IRR

2013

43rd Alfred and Winifred Hoernlé Memorial Lecture

Fixing the Laws that Govern the Labour Market

Martin Brassey

FIXING THE LAWS THAT GOVERN THE LABOUR MARKET

MARTIN BRASSEY[1]

SUMMARY

At the start of this article, the author argues that the solution to our terrible levels of unemployment lies neither in systems of exemptions, whether for young people or others, nor in an 'Economic Codesa'.

He believes both will be futile and says that deeper structural changes to our labour law are required. He acknowledges that this can only be a part of the solution - monetary and fiscal policy is equally important. He recognises, moreover, that the proposals are unlikely to resonate with the Tripartite Alliance. But he argues that they are not, in consequence, irrelevant, for they help us to understand the work we still have to do if our levels of employment are to improve.

The author contends that four fundamental changes to our labour law are required:

- The repeal of the power to extend statutory bargaining agreements to non-parties;
- The abolition of the general unfair dismissal regime – with provisions against victimisation and discrimination remaining in place, however;
- The introduction of mandatory polling (balloting) to limit strikes and, in particular, strike violence;
- The imposition of union liability, albeit circumscribed, for injury and loss caused by striking;

The author believes that it is only by such means that we will liberate the unemployed from the burdens cast on them by big capital and big labour.

[1] BA (UCT) LLB H Dip Tax Law (Wits); Visiting Professor of Law, University of the Witwatersrand; Senior Counsel, Johannesburg Bar.

The official figures for joblessness in South Africa, which reflect the number of active jobseekers, show that our levels of unemployment are among the highest in the world and, if people without hope of securing employment are added to the tally, the figures are much higher still. The picture is, on the face of it, so bleak that commentators predict an uprising by this disaffected underclass unless the trend is reversed. Since the reversal is improbable, time will tell us whether these prophets of doom are correct, but the objective evidence suggests the opposite. People certainly are protesting but, if the news reports are to be believed, the focus of their anger is on poor service delivery and not joblessness. There is no doubt some overlap between the two, but they are far from being the same.

The reason people are not taking to the streets over unemployment is far from clear. Loyalty to the 'revolutionary state' undoubtedly plays a part: the ANC government and its ally, Cosatu, still capture the imagination of ordinary people, and the leadership they provide continues to command respect. Presumably, too, the web of welfare payments, which is now extensive, is providing a safety net of sorts to poor people who would otherwise be penniless. But the bulk of the credit must surely go to an informal sector in which workers *do* get employment, tenuous though it may be, and *can* make money by entrepreneurial activity. According to the available data, the informal sector absorbs a significant proportion of the workers shed by the formal sector. Since many of them will want to return to settled employment and so register as jobseekers, it is wrong to believe that people classified as job seekers are earning nothing in the market place.

The problem

By saying this I do not mean to downplay the problem. There is a problem, and it is far from trivial. Though skilled labour may be in short supply, the supply of labour in general far exceeds the demand. In a free market environment, classically conceived, this should never occur of course: the market for labour should clear at the point when labour becomes cheaper than mechanisation or

some equivalent alternative. In a perfectly competitive market, price is always determined by the intersection of a supply and demand schedule. There can be no overproduction or unemployment. The price or wage simply falls until the market is cleared.

Classical economists, seeking an explanation for market failure, typically find it in the proposition that something is obstructing the natural dynamics of the market. What can it be, they continue, but excessive regulatory intervention by the State? To me, this proposition seems axiomatically correct, a 'no brainer' if you like; but most commentators (or at least most whose background is essentially political) seem to think otherwise, and propose solutions accordingly.

Commonly proposed solutions

One proposal is that financial subsidies be given for job creation and, in one variant, for entrants who struggle to get a foothold in the market. Underlying this idea is the belief that, if businesses are given incentives to employ more workers, the labour market will swell. There are many objections to this proposal, but two at least are worth identifying. One, conceptual in nature, is that labour is a factor of production and not product itself; or, to put the point more simply, that this especial demand for labour can and will last only as long as the subsidies continue. The practical objection, which is the second, is that the scheme is wide open to abuse. Similar schemes have been tried in the past – in the old border areas not least -and they have led to much 'people farming' (that is, the racket in which workers are hired by phantom enterprises at less than the subsidy and the difference is pocketed by the 'employer'). Of course, the potentiality for abuse is not, in itself, an objection to the implementation of a subsidy scheme, but it does become so when the risk is so egregious.

A sophisticated variant of this proposal seeks to improve the employability of new entrants by placing them partly or wholly outside the regulatory net for a given period (six months, a year, maybe two years). At the end of the period the employees are expected to fit seamlessly into the employer's work force, but then what? If the work force has remained static over the period, someone will have to be retrenched and, if it has grown, then the extra workers will have been recruited in the normal course. The scheme simply privileges new over established workers. Though the notion of giving everyone a look-in appeals to our sense of fair play, the proposal is scarcely likely to appeal to unions that have spent time and money successfully recruiting the established workforce against promises of enduring job security.

Underlying these schemes and those like them is a belief that suggestions for radical reform are bound to be rejected. The unions, which are rightly regarded as setting the State's agenda, will have

no truck with structural reforms that might undermine gains already made. Why should they accept changes that run counter to their self-interest? Without answering this important question, some commentators espouse an economic Codesa, out of which, phoenix-like, a new labour dispensation will rise up. In contrast to the negotiations of the nineties, however, the process has nothing much to offer the unions and, unsurprisingly, they have shown no appetite for the process. There is, moreover, some case for saying that powerful interest groups should operate within the structure established for the purpose – NEDLAC, to be specific – and should not be cutting deals behind our backs in smoke-filled rooms.

Is there a willingness to listen?

By abjuring substantive outcomes and opting for a procedural solution, however, this proposal brings to the surface the underlying supposition of all these proposals. This is that all reform will impossible unless the union movement is willing to relinquish the bulk of the gains of the last two decades. This proposition is true as far as it goes, but it ignores the benefits that capital, especially big capital, derives from the current system of industrial relations. In negotiations in the nineties, the concessions went both ways – unions won statutory rights to strike and to organise and, in exchange, employers secured a ban on strikes over dismissals and, importantly, a cap on compensation for unfair labour practices. On one matter both sides were agreed: minimum wages and terms of employment should continue to be set at industry level and be statutorily imposed on all who fall within the industry. By entrenching this practice, which had endured for the best part of a century, each side was able to protect itself against buffeting competition from outside their ranks. Unions could fix wages in the knowledge that non-members would not undercut them, and established employers, by converting wages into a fixed cost like electricity or water, could raise one more barrier to entry by small firms who would, in principle, willingly compete at this level.

The commitment of these interest groups to the prevailing structures is intense. That proponents of change, quailing in the face of their power, should feel compelled to water down their ideas is hardly surprising. Nothing is immutable, however. In a few years the Tripartite Alliance may be dead and buried and a collapse of international banking and trade may have thoroughly emasculated big capital. In the knowledge that such developments are always possible, there is some usefulness in a thorough review of our industrial relations system and in proposals for its substantial improvement. At worst, a study of this sort can, by setting up a model, reveal just how far our current system is falling short.

Impracticable though they might be, proposals for the structural reform of our system of industrial relations must not be impractical. The proposals must take into account certain existing conditions.

The parameters of the debate

First and foremost is the Bill of Rights in the Constitution. It entrenches freedom of association and, in the Labour Relations clause, the right to fair labour practices, to organise and bargain collectively, and to the benefits of the closed and agency shop. In comparative jurisprudence, the right to bargain collectively is taken to embrace the right to strike, since this is the normal means by which bargaining deadlocks are broken. But, in order to make its intentions plain, the clause goes out of its way to remind us that rights whose exercise curtails the freedom of others can be limited by reasonable and justifiable legislative enactments - most notably, the right to strike and union security provisions.

Next are the ILO (International Labour Organisation) Conventions ratified by South Africa over the past century. Ratified conventions have the force of law in South Africa and, until denounced, must be respected and enforced. The Conventions in question, twenty in all, deal principally with matters of child and forced labour, health and safety, and freedom of association and collective bargaining. Notably absent from the list is the Termination of Employment Convention (158), but there is no denying the persuasive impact it has had in our law. The industrial court, established by amendment to the 1956 Labour Relations Act, treated Convention 158 and the corresponding Recommendation (166) as the basis for the development of the far-reaching unfair dismissal jurisdiction.

Finally, there is the common law, in this case the common law of employment. Though they may not always understand as much, people who call for deregulation are not actually asking for that: what they truly want is reversion to the common law that the repeal of the raft of legislative and regulatory enactments would produce. In calling for this, they seek the flexibility and adaptability that the self-regulatory mechanisms of contract law can produce. Frequently, they believe that common law leaves everything to the parties to determine, but this is only true when the parties expressly agree on a point and the resulting obligation survives scrutiny for unlawfulness. If nothing is said on a point, the common law implies obligations that, within the employment context, can be fairly far-reaching: the employer, for example, must treat its employees with respect, pay them the going rate at the proper time, protect and indemnify them from workplace harm, and at its expense give them a reasonable opportunity to find other work if the employee is not responsible for the termination of the relationship. Under the doctrine of lawfulness, moreover, the courts decline to recognise contracts that are servile, oppressive or in undue restraint of trade. There is a point

beyond which the common law will not go, however, for it draws the line at imposing positive obligations – such as paid sick or holiday leave – that the parties cannot be taken to have agreed to by implication. Over the years, it has, however, been responsive to developments within the domain of social morality and this process can only accelerate now that its rules are subject to scrutiny and review under the Constitution.

Compelling values

It is within these three parameters we must locate the statutory interventions we think appropriate. On such matters the range of views is enormous and the conclusions are frequently prompted by a self-interest that is seldom revealed clearly. The only way to resolve the conundrum is to unpack the values that underpin our respective standpoints. It is only by doing this that we can decide why we agree or disagree on any particular conclusion.

'Fairness' is as good a starting point as any, but the concept is, as our courts have repeatedly recognised, an unruly horse that, once mounted, is liable to rush off in all directions. John Rawls has given us a framework by which the concept of fairness can be analysed, which, though providing fodder for interminable jurisprudential debate, remains an excellent point of entry. Postulating that 'justice is the first virtue of social institution', he develops a metaphor in which people judging what is fair are located in an 'original position'. From this point they can judge how society may be structured and the concomitant benefits and detriments distributed, but without knowing where they will be located in the hierarchy.

Working within this paradigm, Rawls[2] deduces three fundamental principles: first, that each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others; secondly, that social and economic inequalities are to be arranged so that they are of the greatest benefit to the least-advantaged members of society; thirdly, that offices and positions must be open to everyone under conditions of fair equality of opportunity. A single glance at these principles should be enough to persuade even the most casual reader of their liberal provenance, but this is no bar to their legitimacy. Quite the reverse; liberal principles are wholly consonant with the fundamental tenets of our law and, when applied, tend to produce a regulatory regime that is consistent with a jurisprudence that has stood the test of time.

The three principles must be regarded as cumulative and interactive if we are to have a proper understanding of Rawls' theory; but in the present context, our focus is especially on 'the least-

[2] John Rawls *A Theory of Justice* (1972).

advantaged members' and, more specifically, whether workers can properly be placed in this category. In the frame of reference from which we borrow our regulatory regime, the Western democratic world, the answer would once have been an emphatic yes. Compared with their employers, employees in general were undeniably poorer and, conceived as subordinated individuals, thoroughly disempowered. Employers, in contrast, tended to be wealthy and powerful, not just because they were more productive, but also because the capitalist system placed them in a favourable position. The doctrine of limited liability enabled entrepreneurs to wash their hands of their failures; licensing laws helped them to corner markets; and ready access to loan capital and influential social networks did the rest.

The competitive dynamic

Within this framework, in which employers and employees were contrasted in this bipolar way, the relative power of the one over the other was self-evident. State intervention, a possible corrective, might make matters better for employees, but under a system of liberal democracy, this was seen as conceptually undesirable and functionally counter-productive. Self-regulation through institutions of collective bargaining was seen as the solution. It is still seen in this light and rightly so; but, in response to recent developments, the analysis has arguably become more subtle and sophisticated. In a society of full employment, it makes some sense to see employers and employees as competitors for a bigger slice of a single cake, but as unemployment increases, the competitive dynamic moves from the vertical to the horizontal. Now, the true locus of competition is between the employed, who are inside, and the unemployed, who are struggling to gain access. The fight they wage is, of course, over the distribution of the worker slice of the cake. Unemployed workers want to secure their gains by offering their services at a lower price, and the employed, naturally represented by the unions who have recruited them as members, bend their efforts to ward off this threat and shore up their position. Workers are no longer the least advantaged class of which Rawls speaks; now it is the jobless who make up this class.

As resources become scarcer and markets contract, the same dance is played out within the ranks of employers. Entrepreneurs become increasingly adventurous and determined and, in response, established employers (the 'big capital' class of whom I earlier spoke) become as determined to keep them out of the competitive market. Where before unions and big capital were mortal enemies, now they discover that their interests converge. Exploiting structures of collective bargaining crafted within a different milieu, they readily find common ground in measures designed to improve the

position of employees within their industries. In the process, they comfortably contemplate the erection of high barriers to entry against emerging entrepreneurs.

Problems of central bargaining

Unions and established employers are able to achieve this outcome because they are cartels. Were it not for the collective bargaining exemption in the Competition Act, they would be open to condemnation as restrictive horizontal practices under section 4 of the statute. Exempting combinations by workers makes complete sense: obviously there can be no collective bargaining unless workers combine in a union or similar worker organization. Whether the same is equally true of a combination of employers is debatable: in the United States, unions are the principal beneficiaries of the corresponding exemption, but collectives of employers, while not banned outright, are assailable if their actions are so unrelated to proper collective bargaining as to warrant antitrust condemnation. Thus in one case[3] a conspiracy between established employers and a union to set terms of employment at a level that would force small employers from the market was condemned under the governing antitrust statute. In our own law, there is precedent within the realms of collective bargaining, slightly bizarre though it is, for drawing a distinction between workers and employers. Under the 1924 Industrial Conciliation Act and its subsequent iterations, black employers could participate in the statutory structures even though their employee counterparts (with a few exceptions) could not.

Of much greater consequence, though, is the extension of collective agreements to black non-parties. In the 1924 statute, this power was absent, but it was included in the 1937 Industrial Conciliation Act and used to considerable effect. The section itself made plain the circumstances in which the power could be invoked – to wit, when 'the purpose [of an agreement] is being or probably will be defeated'. In short, the object was to prevent blacks from undercutting the earnings of white workers that were being set by the agreement at a level that (given prevailing market conditions) was artificially high.

Today, needless to say, the rationale for extending agreements is quite different. It is sourced in the fact that, under the Labour Relations Act, agreements can be extended to non-parties only if they are concluded by unions that enjoy the support of the majority of the employees who are to be bound. On the face of it, there seems to be nothing objectionable in this system; but the doctrine

[3] *United Mineworkers v Pennington* 381 US 657 (1965):

> 'A union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy.'

being invoked – usually described as 'majoritarianism', properly only governs when the constituency comprises those with a formal identity of interest and then only to the extent of such identity. Put simply, if you join a bowling club, you are bound to respect the majority will on bowling matters, but not when they venture into your cricketing activities or the way your book club operates. In the domain of transnational law, this proposition finds expression in the notion that the central body should decide only what is common to the participating nations as a whole. Matters peculiar to individual states are to be decided by each state at its own discretion. This principle ('subsidiarity'), is typically seen as central to good governance by those who reflect on such matters.

From what I have argued above, it should be clear that workers and employees in the same industry by no means always share the same interests. Workers who are unemployed want to compete, not co-operate, with established employees, and small businesses articulate in much the same way with big capital. Given the conflict in interest, it is in principle wrong to permit either to be swamped by the decisions of their established competitors, and the law, far from facilitating this process, should actively take steps to prevent it. The case for plant level bargaining seems impeccable – the employees of a single employer, however refractory they may be, can nevertheless be treated as having a commonality of interest. The same is true of industry bargaining between a plurality of unions and a single employer at plant or industry level. Antitrust considerations aside, there may even be a case for industry bargaining involving a plurality of employers since, in a manner of speaking, each of them delivers to the bargaining table the pool of interests common to the workers in their respective workplaces. But there are profound doctrinal objections to the notion that the product of central bargaining should be imposed on non-parties when they are outsiders who are not sympathetic nor even indifferent, but positively hostile.

Effect of extending agreements

Some research suggests that central bargaining of this kind actually depresses wages, the theory being that the lowest common denominator ultimately sets a standard that then becomes the norm. Local experience suggests otherwise. In the annual round of wage negotiations, a farce is traditionally played out in which each party, having sonorously stated that their bottom line has now been reached, hunker down for a few days of collective action that produces a much trumpeted compromise. Typically, the parties settle on what, to borrow (somewhat loosely) from competition law, might be termed import parity: that is, the wage rates at which the employers can still fend off competition from abroad. When, as often happens, they miscalculate, they are quick to ask for tariff

increase that will inflate the price of import, and if this fails, they seek to persuade us that our country, blighted by one of the highest levels of unemployment in the world though it is, can only compete in what are blithely referred to as 'niche markets'. Throughout this process, they are free to operate without fear of competition on wages within the domestic market: by dint of the contrivance through which agreements are extended, competition has been eliminated.

Who suffers? Why, the unemployed and small firms, of course; but consumers also suffer since they have to pay higher prices for products; and so do the taxpayers who must fund the concomitant burden on welfare payments. The stresses on the system, which are significant, lead to contraventions of the agreement which are, in turn, met with threats from the Bargaining Council to close down the firms concerned. Coupled with this, in the typical scenario, are statements from the unions extolling the importance of the doctrine of 'decent work' enunciated by the ILO. In the ensuing polemical exchanges, the fact that the ILO programme is far more parsimonious than the unions suggest is never mentioned: the programme is, to quote from a relevant website, 'a balanced and integrated programmatic approach to pursue the objectives of *full and productive employment* and decent work *for all*.'

Treating multiparty bargaining as an impermissible species of cartel probably goes too far; we have a long history of this kind of bargaining and, until lesser measures have been tried, the tradition should be respected. Rescinding the power to extend agreements is the obvious next step and, unless it proves ineffective should suffice. Bargaining Council agreements will, of course, continue to bind the parties who sign on to them. They will also bind the members of the unions and employers' organisations that endorse the agreement. In addition, they will bind the employees of employers who are bound - an appropriate result since they constitute a component of the pool of common interests. Outside this band of voluntary adherents, however, no one will be bound, and they will be free to conclude collective or individual contracts for themselves. From this regime will emerge a market-place of competing interests, and councils will then have to set wages and working conditions at realistic levels or find they are pricing themselves out of the market.

Origins of unfair dismissal regime

Responsibility for the unfair dismissal regime, which raises comparable barriers to entry, cannot sensibly be laid at the employers' door. Quite to the contrary; they fought long and hard to prevent the erosion of their right to hire and fire at will and, less directly, of the absolute power to set workplace agendas that the threat to fire engenders. The emerging unions, the principal

protagonists in this fight, chose the industrial court as the forum and its unfair labour practice jurisdiction as the battleground. Over the years the court, much influenced by ILO instruments and English law, created a comprehensive regime in which dismissals of every sort were subject to scrutiny for substantive and procedural fairness. This jurisprudence was taken up *holus bolus* in the unfair dismissal provisions of the 1995 Labour Relations Act and, in codified form, it remains with us to this day.

In developing the law on this point, the industrial court never really explained why it believed such a regime would be desirable for our law. If it had, it might have been forced to ask why it should apply ILO instruments that South Africa had not ratified and whether English unfair dismissal rules, located in an economy of full employment, provided a suitable precedent for a society in which unemployment was already extensive. In plunging blindly ahead, the court seemed, to its credit, to recognise that the protections for unions and workers it was generating were checking oppressions and ultimately contributing to the overthrow of apartheid, but this objective, which would have been viewed as thoroughly subversive, naturally received no formal expression in the court's judgments.

Unfair dismissal under the current LRA

Making allowance for a few unimportant exceptions, all dismissals are subject to scrutiny under the current Labour Relations Act. The touchstone is fairness, and matters of both substance and procedure are encompassed by the evaluation. Dismissals for cause are regarded as unfair unless the employee's misconduct or incompetence is serious, and those without cause, which typically arise out of circumstances of redundancy or corporate restructuring, must pass the test of commercial or institutional rationality. In making the decision, moreover, the employer cannot act out of hand, but must employ a process in which the targeted employees, informed of the fate that might be in store for them, can try to persuade the employer otherwise. Depending on their nature, dismissals can then be challenged in the CCMA or Labour Court, where a fresh enquiry will be held into the merits of the decision. Labour Court decisions are open to fresh consideration in an appeal, and CCMA decisions, while nominally final and binding, can still be reviewed and frequently are. If the dismissal, having run the gamut of these procedures, is declared unfair, the employee can be reinstated (with or without back-pay) but the award will usually be one of compensation (which is capped at a maximum of two years' pay).

Commentators who believe this regime is intended to produce justice in the workplace have a hard case to make. In their favour is the fact that fairness is made the standard by which the legitimacy of a dismissal is determined; justice is, after all, simply fairness writ large. This, however, is about as far as it goes. In Roman law (the matter is slightly less obvious in English law) the principles of the law of contract provided the framework within which employment disputes were resolved. Our common law, derived from Roman law, treats these disputes in the same way: the fact that workers are forced to secure employment on a 'take it or leave it' basis, supposing this to be true, is a matter of no moment. Contracts being consensual, it is largely left to the parties to decide when the relationship will commence and how it should terminate. When the parties leave the issue of termination open, whether designedly or by default, continuing relationships such as employment are terminable without ado. Since neither party need have good cause for the decision to end the relationship, no hearing need be given.

Why the need for protection?

Today our attitudes have moved beyond this. Bound by a liberal-democratic constitution, our courts would not countenance the termination of a lease on racist or sexist grounds and there is a powerful decision of the Constitutional Court[4] that suggests that egregiously oppressive acts of contractual termination, whatever their rationale, might also be struck down. That the courts decline to move beyond that is clear from a comparable case[5] in which the client of a commercial bank was unable to persuade the court that the decision to terminate his account should, as a matter of constitutional law, have been preceded by an enquiry and be reviewable for rationality. Consensus continues to be the fulcrum upon which our contractual relationships are built.

This being so, it is hard to understand why justice demands better treatment for employees. Before they enter the employment relationship, employees and their prospective employers are strangers and there is absolutely nothing that compels them to deal with each other. If the decision to create the bond is wholly theirs, it is all but impossible to see why they should not (matters of unlawfulness aside) be permitted to decide how the bond should be framed. If they are free to decide this, then it is surely senseless, if not plain dishonest, to denude the agreement of its consequences at precisely the moment when a contracting party seeks to invoke it.

Injustice of the unfair dismissal regime

[4] *Barkhuizen v Napier* 2007 (5) SA 323 (CC), (2007 (7) BCLR 691.
[5] *Bredenkamp & others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA).

In short, the unfair dismissal regime does no justice to employers. Rich employers suffer by it, but so, one must recognize, do the not so rich. In itself, this might provide little cause for complaint if, as good Rawlsians, we were disproportionately improving the lot of those who are poorer still. In this category, once termed the "working class", those who are working are, in one sense, better off: they have not just greater job security, but some protection against on-the-job abuses to which employees are frequently forced to submit if they are to avoid instant dismissal. Whether they are, as a whole, better off is debatable – job protection regimes come at a cost, and somebody must pay. No less debatable is the question of whether the benefit outweighs the cost to employers and consumers. But one thing is beyond question: the cost of the regime is most keenly felt by those who can least be expected to bear it – the unemployed.

The unfair dismissal regime does no justice to the unemployed, either. In terms of its tenets, an employer can legitimately dismiss only for serious misconduct or incompetence or if operational requirements cannot be met by some lesser measure (such as working short time). Using the threat of dismissal to impose wage cuts, increase working hours or demand higher productivity becomes all but impossible. Benign though it may be for workers who are permanently employed, this regime erects barriers to entry by workers who are willing to compete for the job by offering to work harder for less. Allowing this kind of competition may seem abhorrent, but the picture becomes less bleak when we look at it in the round, for then we see a world of more employment, higher production and enhanced consumer welfare. Think China or India.

In short, the unfair dismissal regime, tested against the canon of justice, fails to pass muster. We should not be surprised that this is so: it was never designed for this purpose. Its ultimate object is to minimise strike action by requiring grievances over dismissals, which are fairly justiciable in nature, to go to adjudication. Fairness is invoked, not as the object of the enterprise, but as the means by which it can be made to work. It is the medium by which, for functional reasons, the balance is struck between capital and labour.

The ban on striking over dismissals

Under the 1956 LRA, grievances over dismissal could be resolved either by going to court or by striking. If workers chose to strike, they enjoyed some measure of protection against dismissal but, in the absence of a guaranteed right to strike, this shield was far from complete. In the give and take of negotiations over the 1995 statute, unions won an unqualified right to strike over disputes of interest (wages and the like) but surrendered the right to strike over disputes of right (effectively, dismissals). Now all dismissal disputes must be resolved in court.

These developments are consonant with fundamental standards of good industrial relations practice. They insist that there should be no suppression of collective action without the substitution of an appropriate mode of dispute resolution. Recognising as much, thoughtful commentators are reluctant to propound a complete abolition of the unfair dismissal regime. They prefer to look for compromises that will free up the labour market without exposing it to undue harm.

The 'reasonable employer' test

One way of achieving this is to reduce the scope of the unfair dismissal jurisdiction. ILO Convention 158, which although unratified by South Africa still provides us with a useful frame of reference, states that 'the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.' On arguably the best reading of this provision, a valid reason exists if the employer has a reason, valid in law, for dismissing. In consequence, a decision to dismiss, if within the range of reasonableness, will not be overturned even if the court considers it rather harsh or, on facts subsequently emerging, it is shown to be wrong. The enquiry, in other words, is into the process by which the employer came to its decision, not the objective fairness of the decision itself.

This so-called 'reasonable employer' test, which is significantly less restrictive than ours, makes better sense of the requirement of procedural fairness. In our law, as we have already seen, the employer is required to follow due process before deciding to dismiss. If misconduct or incompetence is the issue, an enquiry must be held in which the employee is given a proper opportunity to explain away the offending conduct; if retrenchment is envisaged, the employer is required to consult the union or workers concerned. These processes cohere with a system in which the focus is on the process of decision-making; an employer can scarcely say that a decision is reasonable unless the decision-maker made a proper effort to garner all the relevant facts by listening to the contrary view. In our system, however, the process of internal enquiry makes little sense because the selfsame ground is covered in the ensuing statutory proceedings in which the dismissal is then challenged. We are getting the worst of two worlds. Our procedures are complex and cumbersome because the enquiry is into facts, not perceptions, and they are twice played out, once in the internal and a second time in the external enquiry.

A compensation tariff?

The cost to the employer of these cumbersome procedures is significant. Large employers have specialised departments that deal with these processes, and small employers make do as best they can. Inevitably, there is a powerful inducement to 'throw some money at the problem' and this, in turn, encourages an industry of unfair dismissal cases designed to extract, sometimes extort, a little more by way of termination pay. Each year approximately one hundred thousand dismissal cases are referred to the CCMA. When they are settled, as most are, the employee walks away with several extra months of pay; when they are not, the outcome is much the same though the transaction costs, already higher, have now ballooned.

Observing this futile dance, some commentators suggest that cases of discrimination or victimization aside, we should create a tariff of compensation that is automatically paid unless either party decides to engage with the merits of the case, when costs will be awarded against the unsuccessful party. In Canada an approach along these lines seems to be in place, but the scheme is subject to any number of variants and modifications. Implicit in this approach, however, is a basic conceptual weakness. If a dismissal is unfair, it should never have happened, and if that is so, it should in principle be reversed by reinstatement. If compensation is awarded instead, it should equate to the remuneration the employee is likely to forego while finding alternative employment. In a society of full employment, the amount equates to a few months' pay, so a smallish award by way of compensation is wholly justified. In our country, in which unemployment is acute, awards should notionally be much larger, yet under the proposed model, they will not be.

True, the compensation awards under the current system are also low, but this only shows how uncomprehending we truly are. We have borrowed *holus bolus* from ILO Convention 158 and drawn our inspiration from the principles of English law, but these are norms devised for first world countries at a time when their levels of unemployment were negligible. Ours are not and, for reasons already explained, this makes a profound difference. Our system is meant to provide a complete substitute for deals struck by union negotiators who back their demands up by the threat of strike action. Given the levels of compensation being granted, dismissed employees are arguably being short changed.

Restoring the right to strike over dismissals

Employers have their own reasons for disliking the current unfair dismissal jurisdiction. If the regime is applauded at all, it can only be by the unions, who would otherwise have to pick up on the grievances in question and pay in time and money for their resolution. Promoting the interests of unions is a sound legislative objective, but it should not be done like this. What we should be doing, if we are to remain true to principle and responsive to economic imperatives, is to re-create the right to strike over ordinary dismissals. At present, nothing precludes unions and employers from surrendering the right to strike over the subject matter of a collective agreement, and an application of the same principle will enable them to put in place a dismissal regime of their own. This is basically what happens in the United States. Big employers submit grievances over dismissal to arbitration and small employers, who fly below the radar of union organization, are left to hire and fire at will. If this sounds harsh, bear in mind the old truism: in the US, they are wont to say that the greatest contribution to full employment is the two-word expression 'you're fired'.

The right to strike in general

The recommendations I make in this paper enlarge the scope of strike action. Understandably, this might cause consternation in a country that already has the highest strike rate in the world. In practice, however, the proposals should, at worst, do nothing to increase the incidence of striking and will arguably bring the levels down. Workers, who in any event have only a given appetite for industrial action, are significantly less likely to strike in an environment in which wage settlements are realistically pitched. When they bargain in the rarefied world in which competition is stultified, they lose perspective and so do their employers.

The structures and processes of strike law are satisfactory. In compliance with the dictates of both the Constitution and the ILO, they give ordinary workers the right to strike free of dismissal provided the strike is lawful. Strikes become lawful if the dispute is over a matter of employment and the processes of the statute have been engaged in an effort to resolve it. Provision is made for peaceful picketing, political and secondary strikes are restrictively regulated and arbitration is the compulsory forum for resolving disputes in essential services. If there is a problem – and a problem there is – it is not in the structures themselves, but in their application. In a word, the problem is violence.

Strike violence

Currently, large employers gear up for a strike by hiring private armies at great cost. In the ensuing confrontation, those who want to work must often show great courage and much resolve. Safe passage through the picket line is just one of their concerns; what they must also negotiate is the threat to life and limb at their homes and on the commute back and forth to the place of employment. Murder and arson are far from rare in South African strikes, and assault and intimidation are pervasive.

The easy response is to reproach the police for failing to do their duty. In the past, they were greatly to blame - their response, to strike violence, when not openly sympathetic, was often one of indifference or impotence. An improvement in approach seems to be evident but, however active and conscientious they might be, they cannot be expected to be everywhere. A systemic remedy is crucial if this scourge is to be dealt with properly. Compassion dictates as much; so do considerations of the maintenance of law and order; and so does the proper interplay of collective bargaining, which centrally depends on the ready deployment of non-strikers and strike-breakers to keep production going. Without this, the collective agreement, which should be dictated by the forces of supply and demand, cannot find its proper level.

Some of this violence is a concomitant of unemployment. People out of work will seldom have much sense of worker solidarity and will cross the picket line without compunction in quest of a day's wages. That strikers, finding persuasion useless, resort to violence under such circumstances is understandable though not, of course, excusable. Within the union itself, comparable imperatives are at play with much the same consequences. Workers receive no strike pay from the union and, in consequence, earn nothing when they go out on strike. Since this is an unhappy result, we can assume that some workers respond with reluctance when the call to down tools goes out. How many? Anecdotal evidence suggests that the proportion may be significant, but we cannot be sure; nor, indeed, can we even be sure that the strikes being called have the support of a bare majority of those asked to participate. Since strikes ballots are no longer a precondition for a strike, there is simply no way of telling.

Polling worker views before striking

Under the previous Act, strike ballots, which were mandatory, had a chilling effect on strike action. Aside from the cost and complexity of holding them, employers mined them for technical deficiencies in the hope that, by discrediting the strike, they might justify their conduct in taking reprisal. No one wants a return to those days of naked opportunism, but it still makes sense to

oblige union officials to secure continuing majority support and to be able to demonstrate it to the satisfaction of the Labour Court. In this electronic age, where votes and messages of support can be relayed by e-mail, twitter or sms, this should be relatively easy for a union to do. Given that coercion starts where consent leaves off, ensuring that collective action has the genuine support of the majority can do much to reduce levels, in not of strikes, then certainly of strike violence.

If we are to be realistic, however, we must accept that a balloting rule would be a useful palliative of industrial violence but not a complete antidote. Some levels of violence against 'scabs' will still occur, and measures need to be taken to deal with them. One solution is to give the Labour Court the power to deprive the strike of its protected status. The effect of this, which is to give the strike-hit employer the right to dismiss the strikers, can be profound and by no means necessarily benign, as bitter experience in our country has shown. A second possibility is to channel the dispute into mandatory arbitration and place a ban on the strike, which seems a better option, though it is possible to see how weak unions might use this process opportunistically. In addition to either of these options, unions can be made vicariously liable for harm to person or property unless they can show they have taken reasonable steps to prevent these consequences. To the liberal mind, this solution jars slightly, since it conjures up the spectre of collective responsibility, that is, individual misdeeds being attributed to others by reason of association. We must realise, however, that strike protections and, indeed, other collective and organisational rights are privileges that workers and their unions can be expected to enjoy only if they discharge their concomitant responsibilities. Football unions, despairing of lesser measures, now make clubs strictly liable for the hooliganism of their members and the results are available for all to see. Strict liability for trade unions is not what I am suggesting here, but an enlargement of the attribution of liability that already exists in the provisions of the Regulation of Gatherings Act. A firmer response than the present one is surely called for: we can, in good conscience, no longer sit by and watch unions piously declaiming their distaste for violence while secretly rejoicing at the effectiveness of their bloodthirsty 'A-teams'.

Return of the duty to bargain?

Suffering most from the changes proposed here will be the trade union movement. According to the latest figures, its membership is already in decline, but we should take no comfort from the notion that the process might be accelerated: sound collective bargaining requires strong collective institutions. One way of bolstering unions is by reviving the duty to bargain jurisprudence that the industrial court did so much to create. In 1995 COSATU turned its back on this jurisdiction in the belief that it could best exert its dominance through centralised bargaining. If proposals of the sort ventilated here were ever to be adopted, the belief would no longer hold true.

Conclusion

Before we leave the topic of this paper, we need to remind ourselves that labour market regulation is only one of the factors that determine how many jobs are created or, better put, how much remunerative work is on offer. Monetary and fiscal policy in all its ramifications plays a part and its significance is arguably far more profound than regulations. In devising our laws, the best we can do, it seems to me, is to pay respectful attention to the principles that John Rawls articulated. Power may continue vested in the might battalions of big labour and big capital, but in a properly constructed society, equity and constitutionalism should prevail. At present, the voices of the unemployed are all but completely drowned out. People say that if we don't start listening to them, we shall have a revolution on our hands. Personally, I doubt it: in a democracy such as ours, revolutions are rare. But we must listen all the same, if only because our consciences must surely cry out for this.

The Hoernlé Memorial Lectures

The IRR is republishing the text of the Hoernlé Memorial Lectures, a series of talks which started in 1945. The original introductory note to the lecture series reads as follows:

> *A lecture, entitled the Hoernlé Memorial Lecture (in memory of the late Professor R. F. Alfred Hoernle), President of the Institute from 1934—1943), will be delivered once a year under the auspices of the South African Institute of Race Relations. An invitation to deliver the lecture will be extended each year to some person having special knowledge and experience of racial problems in Africa or elsewhere.*
>
> *It is hoped that the Hoernlé Memorial Lecture will provide a platform for constructive and helpful contributions to thought and action. While the lecturers will be entirely free to express their own views, which may not be those of the Institute as expressed in its formal decisions, it is hoped that lecturers will be guided by the Institute's declaration of policy that "scientific study and research must be allied with the fullest recognition of the human reactions to changing racial situations; that respectful regard must be paid to the traditions and usages of the various national, racial and tribal groups which comprise the population; and that due account must be taken of opposing views earnestly held."*

About the IRR

Since 1929, the Institute of Race Relations has advocated for a free, fair, and prospering South Africa. At the heart of this vision lie the fundamental principles of liberty of the individual and equality before the law guaranteeing the freedom of all citizens. The IRR stands for the right of all people to make decisions about their lives without undue political or bureaucratic interference.

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