued, was "unreasonable". De Kock SM ruled as follows:

"It is not for the court to interfere in the bargaining between management and labour on the basis of what the court . . . regards as a fair or unfair demand. The court would be stepping outside its legitimate terrain. The court may be entitled to have regard to the nature of the demand in extreme cases such as where the demand is unconscionable or so outrageous that one can infer that there was no intention to negotiate with the object of reaching agreement. No such consideration has been established in casu."<sup>99</sup>

The net result, it is submitted, is that "the scheme of the [Labour Relations] Act" no longer limits the industrial court (as argued by Cameron et al in 1989) to intervention in economic bargaining "only by consent".<sup>100</sup> The court has asserted a power to strike down an economic demand not only on grounds of unlawfulness, illegitimacy or impossibility but also if it is not reasonably likely to achieve its purpose, or is so unreasonable as to reveal an absence of good faith, but not on the ground of unfairness alone. In addition, the court may deny a duty to bargain over demands for the creation of new rights subsequent to the commencement of employment though it is doubtful whether this precedent will be followed.

## 6 The basis for limiting the scope of collective bargaining

It remains to consider the principles on which "the court's conception of the collective bargaining process"<sup>101</sup> is based. Although the exercise of the court's powers in this respect must involve a large measure of discretion, it cannot be arbitrary.<sup>102</sup> To make good law, it must rest on principles which are consistent with the objects of the act.

Only in a few cases, however, has this question been dealt with explicitly. In *Dunlop Tyres (Pty) Ltd v National Union of Metalworkers of SA*<sup>103</sup> De Kock M motivated at some length his decision that the union party should be "restrained and interdicted" from persisting with its demand.<sup>104</sup> Firstly, De Kock M postulated a situation where a demand might have been "fatally defective so that there was in fact no dispute between the parties" and posed the rhetorical question:

<sup>98</sup> 592E.

<sup>99</sup> 592G. Cf Copeling AM in *SAWU v Rutherford Joinery (Pty) Ltd* 1990 11 ILJ 695 (IC) 700F.

<sup>100</sup> *New Labour Relations Act* 99.

<sup>101</sup> Thompson in Cheadle et al *Current Labour Law* 39.

<sup>102</sup> Cf the analogous discussion of the meaning of "fairness": Jordaan in Rycroft & Jordaan *A Guide to SA Labour Law* 2 ed 165-168.

<sup>103</sup> 1990 11 ILJ 149 (IC).

<sup>104</sup> Summarised *supra*.



"Is the court not to interfere until a conciliation board is refused or the industrial council refuses to entertain the dispute?"<sup>105</sup>

But when is a demand "fatally defective"? This was not made clear. Instead, De Kock M went on to outline a second situation where court intervention would in his view be justified:

"The court has the authority under both s 43 and s 46(9) to make any order it thinks suitable once it is satisfied that a party has committed an unfair labour practice. The Act does not prescribe at what time the court may do so. The court cannot fetter the discretion granted to it by the Act by adopting a policy that it will not in an interest dispute interfere until the parties have exhausted the conciliatory procedures and gone over to industrial action. It would be wrong to do so. The court would also, in my opinion, fail in its duty to assist in the maintenance of industrial peace."<sup>106</sup>

The question remains: when will a *demand* in an "interest dispute" amount to an unfair labour practice? Rather than making a ruling on this issue, De Kock M resolved the problem as follows:

"The refusal of a demand creates a dispute. The employer will, if it contends that the demand or the manner in which it was made, is illegitimate or unfair, raise a second dispute. It will in many, if not most cases, be in the interest of the employer and his employees that the second dispute be ventilated and, if necessary, decided by some independent tribunal, before resort is had to industrial action."<sup>107</sup>

On the facts before it the court apparently decided that the union's conduct was "illegitimate or unfair" in that it was prejudicial to the bargaining relationship between the parties.<sup>108</sup> The problem is that any demand which is bargained to impasse might be said to have this effect. Nor does the appeal to "industrial peace" takes us further since collective bargaining itself, which must include the raising of "legitimate" demands, is regarded as an instrument of industrial peace. The criteria for determining when demands will be "illegitimate", entitling the court to intervene, thus remain shrouded in ambiguity.

In the *Barlows* and *Transkei Sun* cases,<sup>109</sup> the subtleties surrounding the notion of "illegitimacy" were avoided by purporting to bar the unions' demands on the seemingly solid legal ground of unlawfulness. As was noted, however, such "unlawfulness" consisted in both cases of the perceived absence of a "reasonable possibility" that the demands could be achieved; and this perception, in turn, could not have been unrelated to the employers' unwillingness to comply. What started as an interest issue (the question of a bargaining forum) thus became a rights issue (the illegality of strike action in pursuance of such demand) and court intervention in a dispute of interest was transformed into adjudication of a dispute of right. This, it is

<sup>105</sup> 154H-J.

<sup>106</sup> 155B-C.

<sup>107</sup> 155F-G.

<sup>108</sup> See 153J-154C.

<sup>109</sup> *Supra*.

submitted, will do no more to promote industrial peace than curbs on the bargaining process in any other form.

A more consistent frame of reference was adopted by Bozalek A in *University of the Western Cape and University of the Western Cape United Workers Union*.<sup>110</sup> The crux of the matter was the question of where managerial prerogative should end and where the province of collective bargaining should begin. Referring to the distinction between "permissive" and "mandatory" bargaining topics drawn in US labour law, the arbitrator explained:

"The principle underlying the delineation between permissive and mandatory subjects of bargaining is that the former may be proposed by either party at the bargaining table, but the proponent may not insist on its position to the point of impasse . . . and the other party may decline to discuss the issue altogether without violating the law."<sup>111</sup>

Mandatory subjects "characteristically deal with the working relationship of the employees to the employer" whereas permissive subjects "fall for the most part into two groups: those which deal with the relationship of the employer to third persons, and are normally regarded as within the prerogative of management, and those which deal with the relationship between the union and the employees in the bargaining unit".<sup>112</sup>

Excluded from the compulsory bargaining agenda, therefore, are "certain areas where the employer may lay claim to an absolute managerial prerogative to take decisions unilaterally, for example investment decisions".<sup>113</sup> At the same time, Bozalek A stressed that in his view the area of managerial prerogative has no fixed or permanent boundaries and made it clear that his decision *in casu*<sup>114</sup> was based on considerations of practice rather than principle:

"The union seeks a fairly extraordinary departure from established bargaining practices . . . and from the norm in industry and business . . . I am aware of no instance where management and the union jointly negotiate or determine the level of benefits to be enjoyed by all levels of staff, including those outside the bargaining unit. This should not be understood to mean that the dispensation whereby management uses its prerogative to decide on such matters alone is either natural or equitable."<sup>115</sup>

This, it is submitted, takes us to the heart of the matter and helps to make explicit much that was left implicit in the judgments referred to above. When dealing with the extent of managerial prerogative, the court is faced with the existence of a "norm in industry and business". But does this settle the matter? In fact it raises at least two

<sup>110</sup> 1992 13 ILJ 699 (ARB).

<sup>111</sup> 705A. Cf Gould *A Primer on American Labor Law* (1982) 111-119.

<sup>112</sup> Goriman *Basic Text on Labor Law* cited at 705B-C. The demand for centralised bargaining in the *Barlows* and *Transkei Sun* cases, in other words, was treated in the manner of a permissive demand, which would seem to be inconsistent with US law. 705D-E.

<sup>113</sup> 705D-E.

<sup>114</sup> That the benefits enjoyed by management are not a subject of compulsory collective bargaining between management and the union.

<sup>115</sup> 708C-F.

questions. Firstly, what is the basis for such "norm"? Secondly, on which legal grounds (if any) is the court bound to uphold it?

A further problem is the potential for conflict between managerial prerogative on the one hand and, on the other hand, fairness or even (as hinted at by arbitrator Bozalek) economic common sense. *In casu* it was found that managerial prerogative should prevail because it was the "norm". Is this correct? The act charges the labour courts with the task of upholding fairness, if necessary by striking down labour practices which fail the test of fairness. From this point of view the questions in every disputed case should be: (a) by which criterion, and (b) within which limits, can managerial prerogative be regarded as "fair" in the circumstances?

These questions have been placed in a broader perspective by Klare's illuminating study of the "deradicalization" of the first US collective bargaining statute through a series of judicial decisions which limited its scope, entrenched the area of managerial control and laid a conceptual basis for post-war industrial relations.<sup>116</sup> The starting point is the fact that

"[l]egal rules are always *conventional*, that is, they are fashioned as the product of human choices within particular historical and normative contexts. Moreover, general concepts like property and free exchange are not self-defining, they are *indeterminate*."<sup>117</sup>

Collective bargaining, in the US as in South Africa, was in essence an "indeterminate" concept that implied, potentially at least, a radical democratisation of employment relations. The Wagner Act created a vision that

"employees would participate through their representatives in governing all matters affecting their conditions of work. . . . When judges and the public become more familiar with the principles of industrial democracy it is to be expected that any autocratic conduct by an employer will come to be viewed as a serious breach of the employees' right to self-organization and collective bargaining."<sup>118</sup>

Among employers, conversely, there arose "a fear that collective bargaining meant the loss of control over the production process, the fatal subversion of the hallowed right of managerial freedom to run the enterprise".<sup>119</sup>

On this fundamental issue the Supreme Court placed itself on the standpoint of employers. It "embraced those aims of the Act most consistent with the assumptions of liberal capitalism and foreclosed those potential paths of development most threatening to the

<sup>116</sup> Klare 1978 *Minn LR* 265. Space does not permit a full discussion of this analysis, which raises some important parallels with the post-Wiehahn period in South Africa; what follows is limited to a number of points excerpted from it.

<sup>117</sup> Klare 1988 *Catholic University LR* 1.

<sup>118</sup> *Weyand Majority Rule in Collective Bargaining* cited by Klare 1978 *Minn LR* 284-285.

<sup>119</sup> Klare 1978 *Minn LR* 287.

established order”;<sup>120</sup> it “recognized that state regulation of the wage-bargain could coexist with private-ordering”.<sup>121</sup> Thus it was held in *Fibreboard Paper Prods Corp v NLRB*:<sup>122</sup>

“Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. . . . If, as I think clear, the purpose of § 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise . . . should be excluded from that area.”

This ruling can only be regarded as a decisive disavowal of the concept of industrial democracy. Yet on what *legal* basis could such a far-reaching pronouncement be justified? Labour law had become, in effect, an area of public law; yet the court “never explained how one might define or identify a public interest in one or other balance of power between capital and labor”.<sup>123</sup>

Klare suggests that a number of implicit assumptions “provided the underpinnings of a narrow conception of the social relations of the workplace”:

- (a) “the treatment of workers as sellers of labor power and as consumers of commodities, but not as producers”;
- (b) “since it was imagined that there was an overall societal interest in maintaining the prevailing industrial system, [the Court] encouraged responsible unions to accept the social order as given and to seek to defend and better the lot of their members only within its ground rules”;
- (c) “since union activity was denominated as something separate from members’ self-activity in the workplace, unions could not function as participatory institutions in which workers continuously articulated . . . their aspirations for the governance and transformation of the work-process”.<sup>124</sup>

Similar assumptions, it is submitted, are implicit in the decisions by the South African labour courts and the Appellate Division discussed above. It is these assumptions, and not the inherent limitations of collective bargaining itself, which render it improbable that collective bargaining will serve as a means of democratising the employment relationship and establishing a relationship of “co-operative endeavour” in the workplace.<sup>125</sup> To achieve the theoretical potential of collective bargaining as an instrument for regulating the

<sup>120</sup> Klare 1978 *Minn LR* 292.

<sup>121</sup> Klare 1978 *Minn LR* 309.

<sup>122</sup> 379 US 203 223 (1964) cited by Klare 1978 *Minn LR* 320 n 198.

<sup>123</sup> Klare 1978 *Minn LR* 317.

<sup>124</sup> 1978 *Minn LR* 321.

<sup>125</sup> Bozalek A suggests that “[t]he creation of a different more equal dispensation [in employment relations] is best done through the ordinary process of collective bargaining and the evolution of the relationship between the parties” (*UWC and UWCWU supra* 708F). The problem is that employers are under no obligation to negotiate over this.

employment relationship in its entirety would require legal redefinition of its scope.<sup>126</sup>

To this end the following propositions (which will not be developed in detail here) may be noted for future consideration. Firstly, the far-reaching nature of the curbs imposed by the courts on the scope of collective bargaining must raise doubts as to whether they will be capable of consistent application in a climate of renewed trade union assertiveness. Rules which protect managerial prerogative at the expense of collective bargaining will invite industrial conflict and may thus be found, belatedly, to be contrary to the aims of the Labour Relations Act.<sup>127</sup>

Secondly, "industrial peace" and "adversarial relations" are polar opposites. In terms of the existing act collective bargaining is construed essentially as an instrument for *regulating* the antagonistic relationship between capital and labour, not *replacing* it with a relationship of "co-operative endeavour". To the extent that industrial peace becomes a primary aim in the pursuit of enhanced economic performance, collective bargaining may also need to be reconstrued: as a means of regulating employment relations in a context of industrial democratisation.

Thirdly, an "overall societal interest" in economic rationality should be recognised as a *legal* criterion for assessing the reasonableness, legitimacy or fairness of labour practices in general and the delineation of managerial prerogative in particular.

## 7 Beyond collective bargaining

Two last points may be looked at briefly by way of concluding this part of the study and introducing the areas that remain to be examined.

### 7 1 Control and ownership

For reasons already noted, worker participation in the generally accepted sense does not transcend the limitations of the contractual relationship. It redefines the scope of managerial control and may soften the edges of adversarialism but, when all is said and done, the interests of capital and labour remain juxtaposed along a redrawn frontier.<sup>128</sup>

Control over the labour process, it is submitted, is the issue that legal reform aimed at democratising the employment relationship needs to focus on. This is not to introduce an exotic, "ideological" element into the down-to-earth world of labour; it is to recognise and

<sup>126</sup> As, possibly, in Sweden: see O'Regan *Labour Law* 117 n 26. Cf a 6.3 of the African National Congress Draft Bill of Rights: "The right to organise and to bargain collectively on any social, economic or other matter affecting workers' interests, shall be guaranteed."

<sup>127</sup> Cf *Bulbulia M in NUM v Gold Fields of SA Ltd supra* 99C.

<sup>128</sup> Even in a highly developed social democracy such as Sweden, Innes & Gelb 1987 *TWQ* 561 point out, "the market remains the dominant principle of regulation".



build on an eminently practical fact of economic life. As Jordaan explains:

"In earlier times, ownership of and control over the enterprise . . . was vested firmly in the person of the owner, who was entrepreneur, financier and manager all in one. In contradistinction, the modern enterprise is often characterized by a separation of the beneficial and managerial aspects of ownership: the right to control and manage, traditionally an important incident of ownership, has become vested in the hands of non-owners (i e managers)."<sup>129</sup>

The words in parenthesis highlight the technical and conventional (as opposed to intrinsic) nature of control over economic activity: the fact that it is monopolised by a particular category of non-owners ("managers") as opposed to others involved in the productive process.

Nevertheless, the residual rights of ownership still form a distinct bottom line. The "beneficial" aspect of ownership is the rationale for investment of capital; wages and salaries, in contrast, are treated as a cost of production. On the other hand, this dispensation is not necessarily (in the words of Bozalek A) "either natural or equitable".<sup>130</sup> It is possible also to look at the issue in purely functional terms; that is, in terms of the requirements of the labour process itself. From this standpoint, managerial prerogative on the one hand and industrial democracy on the other would be viewed as opposite extremes in a range of possible models of control to be judged on their technical merits first and foremost.

This opens up a broad and complex terrain which will need to be examined far more closely in order to test the above submissions. It is interesting to note, however, that even the establishment of fully-fledged industrial democracy would involve surprisingly little modification of existing legal concepts. Most fundamentally it would mean redrawing the boundaries of *dominium* in that certain *res intra commercium* would be treated, in effect, as either *res communes* or *res publicae*.<sup>131</sup> Beyond this, issues which need to be examined include the existing structures of collective control over productive property, in particular company law, and the systematic centralisation of decision-making which is inherent in these structures.<sup>132</sup>

The guiding principle, it is submitted, should be the rationalisation of control with a view to developing the most efficient organisation of production that is possible, given the technical and human resources available, at any particular stage. In following through the separation between ownership and control to its logical conclusion, the residual powers of ownership (as an entity divorced from the

<sup>129</sup> In Rycroft & Jordaan *A Guide to SA Labour Law* 2 ed 13.

<sup>130</sup> *UWC and UWCWU supra*.

<sup>131</sup> Cf Gibson Wille's *Principles of South African Law* 6 ed (1970) 161-162. Cf a 11 of the African National Congress Draft Bill of Rights, in particular a 11.2 and 11.3; a 13 of ANC Preliminary Revised Version (February 1993).

<sup>132</sup> Cf Hadden *Company Law* 324-326; at 483-485 the author summarises a few of the potential remedies and their problems.

labour process) over the property in question would presumably wither away and, with it, the existing source of managerial control. This, in turn, would strike at the legal basis of the dichotomy between "management" and "labour" as an institutionalised contradiction, reducing it to an incident of the division of labour.<sup>133</sup>

But this, too, would represent a continuation of an existing trend with its roots in the warp and woof of modern industrial society. To quote Jordaan again:

"In relation to property, [socialization of the law] entails a shift away from an individualistic 'and basically exploitative' perception of property rights towards the notion that property is a social responsibility. The underlying premise is that the institution of property is derived from and protected by society, i.e. it is a social institution and may be made to serve particular social objectives. This is accomplished through 'public law' regulation of the use and application of property resources."<sup>134</sup>

"Co-operative endeavour" on this basis will undoubtedly bring tensions of its own but these would be of a different order from the contradictions of the employment relationship as we know it.<sup>135</sup>

## 7.2 Of processes and plans

Even if everything said so far is true, it does not follow that reform along the lines discussed above will necessarily be legislated into existence.<sup>136</sup> Anstey observes that

"industrial relations systems are seldom the product of a systematic conceptual or legislative masterplan, but are rather the product of prolonged historical power exchanges and compromises between organised labour, employers and the state in the context of their evolving political economies".<sup>137</sup>

South Africa in the turbulent 1990s is likely to be no exception, though with less scope for "compromises" on fundamental issues and a greater propensity for "power exchanges" than might have been hoped for at the time when Anstey was writing.

No country in the world provides an exact precedent for the complex situation which we face. Nevertheless, a thought-provoking illustration of the stressful manner in which legal rights may be born is offered by the events in Germany after World War I in which the

<sup>133</sup> Cf Marx's criticism of the division of labour in capitalist society: "In principle, a porter differs less from a philosopher than a mastiff from a greyhound. It is the division of labour which has set a gulf between them": *The Poverty of Philosophy* (1978) 124.

<sup>134</sup> Rycroft & Jordaan *A Guide to SA Labour Law* 2 ed 16.

<sup>135</sup> For a discussion of the implications, see Innes & Gelb 1987 *TWQ* 562-577. Although the authors' starting point is fulfilment of the aims of the Freedom Charter rather than the optimisation of production, "the very positive effect [of workplace democracy] on productivity levels" is recognised (566). In general see Horvat *Political Economy* part III. Classical Marxist writings on the subject include Marx's own *The Civil War in France*, dealing with the experience of the Paris Commune of 1871, and Lenin's *The State and Revolution*, especially ch 5.

<sup>136</sup> Eg, notwithstanding the intellectual case made out for extending labour law to farm workers, there is powerful opposition among farmers to such reform.

<sup>137</sup> *Worker Participation* 2.

“German model” of worker participation has its roots. Nörr observes:

“As everyone knows, in Russia after the revolution [of 1917] the constitution of councils or soviets was introduced.<sup>138</sup> Following this model, in Germany during the revolution of 1918/19 workers’ and soldiers’ councils emerged as well. They saw themselves as political organs and tried to push forward the political councils’ constitution. The councils’ constitution, however, is in sharp contrast with parliamentary democracy so that the final conflict over the future of the new republic was inevitable.<sup>139</sup> The Social-Democratic Party representing the majority of the workers supported the Western model of democracy. In order to take the sting out of the councils’ movement on the extreme left and to win the workers from this camp a program was developed which did not lead to the abolition of the workers’ councils but would keep them by substituting their political function for [sic] an economic one; the councils’ system was depoliticized and transformed into economy.”<sup>140</sup>

In the event this transformation was achieved through a violent process that involved attempted insurrection, armed repression and the assassination by army officers of the most prominent leaders of the left, Rosa Luxemburg and Karl Liebknecht.

Germany’s experience confirmed that relations of “co-operative endeavour” do not come about through the stroke of a pen. Under the threat of revolution the Weimar government wrote the following clause into the constitution which, on the face of it, created a framework for industrial democracy:

“Labourers and employees are to cooperate on equal terms in alliance with entrepreneurs in the regulation of conditions of wages and labour, as well as in the entire economic development of the productive forces. The organizations of both sides, and their agreements, are recognized.”<sup>141</sup>

With the defeat of the councils’ movement, however, this clause was interpreted as meaning that wages and working conditions should be decided through collective bargaining, as before. Issues of “economic development” were delegated to a hierarchy of “economic councils” which included not only the representatives of

<sup>138</sup> I.e., establishing the political power of the elected soviets (councils) of workers’, soldiers’ and peasants’ delegates, a power that was subsequently eroded and eventually abolished in all but name as bureaucratic dictatorship became entrenched.

<sup>139</sup> Deutscher *The Prophet Armed* (1970) 318–319 explains this contrast as follows: “Of course, the Soviet republic was to be a ‘proletarian dictatorship’. By this was meant the social and political preponderance of the working class; but the means by which this preponderance was to be established were not fixed in advance. [Socialists] were wont to describe the parliamentary democracies of the West as ‘bourgeois dictatorships’, in the sense that they embodied the social preponderance of the bourgeoisie, not that they were actually ruled in a dictatorial manner. The Bolsheviks [expected] in all sincerity that by comparison with the bourgeois democracies the republic of the Soviets would bring to the vast majority of the nation more, not less, liberty.”

<sup>140</sup> Or, more succinctly, “to avert the councils movement’s political threat to parliamentary democracy by incorporating the councils into labour law and into the economic system”: Nörr *Labour Law and Constitution: The Example of the Weimar Constitution of 1919* (1992) 5 14. The dominant “Weimar Coalition” in fact consisted of an “alliance of social democrats, Catholic Centre Party and left-wing liberals” (12).

<sup>141</sup> A 165.1, quoted by Nörr *Weimar Constitution* 15.

labour and employers "on equal terms", but also "other interests" such as "independent professions, commerce, consumers etc".<sup>142</sup> In practice, the workers' councils "had to be content with the role of a minority when they met with other professional groups and the consumers in the economic council".<sup>143</sup> In addition, the economic councils were subordinated to parliament and regarded as having "simply the right of discussion".<sup>144</sup>

All the more indeterminate at present is the outcome of the turbulent processes taking place in South Africa, in terms of the legal changes that they may give rise to as well as the effect of such changes.

## 8 In conclusion

At the risk of over-simplification, it may be useful to recapitulate some of the essential points argued above:

- (i) Socio-economic progress is bound up with transcending the adversarial nature of the employment relationship and developing relations of "co-operative endeavour" in the labour process.
- (ii) The adversarial nature of the employment relationship arises from the contradiction between (on the one side) the beneficial and managerial rights and powers associated with the owners and/or managers of enterprises and (on the other side) the differentiated and subordinate position of employees.
- (iii) Worker participation, though widely regarded as a means of overcoming the contradiction, typically does no more than circumscribe it. Models of "worker participation" which overcome it may more appropriately be termed "industrial democracy" and would imply a fundamentally different system of ownership and control if they become the rule.
- (iv) Collective bargaining is construed by our courts in such a way as to leave the bedrock of managerial prerogative intact, thus locking the labour process into its existing adversarial mode.
- (v) Legal reform, building on historical trends towards (a) the separation of ownership and control and (b) the socialisation of property, would be needed to overcome the limitations of collective bargaining and the existing employment relationship.
- (vi) As a guideline to legal reform, the criterion of "industrial peace" should be re-examined, not in the sense of institutionalising an ongoing conflict between capital and labour, but in the sense of overcoming it.

<sup>142</sup> Nörr *Weimar Constitution* 15.

<sup>143</sup> Nörr *Weimar Constitution* 16-17.

<sup>144</sup> Nörr *Weimar Constitution* 16, though this included "the right of legislative initiative".

- (vii) In economic life as in political life, democracy is an indispensable ingredient of peace and co-operation in the longer term; for this reason industrial peace in the above sense implies a far-reaching democratisation of the labour process.
- (viii) The present situation in South Africa creates a context in which these questions can and should be posed afresh. It is true, as Anstey says, that “[m]ajor changes in economic and authority relations in organisations and the wider society would be required to achieve the ‘vision’ of this approach on a wide front”.<sup>145</sup> Many would believe that such changes are precisely what the current constitutional debate is about.

#### ADDENDUM:

##### Methodology and ‘-isms’: an excursus

Is it feasible for management and labour, as argued by Anstey, to move “beyond adversarialism” towards new forms of “co-operative endeavour” as part of building a democratic South Africa?

Anstey’s point of departure is that every system of industrial relations is the product of specific social processes—of “historical compromises, revolutions, economic crises, experiments and power exchanges”.<sup>146</sup> The problem with the idea outlined above is that it does not seem to take account of this. It is not premised on social processes through which management and labour are likely to be “moved” to the positions which are advocated. Rather, “co-operative endeavour” is justified in terms of its own perceived desirability as a means to a chosen end. It is one thing, and perfectly legitimate, to *argue for* a particular policy option in these terms. But it is not the same as demonstrating why or how, on the balance of available evidence, that system is likely to eventuate as a result of social processes.<sup>147</sup>

This is not the place to attempt an in-depth analysis of the political and economic processes by which current and future industrial relations in South Africa are being shaped. The period since 1989 has been one of the most tumultuous in our history. If we take investment as an indicator of real expectations, then business leaders have shown little confidence that matters are likely to change

<sup>145</sup> *Worker Participation* 3; cf Salamon *Industrial Relations* 295.

<sup>146</sup> Anstey *Worker Participation* 2.

<sup>147</sup> Countless examples illustrate the limitations of preconceived plans for regulating the relationship between capital and labour. To take just one: the “processes” in Russia prior to the revolution of October 1917 led to the formation of workers’ councils and produced growing tension between management and labour. Horvat *Political Economy* 137 describes what happened as follows: “On May 23 the provisional government issued a decree that legalised *factory committees* but attempted to limit them to consultative [functions]. Factory committees soon transcended these limits, however; in particular, when there was a danger of a factory close-down they would assume the management of production.”



fundamentally in the foreseeable future. On any sober reading of the situation, political tension, economic instability and industrial conflict are likely to remain significant in the period ahead.

Anstey acknowledges that "[t]he question really centres around whether in an escalating conflict situation parties will retain the desire or capacity to create or exploit co-operative opportunities"<sup>148</sup>—but answers this by detailing changes in the outlook and conduct of unions and management that *would need to come about to solve the problem*. Is this not begging the question? "Ideological softening", Anstey says, "requires the development of a new vision on the part of organised labour and employers". How, in a situation of endemic conflict between labour and employers, is a new *joint* vision likely to develop by which the conflict could be eased? Would an easing of conflict not be a prerequisite for the parties to sink their differences in a "perception of common crisis"?

Possibly anticipating questions of this nature, Anstey states:

"Determinists will argue that the process [of conflict] is so irrevocably advanced in the wider society as to render the relationship-building and organisational restructuring required for effective worker participation progress a hopeless dream."

When this was written, it should be remembered, South Africa was poised at the beginning of an uncharted period when many things seemed possible: it was a time to argue for favoured options. The experience since then has narrowed the options down. With the wisdom of hindsight one does not have to be a "determinist" to question seriously whether the conflict in society can be overcome along the lines suggested above.

Even if the prospects for "relationship-building" between employers and labour are not promising, it does not, however, follow that the "organisational restructuring required for effective worker participation" is necessarily "a hopeless dream". What it does mean is that we need to question the institutional framework—that is, the legal and economic context—within which such a process could feasibly take place.

The reason for the difficulties encountered by the above approach, it is submitted, is that it *assumes* a fundamental continuity in property, legal and economic relations.<sup>149</sup> Anstey does speak of "[i]nternational shifts away from the 'isms'—capitalism and socialism—to political economies structured around pragmatic questions of economic growth, employment creation, foreign trade and investment, and competitiveness in world markets".<sup>150</sup> Presumably

<sup>148</sup> *Worker Participation* 25. The next three quotations are from 24–25.

<sup>149</sup> Cf. Douwes-Dekker in *Anstey Worker Participation* 154; or as Volkswagen's Brian Smith sums it up: "On the union side, we [*sic*] are *going to have to start working with the 'bosses'* and not blame them for all the problems in the company or the country" (*Anstey Worker Participation* 243 (my italics)).

<sup>150</sup> *Worker Participation* 25–26.

this referred to the impending collapse of Stalinism and (perhaps prematurely) a shift away from the economic policies identified with Reagan and Thatcher which dominated the capitalist world during the 1980s. It would certainly not have been correct, however, to suggest that a phasing out of capitalism itself was taking place.

The events in Eastern Europe since 1989 have underlined this point. The disappearance of the state-owned, bureaucratically-planned economic system as a viable option has been hailed as a historical vindication of capitalism. Many who regarded themselves as socialists in the past now make no bones of the fact that they can see no alternative to "the market". In this sense alone has there been a "shift away from the '-isms' ": in South Africa, as in other countries, the debate has been shifted from "capitalism v socialism" to the policy options that are available *within* capitalism by means of state intervention ("mixed economy") and other devices.

The idea of "co-operative endeavour" between employers and employees, it is submitted, falls very much within this trend.

In this light the question addressed by Anstey, and indeed by this article, can perhaps be more clearly defined. Practical solutions to South Africa's enormous economic, political and social problems must indeed be found if we are to avoid drifting deeper into a situation of crisis that could turn out to be irrevocable. There is a staggering shortage of goods and services; the existing economic system is unable to meet the demands that are placed on it. Any proposals for tackling our huge backlog must surely be high on the agenda of policy-making and research—and not only those which can be accommodated by the existing institutional framework.

Indeed, many would argue that the crisis in South Africa is by definition a product of this framework. In itself this does not indicate any particular solution; rather, it suggests that the search for effective solutions will require considerable flexibility and open-endedness in our "vision of improving institutions".<sup>151</sup>

#### OPSOMMING

Die grondwetlike debat in Suid-Afrika het die verwante vraagstukke van *demokrasie* en die *verhoging van produksie en herverdeling van rykdom* sentraal op die agenda geplaas. Die artikel betoog dat demokratisering van die diens-verhouding belangrik is vanuit beide oogpunte.

Dit word reeds algemeen ingesien dat deelname van werknemers in besluitvorming op bedryfsvlak groter doeltreffendheid en produktiwiteit tot gevolg kan hê. Die ervaring leer egter dat werknemersdeelname nie noodwendig tot arbeidsvrede lei nie. Werkersdeelname kan kennelik nie die plek van kollektiewe bedinging inneem nie.

Kollektiewe bedinging is die aangewese middel om demokratiese deelname van werknemers in die produksieproses te bevorder. Ons arbeidsreg verwag dat werkgewers met verteenwoordigende vakbonde oor die arbeidsvoorwaardes (*terms and conditions of employment*) van hul werknemers moet onderhandel maar aanvaar ook dat bepaalde aangeleenthede uitsluitlik binne die werkgewer

<sup>151</sup> See n 2 *supra*.

se bestuursbevoegdheid val. Die vraag is hoe die terrein van toelaatbare onderhandelingsonderwerpe en dié van bestuursbevoegdheid van mekaar afgebaken word.

Die algemene tendens van ons nywerheidshowe is om die werkgever se onderhandelingspilig in 'n beperkende sin te interpreteer: eerstens, deur die begrip "diensvoorwaardes" eng te interpreteer; tweedens, deur bepaalde aspekte van die diensverhouding buite die bestek van die onderhandelingsagenda te plaas; en dertens, deur bepaalde eise selfs met betrekking tot toelaatbare onderwerpe, ontoelaatbaar te verklaar.

Geen konsekwente regsgronde vir hierdie opvatting blyk uit die regspraak nie hoewel daar aanduidings is, onder meer in die lig van vergelykbare ontwikkelinge in die Amerikaanse arbeidsreg, dat die uitsprake uiteindelik meer met instandhouding van bestaande praktyke as met regsbeginsels te doen het. Daarteenoor is die taak van die nywerheidshowe om "billikheid" te handhaaf, indien nodig deur bestaande praktyke ongeldig te verklaar.

Die artikel identifiseer drie gronde waarop die nywerheidshowe se beperking van onderhandelingsonderwerpe bevraagteken kan word: eerstens, omdat dit (in stryd met die oogmerke van die Wet op Arbeidsverhoudinge 28 van 1956) nywerheidskonflikte kan uitlok; tweedens, omdat uitbreiding van kollektiewe onderhandeling tot 'n meer demokratiese en minder gepolariseerde arbeidsbestel kan lei; en dertens, dat 'n algemene maatskaplike belang in 'n meer rasionele, dus meer produktiewe, ekonomiese bestel as regsbeginsel erken moet word.

*Russiese spreekwoord:* Die reg is 'n vlag, en goud is die wind wat hom laat waai.

\* \* \*

*Skotse spreekwoord:* 'n Regsgeding is duur; drink 'n halfliter en skik.

\* \* \*

*Soefi spreekwoord:* Alles waarin mens God nie vergeet nie, is wettig.

\* \* \*

*Spaanse spreekwoord:* 'n Hofsaak oor 'n sent kos vyf en twintig sent se papierwerk.