THE ROLE OF THE LAW IN THE INSTITUTIONALIZATION OF INDUSTRIAL CONFLICT WITH SPECIFIC REFERENCE TO THE USE OF THE LOCK-OUT IN SOUTH AFRICA

by

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To my mother, Rosa de Witt

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SUMMARY

Difference of opinion exists as to whether the law has a role to play in the institutionalization of industrial conflict. It is argued in this thesis that it does. Firstly, the thesis deals with the development of an institutionalization model allowing for an effective and legitimate role for the law, particularly with regard to the regulation of managerial industrial power in the overall institutionalization design. It is argued that the law has a procedural role to play in the regulation of the quantum of industrial power, the nature of disputes which should be settled by the use of power and the position of power as a last resort in the overall institutionalization design.

Secondly, the thesis addresses the use of managerial power in the South African industrial relations system against the background of the above model. It starts off with an evaluation of contract as a means to regulate employment and it is concluded that contract fails to address the power discrepancies between capital and labour on both an economic and hierarchical level and it further fails to provide security of employment. The unfair labour practice concept designed to redress the inadequacies of contract was fairly successful in the area of security of employment, but failed in the area of collective bargaining. The legislature should codify the law with regard to security of employment and restrict the ambit of the unfair labour practice to collective bargaining. The latter should be regulated in terms of clear, procedural, legislative provisions.

After an analysis of the institutionalization design of the South African system the regulation of the lock-out itself is evaluated with regard to the size of managerial power, the kind of disputes it is designed to settle and the position of the lock-out vis-à-vis other settlement mechanisms in the overall institutionalization design. Finally, suggestions with regard to the definition of certain key concepts are made.

OPSOMMING

Meningsverskil heers oor of die reg 'n rol te vervul het in die institusionalisering van arbeidskonflik. In die tesis word aangevoer dat dit wel so 'n rol het. Die tesis handel eerstens oor die ontwikkeling van 'n institusionaliseringsmodel wat voorsiening maak vir 'n effektiewe en legitieme rol vir die reg veral met betrekking tot die regulering van industriële bestuursmag in die totale institusionaliseringsopset. Dit word aangevoer dat die reg 'n prosedurele rol te vervul het in die regulering van die grootte van industriële mag, die aard van geskille geskik vir beslegting deur die gebruik van mag en die plek van mag as 'n laaste uitweg in die totale institusionaliseringsbestel.

Tweedens word die gebruik van bestuursmag in die Suid-Afrikaanse arbeidsverhoudingstelsel teen die agtergrond van bostaande model in die tesis aangespreek. Dit begin met 'n evaluering van kontrak as 'n model om die diensverhouding te reguleer. Die slotsom is dat kontrak nie daarin slaag om die magsverskil tussen kapitaal en arbeid in beide ekonomiese en hiërargiese verband aan te spreek nie. Dit misluk voorts om werksekuriteit te verskaf. Die onbillike arbeidspraktyk as poging van wetgewerkant om die tekortkominge van kontrak reg te stel slaag grootliks wat betref werksekuriteit, maar misluk ten opsigte van kollektiewe bedinging. Die wetgewer behoort die reg ten aansien van werksekuriteit te kodifiseer en die trefwydte van die onbillike arbeidspraktyk tot kollektiewe bedinging te beperk. Laasgenoemde behoort in terme van duidelike, prosedurele wetsbepalings gereël te word.

Na 'n ontleding van die institusionaliseringsontwerp van die Suid-Afrikaanse arbeidsverhoudingsisteem word die regulering van die uitsluiting self met betrekking tot die grootte van bestuursmag, die tipe geskille waarvoor dit aangewend kan word en die plek van die uitsluiting ten opsigte van ander geskilbeslegtingsmeganismes in die totale institusionaliseringsopset na waarde geskat. Die tesis eindig met voorstelle ten opsigte van die definisie van sekere kernbegrippe.

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INTRODUCTION

1 MOTIVATION AND DEMARCATION

Compared to strikes very little research has been done on the lock-out in South Africa and elsewhere in the world. Unlike in most countries, in South Africa the lock-out is regulated in detail on a parity basis with strikes in the Labour Relations Act 28 of 1956. Yet, in spite of this, it has drawn little attention from academic writers and has seldom been the subject of litigation before the courts. Material that does exist in South Africa is often fragmentary, confused and confusing.

In practice the lock-out has also received scant attention in spite of its inclusion in labour legislation since 1924. During the last decade and especially the last five years or so, with the dramatic increase in trade union power after the Wiehahn Commission recommendations, interest in the lock-out and its possibilities have grown. Employers make less and less use of mass dismissals and are increasingly looking for alternatives to accommodate the wave of demands (often unrealistic) and concomitant strike action emanating from unions at a time of economic depression and huge unemployment in the country. A need therefore exists for a fundamental and comprehensive investigation into the regulation of the lock-out in South Africa in order to provide more clarity on the nature of the mechanism and its possible use. The lock-out can for example be used to prevent retrenchments or to promote productivity as a powerful tool in the hands of management in the bargaining process. Employees can for example be induced/compelled to work longer hours or to accept less pay in order to reduce labour costs and increase productivity. In this way operational viability can be improved and retrenchments avoided.

Research on the lock-out also necessitates an evaluation of the role of the law in the regulation of power in industrial relations and more particularly where and how the law can be of assistance in order to promote the effective and legitimate institutionalization of industrial conflict. This further requires a look at the nature of disputes and appropriate mechanisms to settle them, the nature of power and how the law can adjust it and in general an overall perspective on institutionalization design and the proper place of power in such a design. These subjects have all received little attention to date and constitute valuable additional areas for research.

Vast subjects such as the above are notoriously difficult to demarcate. The relationship between capital and labour is one of power. This thesis is limited to an investigation of the regulation and use of managerial power in the institutionalization of industrial conflict. More

particularly, the emphasis is on the use of lock-out in dispute of interest situations and the role which the law fulfils in this regard.

The thesis does not cover managerial prerogative in general, nor does it cover the whole area of collective bargaining and strike law or disputes of rights and other settlement mechanisms in detail. Some of these topics have been addressed elsewhere.

The scope of the thesis is restricted to the regulation by the law of the quantum of managerial industrial power, the nature of the disputes suitable for settlement by the implementation of the lock-out and the position of the lock-out as a last resort in the overall institutionalization design. The actual mechanics of the lock-out in South African are also discussed by means of an analysis of the relevant provisions in the Labour Relations Act.

2 THE PROBLEM, APPROACH AND ARRANGEMENT

It is not always realized that collective bargaining is essentially a matter of power play between capital and labour - that it, is a power rather than a legal dynamic. Those who realize this conventionally argue that the power play should take place on a purely voluntary basis, without interference by the law. Where a role for the law is envisaged, it is often difficult to demarcate an effective and legitimate function for it in respect of collective bargaining and the regulation of industrial power in general.

In South Africa the debate whether the law should intervene in the power play and if so, when, has been going on for some time. No universal clarity has resulted yet. Up to now the debate has centred primarily around the existence or not of a duty to bargain and the protection of security of employment towards promoting a right to strike. The vehicle used to further these arguments has been the widely defined unfair labour practice.

Few attempts have been made to evaluate the role of the law with regard to managerial power, with the result that a number of practical legal problems with regard to the nature of the lock-out and its proper use remain. Some of these problems are: what is a lock-out, who may institute it, when may it be instituted and in respect of what kinds of disputes? Can it be implemented offensively before a strike or defensively in response to a strike or both? Must an employer pay wages during a lock-out and is termination as part of the lock-out final? What happens to the common-law remedies of employees locked out and can they approach the industrial court for relief in terms of the unfair labour practice concept? When does a lock-out terminate, is it equal to a strike and how does it differ

from retrenchment and dismissal? These and other questions remain largely unanswered.

In order to address these questions it is first necessary to clarify an approach to industrial relations and to demarcate an appropriate role for the law with regard to the regulation of managerial industrial power and then to investigate the position as it exists in South Africa. The problem is approached as follows:

The traditional voluntarist/pluralist perception of industrial relations does not envisage a role for the law in the rule making process between capital and labour. Capital and labour are perceived as creating their own rules by means of collective bargaining on a bilateral basis without any interference by outside agencies such as the state and the law as an instrument in the hands of the state. Pluralism assumes equal bargaining power between capital and labour and therefore no intervention by the law is needed.

It is argued in this thesis that the law of necessity has to intervene in the institutionalization process in order to render the outcome more equitable. Since the outcome of the institutionalization process or the nature of the rules created is primarily a function of the power between capital and labour, the law itself is viewed as a set of rules supported by the power of the state.

Institutionalization of conflict can be regarded as the conversion of conflict into rules. The outcome of the process is determined by power. To view the law as a set of rules and a form of power therefore has the advantage of establishing a conceptual link which makes it easier to trace the role of the law as a technique for the regulation of social power.

That the law has a role to play in the institutionalization of industrial conflict is not a new insight. On the contrary, writers such as Kahn-Freund have long advocated an indirect role for the law in that it serves in a regulatory, auxiliary and restrictive capacity to hold the ring for capital and labour which then determine the outcome of the institutionalization process themselves.

A more interventionist role is envisaged here. It is argued that the law should actively intervene in order to adjust the power balance between capital and labour in order to ensure a more equitable outcome in the institutionalization process. Furthermore, the law should be willing to protect the established interests of the parties by enforcing the rules (rights and duties) created in the institutionalization process when necessary. In other words, it should be prepared to enforce rights for

fixed periods of time. A form of contractual rather than dynamic bargaining is therefore advocated.

The central problem remains, and that is how and where the law should intervene in order to assist the institutionalization process effectively and legitimately.

To address this problem, it is necessary to make a distinction between disputes of interest and disputes of rights, that is, a distinction between the creation of rules and their application and to spell out an appropriate role for the law in the settlement of each. In other words, the conflict which is inherent between capital and labour (as a result of their competition in a situation where scarce resources have to be allocated), erupts into disputes of interest (involving the allocation of scarce resources) and disputes of rights (involving the protection of allocated resources or acquired rights). The law has a definite role to play in each settlement process, the question is what role and how it should be regulated.

In order to gain a better perspective on the role of the law it is not only necessary to make the distinction between disputes of interest and disputes of rights, but also to evaluate the settlement mechanisms best suited to settle various kinds of disputes effectively and legitimately.

The two primary forms of settlement, namely adjudication and legislation, are therefore analysed and in general it is argued that negotiation is a superior form of settlement.

The role of the law with regard to disputes of rights is not discussed in detail. The thesis is ultimately concerned with the use of managerial power (that is, the lock-out) in the institutionalization process and the role that the law has to play in this regard.

Since the outcome of the institutionalization process is ultimately a function of power, it is necessary first to analyse the nature of power and then to investigate how the law can influence the power position between the parties.

Power, it is argued, is a function of the dependencies of the parties on each other. The more dependent a particular party is on another, the more powerful the latter is vis-à-vis the former. Actual power can only be quantified in operation (that is, when implemented).

The law can influence the dependencies operative between capital and labour. This it can do by means of clear procedural rules designed to address the following. Firstly, it should guarantee freedom of association, promote collective bargaining and permit the implementation

of industrial power and secondly, it should enhance security of employment (or protect the employment relationship within which the allocation of scarce resources takes place). The ultimate purpose is to make capital more dependent on labour in order to promote a more equitable distribution of scarce resources in the institutionalization process. In this way the law can adjust the quantum of power procedurally.

A second but very important consideration, is the subject-matter or nature of the dispute which should be settled by means of power. Power should only be used to settle disputes of interest. Disputes of interest are sometimes referred to as economic disputes or disputes concerning the allocation of scarce resources. Power should not be used to settle disputes of rights (or protection of allocated resources). It is therefore necessary that a clear distinction be made between disputes of interest and disputes of rights in any institutionalization system and that the law should structure settlement mechanisms vis-à-vis one another procedurally, taking proper cognizance of the distinction in order to ensure effective and legitimate institutionalization of industrial conflict.

Thirdly, the law also has a role to play with regard to the position of power in the overall institutionalization process. It is argued that the use of industrial power should be adopted as a last resort to induce agreement in disputes of interest.

Lastly, the actual mechanics of the lock-out is analysed in order to answer some of the practical problems that exist.

The above broad approach is arranged as follows:

An attempt is made in chapters 1 and 2 to construct an institutionalization model which makes provision for the proper regulation of the quantum of industrial power, the subject-matter which it is designed to address and the position of power in the overall institutionalization design. This model is then used as a background against which the use of managerial power in South Africa is evaluated.

The analysis of the position in South Africa commences with an evaluation of contract as a mechanism to regulate employment in chapter 3. This is necessary in order to show the power inequalities between capital and labour on a hierarchical and economic level which contract fails to address. Contract also fails to provide adequate security of employment making capital less dependent on labour and therefore more powerful. As far as the quantum of power is concerned, it is therefore argued that the common-law contract of employment tips the scale in favour of capital.

The South African legislature's attempt to address the inadequacies of contract by means of the act based unfair labour practice concept is then evaluated and it is argued that the concept successfully strengthened security of employment, but failed to provide clear guidelines with regard to the regulation of collective bargaining. It is argued that the legislature should codify the law with regard to security of employment clearly in order to allow for effective adjudication in this area. Furthermore, the unfair labour practice should be restricted to the regulation of collective bargaining, but again the legislature should create clear rights which, when not adhered to, can be effectively adjudicated as procedural disputes of rights.

The institutionalization structure in South Africa is analysed in chapter 4 to gain a general perspective on the nature of disputes and mechanisms designed to settle them in order to assess whether the structure corresponds in general with the model developed in chapters 1 and 2.

A specific look is taken at the actual regulation of the lock-out in terms of the Labour Relations Act in chapter 5. This is done to assess the balance of power between capital and labour further and to evaluate whether managerial power is utilized effectively and legitimately with regard to subject-matter (that is, the nature of disputes it is designed to settle) and its position vis-à-vis other settlement mechanisms. An attempt is also made to answer some of the practical problems associated with the lock-out in South Africa referred to above.

3 METHOD

This study does not lend itself to international comparisons as the position in very few, if any, country can be compared effectively with that in South Africa.

In spite of this, comprehensive use is made of international material of mostly English and North American origin. The reason for this is to develop an institutionalization model with universal appeal against which the position in South Africa can be evaluated. The development of the model is also not a comparison with overseas models, as no such models exist. The model is developed creatively by making use of appropriate material where possible and necessary.

The position in South Africa is evaluated against this model primarily by means of a study of existing literature, and an analysis of court decisions and especially appropriate legislation.

CHAPTER ONE

AN APPROACH TO INDUSTRIAL RELATIONS

1 AN APPROACH TO INDUSTRIAL RELATIONS

Industrial relations is a multidisciplinary field of study comprising aspects of economics, psychology, history, political science and the law.[1] No universally accepted analytical theory exists, but the choice of theory determines a particular approach to the subject.[2] Some of the well-known approaches to industrial relations are discussed briefly in order to suggest a suitable approach which will enhance a proper perspective on the role of the law in industrial relations.

1.1 The Unitary, Pluralistic and Radical Approaches

Approaches to industrial relations centre around conceptions of the existence, size and position of conflict in the undertaking, industrial society and the wider society and the resolution thereof.[3] These approaches, which are detailed below, cannot be neatly separated from one another

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1 Walker "Towards Useful Theorising About Industrial Relations" 1977 British Journal of Industrial Relations XV (3): 307-16. See also Bluen "Industrial Relations: Approaches & Ideologies" in Barling, Fullager & Bluen (eds) Behaviour in Organizations: South African Perspectives 673 (Bluen).

2 Fox quotes with approval the following statement by Thelen & Whitehall: "Each person perceives and interprets events by means of a conceptual structure of generalizations or contexts (which consists of) postulates about what is essential, assumptions as to what is valuable, attitudes about what is possible, and ideas about what will work effectively. This conceptual structure constitutes the frame of reference of that person." (See Fox "Industrial Sociology and Industrial Relations" Research Paper 3 2.) See also Bluen 690: "Thus our ideological perspective shapes our selective perception, our judgement and our behaviour." The warning of Hyman is however also appropriate: "It is often a sterile exercise to attach labels to particular theorists in the hope that this will clearly indicate their belief and findings of analysis." (Hyman "Pluralism, Procedural Consensus and Collective Bargaining" 1978 British Journal of Industrial Relations 16 (Hyman Pluralism).

3 See in general Jackson Industrial Relations 17-35 and Bluen 673-701.

nor can it be said that a proponent belongs to the one or the other school of thought in any definite sense.

1.1.1 **The Unitary Approach**

Sir Halford Reddish, a proponent of the unitary approach explains:

> "Everything material in this world is derived from human labour, mental or physical. Modern industrial organizations are in effect a partnership between the labour of yesterday (which we call capital) and the labour of today (all of us who work for wages or salaries) ....
>
> We regret the idea that amongst the employees of a company there are `two sides' meaning the executive directors and managers on the one hand and the weekly-paid employees on the other. Executive directors are just as much employees of the company as anyone else. We are all on the same side, members of the same team."[4]

This approach is a remnant of the old human relations school with its emphasis on harmonious social relationships based on common interests in industry. In terms thereof, conflict is the result of bad communications.[5] This approach is correct in that the labour of yesterday can become the capital of today, provided the system within which people

---

4 Reddish "Written Memorandum of Evidence to the Royal Commission on Trade Unions and Employers' Associations" in Barret, Rhodes & Beishon (eds) Industrial Relations and the Wider Society. Aspects of Interaction 298 299.

5 Jackson 30; Bluen 691; Reddish in general 298-301. See also in general Fox "Industrial Relations: A Social Critique of Pluralist Ideology" in Barrett, Rhodes & Beishon 302-4 (Fox Social Critique).

work allows it, but while this transition takes place, conflict is bound to manifest itself as part of the process.

According to Fox, however, the unitary approach holds that management prerogatives can be enforced in any healthy undertaking:

> "The greater the tendency to see the `true' nature of industrial enterprise as unitary, and to see any challenge to managerial rule as of doubtful legitimacy, the greater the disposition to view the enforcement of prerogative by coercive power as desirable and justified. The time-consuming and patience-sharing process of `winning consent' through consultation and negotiation may appear not only burdensome in practice, but even pusillanimous in principle. Observation suggests that this stance is apt to predispose its holders to beliefs which may in some circumstances prove to be wishful thinking - that power does in fact lie to hand in sufficient measure not only to make immediate coercion possible, but also to suppress control, or eliminate any possible adverse long-run consequences which might otherwise outweigh the benefits of applying it."[6]

Proponents of the unitary approach are essentially capitalistic in their orientation and exhibit a willingness to enforce harmony in the undertaking in a paternalistic way even at the expense of consensus. Ironically, this fixation with harmony cannot be reconciled with the dynamic that the labour of yesterday can become the capital of today for the simple reason that the hierarchy of ranks or control is

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6 Fox Social Critique 302-3.

regarded as a given, fixed state of affairs which should be protected by the exercise of power.

That this approach is out of touch with reality is evidenced by the mere existence of unions, conflict and collective bargaining. Unitarists do have explanations for these phenomena. They believe unions are historic remains born out of the short-sighted and inhuman treatment of workers by their employers in the past. Their existence is a manifestation of group greed and they serve as power vehicles for those who wish to overthrow the existing social order. It is not practical to suppress unions but their activities are suspect and should be curbed at all costs.[7]

Elements within management subscribe to this approach because it strengthens management confidence, promotes worker loyalty and legitimizes management prerogatives.[8] All industrial relations systems exhibit signs of unitarism, primarily in smaller businesses, family concerns, paternalistic interests with charismatic leaders and workers with long-service records, firms in isolated areas where job opportunities are scarce and in environments where the "boss mentality" is still firmly entrenched.[9]

The unitary approach therefore regards conflict with suspicion, as a mistake that can and should be rectified.

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7 Fox Social Critique 303. See also the Committee of Inquiry into Certain Matters Concerning the Post Transport Industry Final Report (Minority of Labour), quoted by Jackson 29: "[Some `union leaders'] ... find industrial agitation a satisfactory way of life, bringing personal influence and prestige, and whose concern it is to make sure that there is always something to agitate about. Such men put forward extravagant programmes so that they can be sure of being well ahead of any settlement that is made and at the same time be able to represent the settlement as a move towards what they have always advocated. All such men, whatever their motives, are `wreckers'."

8 Bluen 692; See also Fox "Ideologies of Management and Collectivities" in Barret, Rhodes & Beishon 261 (Fox Ideologies).

9 Fox Social Critique 304.

Although it still enjoys a limited amount of popularity, factors such as the increasing size and complexity of undertakings, power formation, inflated worker expectations and politicization have eroded traditional attitudes.[10] The unitary approach as a method to explain and further the institutionalization of conflict is largely obsolete. The suggestion that the workers of today can be the owners of capital tomorrow is correct for it shows that the capitalist system is not necessarily bad, provided equal opportunity exists for the accumulation and utilization of capital and movement in the hierarchy of ranks towards gainful implementation of own capital or at least shared decision-making power. This implies opportunity for power formation and utilization by labour in conflict with the capital of the day.

1.1.2 **The Pluralistic Approach**

Pluralism[11] emerged as a criticism of the postulates of the doctrine of sovereignty, namely that there is an ultimate authority in a political system whose decisions are final and unquestionable. The pluralist does not accept this. On the contrary, a number of groups, each with its own convictions and interests, exists within the political system and the government itself is dependent on their consent and co-operation. Governments can accept this state of affairs and live with it or they can attempt to suppress the activities of groups and by doing so enlarge the power of the state and increase their dependence on government. If acknowledged channels for the promotion of group interests are however denied, the real danger of unrest may emerge which may endanger the continued existence of the political

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10 Fox Social Critique 304.

11 See in general Clegg "Pluralism in Industrial Relations" 1975 British Journal of Industrial Relations 13 (3): 309-16 specifically 309.

system. According to Ross an organization must be viewed as a "plural society, containing many related but separate interests and objectives which must be maintained in some kind of equilibrium". He continues: "The problem of government of a plural society is not to verify, integrate or liquidate sectional groups and their special interests in the name of some over-riding corporate existence, but to control and balance the activities of constituent groups so as to provide for the maximum degree of freedom of association and action for sectional and group purposes consistent with the general interest of the society as conceived, with the support of public opinion, by those responsible for government."[12]

From this it appears that conflict is not abnormal, but part of everyday existence. Management and governments should not expect blind obedience and try to eliminate opinions in conflict with their own, but should rather endeavour to reconcile opposing opinions and expectations. In this way, conflict can be institutionalized and kept within proper bounds in order not to endanger the survival of the business or the government itself.[13]

In the context of industrial relations, the origins of pluralism can be traced to the beginning of collective

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12 Ross in Hughes-Jones (ed) Human Relations and Modern Management, quoted by Jackson 30.

13 Jackson 30. Bluen 683 describes institutionalization thus: "Collective bargaining institutionalizes conflict by providing a framework within which management and workers can examine disputed issues and deal with them in the least destructive manner. The two parties compromise on their differences to reach a mutually acceptable agreement. In this way the inputs (conflicts) are converted to the outputs (rules) by collective bargaining. Also, because parties recognise that collective bargaining occurs within the context of a continuing relationship, they do not attempt to maximise their gains at the expense of the other party by whatever means possible. Instead they usually restrain their pressure and attempt to regulate their differences in a constructive manner. In so doing, a trusting relationship can be built which enhances the collective bargaining process." This emphasis on collective bargaining is typical of the Industrial Government or Oxford approach and is shared by writers such as Clegg, Flanders, Fox, Hughes-Jones, McCarthy & Marks. It is also known as British voluntarism (Bluen 679-85).

bargaining and especially to the contribution of the Webbs at the beginning of the century.[14] Fox summarizes pluralism as follows:

> "Management is seen as making its decisions within a complex set of constraints which include employees, consumers, suppliers, government, the law, `the local' community, and sources of finance ....
>
> Thus the enterprise is seen as a complex of tensions and competing claims which have to be `managed' in the interests of maintaining a viable collaborative structure within which all the stakeholders can with varying degrees of success, pursue their aspirations ....
>
> A certain amount of overt conflict and disruption is welcomed as evidence that not all aspirations are being either sapped by hopelessness or suppressed by power."[15]

This description assumes that the parties have enough in common to regard the context within which they pursue opposing interests, the undertaking itself, as of primary importance. In a similar vein Kerr declares that "a pluralistic industrial system ... can only operate well if the ideology impelling its important groups is consistent with pluralism, i.e. a philosophy of mutual survival".[16] Bakke also states that it is desirable that "although

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14 Bluen 693.

15 Fox Social Critique 304-5. See also the summary by Jordaan "Industrial Pluralism and the Role of the Industrial Court" 1989 Industrial Law Journal SA 10: 791, quoted in ch 4 par 3 n 14 below.

16 Kerr C Industrial Relations and the Liberal Pluralist, quoted by Fox Social Critique 305.

pursuing each his own interest, the parties recognize their mutual dependence upon each other, agree to respect the survival needs of the other, and to adjust their differences by methods which will not destroy but rather improve the opportunities of the other".[17]

The pluralistic approach of mutual survival is furthermore characterized by an underlying ethical code in terms of which parties consider themselves bound by agreements which have been concluded in terms of agreed procedures. This commitment to honour further presupposes a rough balance of power.[18]

Selznick explains:

> "As a theory of the social foundations of freedom, pluralism rests its hopes on civil antagonism. It sees in group conflict a benign disorder ...."[19]

Pen postulates a power balance:

> "[T]he criss-crossing of small conflicts has stabilizing functions: this fits into the picture of a pluralistic society. One step further and we arrive at a balance of forces ...."[20]

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17 Bakke Mutual Survival: The Goal of Unions and Management quoted by Fox Social Critique 305.

18 Fox Social Critique 306: "The normal pluralist stress on the moral obligation to observe agreements therefore implies a belief that power is not so evenly matched as to introduce the extenuating concept of duress." The pluralist assumes therefore that the parties are equally dependent. See the discussion on power in ch 2 par 4.1.

19 Selznick Law, Society and Industrial Justice 41.

20 Pen Harmony and Conflict in Modern Society 278-9, quoted by Fox Social Critique 307. See also Selekman & Selekman Power and Morality in a Business Society 181: "We end up with a pluralistic system of power, the parts checking and counter-checking each other ...."

Pluralism in its pure form acknowledges conflicting interests in the context of employment and believes that parties will mutually temper their claims against the background of a natural balance of power in order to ensure the continued existence[21] of the enterprise. The assumption of a natural balance of power and restraint is naïve since capital is always more powerful than labour on both an economic and hierarchical level and the latter will do its utmost to obtain maximum gains. Some adjustment of this power imbalance and restraint of disruption must therefore be achieved by legal intervention.

1.1.3 **The Radical Approach**

The most important deviation from the unitary and pluralistic approaches is the radical perspective with its emphasis on the dichotomy between owners of the means of production and those who only have their labour to sell.

Schienstock describes this approach as follows:

> "Capitalists and wage-workers stand at each side of the labour market as buyers and sellers respectively of the commodity `labour'. Wage-workers, as the owners of this commodity, present themselves on the labour market in order to sell their labour in

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21 See also in general Godsell "Industrial Relations in the 1980's: Some Conceptual Signposts" in Barling, Fullagar & Bluen 831-2. See also the quotation by Jordaan in ch 4 par 3 n 14 below. Hyman severely criticizes the assumption of restraint and natural development of trust on the basis of an automatic balance of forces by means of mature collective bargaining. He contends that workers regard trade unionism primarily as a source of material advantage. Worker interests are not restrained as Kahn-Freund would have it to "steadily increased real wages" and a "reasonable measure of job security". Collective bargaining is not admired by workers "as an elegant ritual, a procedural pas-de-deux as significant for its aesthetic sophistication as for its substantial outcome. They value trade unionism, more prosaically, as an effective means of pursuing interests which differ significantly from those of the employer: at the very least as a mechanism for maintaining or improving the conditions of their working lives" (Hyman Pluralism 32-3).

> exchange for the financial means to sustain their existence. This labour is completely valueless to them until it is combined with the means of production. However, since these are owned by the capitalists, wage-workers can capitalise on their labour only by selling it. Capitalists, for their part, present themselves on the labour market in order to purchase the labour required for the profitable deployment of their means of production."[22]

It is clear that conflict occupies a central place in this approach. Any profits made by the owners of the means of production of necessity impact detrimentally on the interests of workers.[23] The result is an ever-increasing struggle characterized by profit-seeking at the expense of the economic and human needs of the workers.[24] A situation of mutual dependency exists: capitalists are buyers of labour whilst workers sell it. The market determines the balance of power.

Marxism does not presuppose a power balance between capital and labour. On the contrary, the owners of the means of production are much more powerful than the workers and utilize this power to influence circumstances to the general detriment of labour.[25]

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22 Schienstock "Towards a Theory of Industrial Relations" 1981 British Journal of Industrial Relations 19 (2): 180-1.

23 Jackson 34.

24 Hyman R Industrial Relations: A Marxist Introduction 26 (Hyman). See also Walker "Towards Useful Theorising about Industrial Relations" 1977 British Journal of Industrial Relations XV (3): 311: "Because capitalist enterprise is concerned only with the pursuit of profit and labour is bought and sold as a commodity, and treated impersonally as a factor of production, the economic and human interests of employees are sacrificed under the coercive power of the capitalist. It is this inherent exploitation that builds conflict into the social relations in production."

25 Jackson 34.

Unions are regarded as an important means of countering the exploitation of workers by providing them with collective power.[26] The ultimate aim is to overthrow the capitalist system or else workers will always be subject to and at the mercy of their capitalist bosses.

The radical approach emphasizes conflict between capital and labour in a situation where capital will always be in a far more powerful position than labour until the capitalist system itself is dismantled. The radical approach fails to realize that workers may also accumulate capital and become capitalists themselves and that their domination is not necessarily absolute and permanent. They further fail to realize that even if capitalism is overthrown, workers will still be subject to hierarchical subordination since it is not possible to perform labour in a hierarchical situation without subordination of some kind. The person of the worker and his potential labour will always be inseparable. In order to realize his labour potential in any organization the worker will have to submit to a hierarchy of decision-making powers. Capitalism is therefore not necessarily a worse form of domination than a command economy, provided market forces are adjusted in order to create an acceptable balance of power by the law.

1.1.4 **Conclusion**

The above approaches to industrial relations all centre around conflict. Bluen places them on the following harmony-conflict continuum, and simultaneously shows the ambit of their ideological analysis:[27]

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26 "Marx believed, moreover, that industrial development would increase the imbalances, mechanisation would create a growing pool of unemployment, undermining trade union strength." (Hyman 28).

27 Bluen 699.

	Unitary	Pluralistic	Radical	
(Harmony)				(Conflict)
	Organization	Industrial Society	Wider Society	

It is important to note that perspectives about conflict not only determine the nature and dynamics of the relationship between management and workers but also its ideological ambit. The latter is especially important with regard to the potential for institutionalization of conflict in the South African industrial relations system[28] because of the aspirations of trade unions which extend their scope of activity outside the strict management-worker relationship. A very important factor in the regulation of conflict is the extent to which the parties are dependent on each other, in other words, their respective power. The unitarists believe that no power adjustments are necessary since interests are the same, no conflict exists and therefore considerations of group power are irrelevant. This is clearly naïve. Pluralists believe that a natural power balance exists, whereas radicalists believe that it does not exist but that when the capitalist system is overthrown the position will be rectified. Both these latter approaches are incorrect in their simplistic forms. There will always be power discrepancies - the idea is to adjust them to acceptable levels by means of appropriate legal intervention.

1.2 **A Suggested Approach**

Any attempt to formulate an approach to industrial relations should concentrate on the concepts of conflict, power, the parties involved, their interaction within a

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28 See the discussion in par 1.2 below.

particular space[29] and the rules created to govern their relationships.

1.2.1 **Conflict, Power and Policy**

Conflict originates as a result of limitations with regard to the availability of and access to scarce resources. It is therefore a result of allocation in a situation of scarcity. Power is the ability to obtain these resources in competition with others within a particular space. It is important to realize that power is a property of the social relationship and is not an attribute of the actor. Power is not a characteristic of a person or group in isolation, but it resides implicitly in one actor's dependence on another. It therefore only manifests itself in ties of mutual dependence between people and groups and not in vacuo.[30] Capitalists and workers are for example mutually dependent as the buyers and sellers of labour respectively. These relationships are therefore fundamentally relationships of power.

Allen describes the capitalist system as follows:

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29 See the discussion in par 1.1 above. With "space" is meant a particular system such as the organization, the industrial society and the wider society and the ideologies operative in the system such as pluralism, capitalism, etc.

30 See Emerson "Power Dependence Relations" 1962 American Sociological Review 27: 31-2. Vago Law and Society 257 in respect of conflict.

See Godsell 832: "Power is a much more ambiguous phenomenon. It can only be defined for the present, and more precisely as a result of the interplay between the perceived interests, and optional actions with their surmised consequences, of groups of actors .... For Industrial relations power, indeed, is only defined on (rare) occasions of critical tests." An important point is made by Godsell. The effective application of power relies to a large extent on the perceptions of the parties in the power play situation. The real size or impact of power can only be assessed in crisis situations when power is in fact implemented. Crisis situations are unacceptable to the pluralist and avoided as far as possible with the result that power is rarely quantified. See also discussion in ch 2 par 5.1 below.

> "One approach sees industrial relations occurring within a dynamic conflict situation which is permanent and unalterable so long as the structure of the society remains unaltered. It occurs because on the one hand the sellers of labour power enter the labour market in order to subsist so that the price of labour power is a vital subsistence matter for them, while on the other hand the buyers enter the market because they own the means of production and have insufficient labour power to make production possible so that the price is an important cost factor which has to be minimized in order to make production profitable. These two interests are irreconcilable. They are engaged in a perpetual conflict over the distribution of revenue....
>
> The means of production are privately owned and labour power is obtained through the open market. It follows that so long as these factors remain unchanged then so will the conflict situation. In other words, the necessary condition for the elimination of class conflict is the destruction of the relationship between the buyers and sellers of labour power. No amount of superstructural adaptation will achieve this end."[31]

The values of people are the basic determinants of how they order and structure the particular society in which they live. At the one end of the spectrum lies the model of a free market economy and at the other end that of socialism. The former emphasizes individualism and freedom of choice and the latter concentrates on collectivism. No societal

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31 Allen "The Sociology of Industrial Relations: Studies in Method" in Barret, Rhodes & Beishon 35-6. This exposition is quoted in full as it provides a handy Marxist sociological perspective.

structure can readily be described as an absolute manifestation of either of these two models. In this sense Allen's description is therefore one-sided but provides insight into the need to adjust dependencies in appropriate circumstances.

Equally one-sided is this statement from the Wiehahn Report:

> "The Republic of South Africa subscribes to the principles of a free market economy[32] based on individual freedom in the market place. This freedom relates to freedom of choice either as consumer or as producer, and freedom of competition within a political democracy. This ideology has been practised by successive governments of South Africa since the dawn of the industrial and commercial history of the country and the Commission has no reason to believe that this philosophy will be abandoned."[33]

The true position with regard to any particular society lies somewhere between the extremes of the free market and socialist models. To what extent either of the two orientations are present or dominant depends on the power realities operative within the society and which interests

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32 See the following quotations from Gxwala "Free Enterprise and Unions in South Africa" June 1980 South African Journal of Labour Relations 4 (2): 47: "The essence of a free market economy lies in the freedom of the individual to own property, to provide whatever goods he is capable of producing and to sell them at a profit without hindrance in an open market. This implies equality of opportunity and free competition." "In socialism, the ideal organization of society is to consider people not as individuals, but as a collectivity of workers owning in common the means of production. Socialization also stands as a protest against the social dichotomy of capitalistic society, namely the owner of the means of production vis-à-vis the workers."

33 Wiehahn The Complete Wiehahn Report with Notes Part 1 6 par 1.19.1.

are given effect to by the state (or the law).[34] In order to assess which position dominates in any particular society one has to look beyond official rhetoric at the actual rules governing that society and even beyond the rules to assess whether any discrepancies exist between the rules and the facts they purport to regulate. In South Africa, the official government policy is one of free enterprise, but this policy is not consistently applied in practice.[35]

From the worker perspective of Allen it is only possible to eliminate conflict by eliminating the structural dichotomy between capital and labour. This implies a predominantly political role for unions in the wider

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34 The role of the state is elaborated more fully in par 1.2.2 below and in the discussion on the role of the law in ch 2 pars 1 and 2 below. "The involvement of government in industrial relations is seen as a means to contain trade unions. Labour law is restrictive, disarming, sometimes oppressive. Unions are part of the process of transformation of capitalism and governments represent the interests which want to preserve the system." (Allen 36-7.) This extreme perspective sees the role of the state, and the law as a tool in the hands of the state, in negative terms. This need not necessarily be the case. On the contrary, the law can achieve a great deal as a means of adjusting social power.

35 In MAWU v Hart Ltd (1985) 6 ILJ 478 (IC) 494 the court stated in respect of South Africa: "The court has to take judicial notice of the fact that the economic system in South Africa is based essentially on the principles of capitalism." Gxwala concludes at 50: "The future growth of a free market economy in the Republic of South Africa depends largely on the government's ability to effectively eliminate the existing political and socio-economic dualism by the meaningful integration of the Blacks into the existing free enterprise structures. This means a constructive assault on the solid and age old edifice of apartheid. Any action short of this will probably leave the status quo untouched, a form of socialism with central planning for Blacks and a free market economy for Whites tempered with quasi-state monopolies." He ends off with a quotation by Gavin Relly, former chairman of the Anglo American Corporation of SA Ltd: "An understanding and acceptance of the basic tenets of a market economy, which works ultimately to the advantage of all, has some chance of emerging only if the political and business environment is demonstrably one which provides full and fair opportunities to all without discrimination. This applies no less in terms of abundance, particularly when in the eyes of some it must be seen to be accruing only in certain areas." See also the discussion on the inadequacies of contract as a means of allocating scarce resources discussed in ch 3, especially the discrepancies between rule and fact elaborated on in par 3.2.3 below.

society[36] in contrast to the pluralistic perspective which endeavours to limit industrial relations activity to the strict management-worker relationship.[37] Both these perceptions are overstatements and do not entirely correspond with industrial relations reality. Capitalism does not have to be eradicated; it is the power discrepancies between capital and labour that have to be adjusted. Unions need not overthrow capitalism, but can operate meaningfully within it by adjusting the power balance to acceptable levels for both capital and labour.

Management objectives differ widely from those of workers. Decisions are made within a set of limitations dictated by the interests of workers, consumers, suppliers, the government, the law, the local community and sources of finance.[38] Management has to reconcile[39] these divergent interests, but according to Chamberlain & Kuhn sight should not be lost of one important fact:

> "Despite managers' professed responsibility to multiple interest groups, their continued acceptance of profit positions as a reflection of the competency of their performance suggests the

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36 Allen 36 explains: "The conflict situation creates the need for employees to combine and protect themselves." He continues: "If trade unions are structurally determined then so must their methods be. Strikes are an index of conflict and are a permanent feature of a capitalist system. Individual strikes can be resolved, as empirical evidence shows, but the phenomenon of strike action - the possibility of strikes recurring - must be accepted as an inevitable consequence of the nature of capitalism."

37 See for example section 8(6) and (7) of the Labour Relations Act 28 of 1956 which prohibits political activities.

38 See Fox Social Critique 304-5.

39 Chamberlain & Kuhn "Collective Bargaining and its Politics" in Barret, Rhodes & Beishon 85-6 explain the conciliation attempt as follows: "Relative profits to stockholders, relative status and prestige to management itself, relative wages and welfare to employees, and relative prices to consumers - these comparisons are all coercive with respect to management. They must be reconciled in some manner if the various responsibilities are all to be met."

> strength still remaining in the link to ownership interests. Even where pride in high wages and low prices exists, as evidence of other responsibilities met, these carry less weight than the profit record within the management fraternity as an indication of ability, as the source of prestige, and a command over income. To this extent, managerial self-interest remains primarily identified with stockholder interest."[40]

Workers need not necessarily accept this perspective and may want to change the rules on both a local (between management and workers) and a central (that is, a government policy and legislation) level. The relationship between capital and labour is therefore not purely economic in the sense that profit is distributed by means of collective bargaining, but it is also political in the sense that the regulation of power by the government (and the law) is important, since power eventually determines the outcome of the allocation process. Any system of industrial relations should therefore allow for a healthy interaction between the powers operative in the industrial and the wider society and should be amenable to power adjustments where necessary.

1.2.1.1 **Conclusion**

From the discussion thus far the following conclusions can be drawn: Management and workers are in conflict over the allocation of resources generated by the undertaking. How resources are allocated is a function of the reciprocal power positions of the parties and the structure within which the power play takes place. The latter is largely regulated by the state as policy maker and legislator. The potential for conflict increases to the

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40 Chamberlain & Kuhn 89.

extent that value premises between actors differ and discrepancies may exist between official rhetoric and the actual implementation of government policy and furthermore between rules and the facts they purport to regulate. Employers and employees may want to change the political system in which they interact to suit their needs better. This may create additional conflict, but it is necessary in order to adapt their mutual dependencies and therefore their power vis-à-vis each other.

1.2.2 The Parties, Their Interaction and the Creation of Rules

From the discussion in paragraph 1.2.1 above, it is evident that the state as a third party[41] fulfils a prominent role in industrial relations in that it may have an important influence on the power balance between the parties. The voluntarist idea that the state (and the law) do not have a function in industrial relations[42] and that management and workers should be left to work out their problems for their own good is an exaggeration both in principle[43] and in practice.[44]

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41 The other two being management and workers.

42 See for example the following quotation from Flanders "The Tradition of Voluntarism" in Barret, Rhodes & Beishon 374: "Asked about the Governments' role in collective bargaining Feather said, We don't think there should be a third party in collective bargaining. Collective bargaining is between employers and trade unions. Green asked Donovan, `Why do you want to raise all these problems when we've got enough problems as it is?'" "... In so far as one can speak of any common ideology shaping or re-enforcing the attitudes of British trade unions to the State, it is not socialism or the class struggle but a devotion to what is called the voluntary system or, sometimes free collective bargaining." See also Rogin "Voluntarism, the Political Foundation of an Anti-political Doctrine" July 1962 Industrial and Labour Relations Review 521-2: "... in its original conception, the unifying theme of voluntarism was that workers could best achieve their goals by relying on their own voluntary associations."

43 Because of the fact that no natural balance of power exists (see par 1.1 above and in general Fox Social Critique 308-22 particularly 312-13: "Only the margins of power are needed to cope with marginal adjustments. This then, is what accounts for the illusion of a power balance.")

The next question to address is how the parties manage to conduct a meaningful relationship with one another.

Dunlop was the first to analyse the idea of "tripartism" systematically. An industrial relations system "at any one time in its development is regarded as comprised of certain actors, certain contexts, an ideology which binds the industrial relations system together, and a body of rules created to govern the actors at the place of work and work community".[45]

The creation of rules is the central purpose of the system and Dunlop identifies three groups which participate in this process:

- a management hierarchy and its supervisors;
- a hierarchy of workers and their representatives;
- specialized government agencies which busy themselves with workers, undertakings and their relationships.

These parties are not completely free to do as they please, but are influenced and restricted by the environment in which they operate. These environmental factors include the technological characteristics of the workplace and work community, market and budget constraints and the location and distribution of power in the wider society. It is important to note that these factors are imposed by the wider society

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44(...continued)

44 Lewis Kahn-Freund and Labour Law: an Outline Critique Paper 220-1. "These developments point to an unprecedented degree of legal intervention in British industrial relations.... The reform of industrial relations, the enactment of new laws, the succession of income policies and perhaps also the proliferation of tri-partite agencies have all served to strengthen the tendency which some sociologists have described as `corporatist'." The term voluntarism however retains its prescriptive value in the sense of free collective bargaining.

45 Dunlop Industrial Relations Systems 7.

and that their existence and impact cannot be accounted for from within the strict management-worker relationship.[46]

The system is kept together by an ideology or a common set of values which determines the role of each actor in the system. Divergent approaches are recognized but "an industrial relations system requires that these ideologies must be sufficiently compatible and consistent so as to permit a common set of ideas which recognize an acceptable role for each actor".[47]

It is clear that if strongly divergent conceptions with regard to the role of each party within the system exist, additional conflict may be generated which could eventually threaten the continued existence of the system. As differences in the values held by capital and labour increase more rules have to be created which in turn enlarge the role of power and even coercion. Where parties do not share values their points of departure in participating in society differ and more rules have to be designed and enforced in order to maintain peace and stability in society. These rules can be created by management and the workers themselves (local rule making) or they can be laid down by the state as third party (central rule making). It is furthermore valid to conclude that as the differences in the values held by the parties increase and the resultant conflict intensifies, it would be the state as the most powerful party which would increasingly create rules and be prepared to enforce them in order to ensure the survival of the system. For example, if management were to become

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46 Dunlop 9 says that environmental factors "are determined by the larger society and its other sub-systems and are not explained within an industrial relations system". See also Jackson in general 17-19.

47 Dunlop 17. According to Walker 679, Dunlop does not succeed in explaining the dynamics of industrial relations: "His model is only descriptive, but when the value orientations of the parties are taken into account, the model provides a handy tool."

increasingly unitarist[48] and workers increasingly radical[49] within the parameters of a capitalist structure, the state could promulgate rules that would not only attempt to limit and reduce conflict, but these rules could be formulated in a way that kept the capitalist structure in tact and that institutionalized the conflict within its bounds.[50] If the state (central rule making) is not sufficiently accessible and susceptible to influence and change promoted by both capital and labour it may eventually itself run the risk of collapsing.

Flanders, a pluralist, also concentrates on rules as the central concept in industrial relations and emphasizes collective bargaining as the preferred means of creating them:

> "The only aspect of business enterprise with which industrial relations is concerned is the employment aspect; the relations between the enterprise and its employees and among those employees themselves. One way of identifying these relationships is to place them in their legal setting. They are all either expressed in or arise out of contracts of employment (or service), which represent, in common speech, jobs. The study of industrial relations may

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48 See par 1.1.1 above.

49 See par 1.1.2 above.

50 See the statement in MAWU v Hart Ltd (1985) 6 ILJ 478 (IC) 494 F-G: "However, it must also be accepted that it is beyond the scope of the industrial court to prevent industrial unrest altogether. The court has to take judicial notice of the fact that the economic system in South Africa is based essentially on the principles of capitalism. The conventions of the free market system do not permit of regimentation; and a strike which takes place in accordance with the provisions of the Act is a legitimate instrument of industrial action." See also Dunlop "Political Systems and Industrial Relations" in Barret, Rhodes & Beishon 365: "In a sense, `political systems' set up the major players in the industrial relations game and define their major rules of play. Industrial relations provide the results of the play in a given technological and economic environment and at a given stage of economic development."

therefore be described as a study of the institutions of job regulation."[51]

Two types of rules, procedural and substantive, can be identified. Procedural rules[52] regulate the method and stages of dispute settlement as well as the facilities and status (such as access, meeting facilities, etc) granted to the representatives of the parties. They relate to how the parties deal with each other. Substantive rules[53] on the other hand refer to the actual conditions of employment, such as compensation and hours of work.[54] They indicate what each

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51 Flanders "Industrial Relations - What is Wrong with the System?" in Barret, Rhodes & Beishon 21.

52 These rules are indicative of how the parties deal with each other, for example how an agreement is concluded (see also n 54 below).

53 See Hyman Pluralism 32: "Pluralists, especially the British, tend to emphasise the importance of procedural rules at the expense of substantive rules: ... Here is a further paradox of pluralism - and in particular the pluralism of students of British industrial relations: the tendency to evaluate procedural rights far above substantive interests. This orientation might be seen in some respects as a simple reflection of the actual preferences and practice of the parties to industrial relations in Britain. `The parties to collective bargaining in this country, wrote Flanders, have generally preferred to build their relations more on their procedural than on the substantive rules'. When the importance of procedural rules is emphasised, he added, `a premium is being placed on industrial peace and less regard is being paid to the terms on which it may be obtained'. Clegg made a similar point when he wrote that `trade unionists may think that unions raise their wages; but they established unions as a means of giving themselves some part in the regulation of the conditions of their working lives, and even if it could be shown that unions have little effect on wages, they would continue to value them for the same reason as a method of regulating relationships between people in industry, and as the channel they wish wage changes to pass through, whatever these changes may be'."

Too much emphasis on procedure underestimates the true purpose of trade unions, that is to enhance the power basis of workers to get more substantively. Respect for procedures will not exist automatically but may have to be enforced by the law.

54 Flanders 22: "The first kind of rules [ie procedural] regulate the behaviour of parties to the collective agreements - trade unions and employers or their associations, and those who act on their behalf; whereas the second kind [i e substantive] regulate the behaviour of employees and employers as parties to individual contracts of employment. In short, it is the substantive rules of collective bargaining that regulate jobs. Since, however, the procedural rules of collective bargaining regulate the making, interpretation and enforcement of its substantive rules, they provide this particular institution of job regulation with its form and constitution.

(continued...)

party receives in the allocation process (which takes place by means of negotiation).

The relationships governed by substantive rules are partly economic in nature. The contract of service for example represents a transaction in terms of which services are bought and sold - a wage-work agreement. Negotiation is only one of the characteristic market processes, the other is competition. While rules governing negotiation determine a price for labour, those governing competition determine the supply and demand for labour:

> "These market relations between employers and employees include opportunities to enter into contracts in addition to the terms on which they are concluded."[55]

The moment a contract of employment is concluded the employee enters into a new set of relationships. He or shee agrees to obey certain instructions about the work he or she has to perform and to submit to discipline in general where he or she fails to perform in accordance with stipulated standards of conduct. Each organization, according to Drucker, therefore possesses "an internal order based on authority and subordination; that's a power relationship. In

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[54](...continued)

To take this distinction a little further, one of the effects of rules is to establish rights and obligations, which together define status. Generally, the procedural rules of industrial relations can be said to settle the status of any of the parties participating in job regulation, whether this be through collective bargaining or by other methods. Similarly, the substantive rules of industrial relations, by attaching various rights and obligations to jobs, settle their status, regardless normally of the individuals who occupy them. They fix, as we say, `a rate for the job', but of course, many other standard terms and conditions of employment as well."

[55] Flanders 23.

the broadest sense of the word these relationships are political, not economic".[56]

Flanders[57] also identifies a third set of relationships, human relations. These are organized group relations essentially social in character which are maintained by employees to serve their own ends rather than the ends of the enterprise - the equivalent within the enterprise of voluntary associations in society at large. Flanders continues:

> "To sum up with another phrase of Drucker's, a business enterprise has `a triple personality'; it is at once an economic, a political and a social institution. In the first of these personalities it produces and distributes incomes by operating within a nexus of factor and product markets. In the second it embodies a system of government in which managers collectively exercise authority over the managed, but are also themselves involved in an intricate pattern of political relationships. Its third personality is revealed in the `plant community'[58] which evolves from below out of face-to-face relations based on shared interests, sentiments, beliefs and values among various groups of employees."[59]

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56 Drucker The New Society 27.

57 Flanders 24.

58 Drucker 263 explains: "Its existence does not rest on the needs and purposes of the enterprise but on the needs and purposes of the members as human beings. Management can neither make the plant community nor abolish it; it is spontaneous and irrepressible in every enterprise."

59 Flanders 24.

A fourth category of relationships is that of the employee to his or her physical environment.[60] Rules are designed to protect his or her safety, health and welfare.

Rules are therefore generated by four kinds of relationships[61] according to Flanders, but one should be careful not to limit the needs and aspirations of workers in the workplace to these categories only.[62] The important point is that "the institutions of job regulation"[63] may cover all aspects of human life.

The institutions of job regulation may be internal[64] or external.[65] This distinction has very important analytical implications for it is indicative of whether the enterprise and its members can create and administer the institutions autonomously or whether they are dependent on some outside agency[66] for their creation and administration - whether the system of rule making is voluntary[67] or

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60 Flanders 24.

61 economic, political, social and physical.

62 Workers may for example have moral needs about which they feel very strongly.

63 See n 51 above.

64 Flanders 24 states: "Some of the institutions of job regulation are an integral part of this system; they are, as it were, the domestic industrial relations of the enterprise." Examples are grievance and disciplinary procedures.

65 See Flanders 24: "These limit the freedom of the enterprise and its members in their own rule-making activities." Labour legislation and rules created by trade unions and employers' organizations fall into this category.

66 The most important outside agency is the state (and the law); see also n 42 above.

67 See Bendix "Trade Unions, Collective Bargaining and Political Democracy: Some General Considerations Relevant to South Africa" 1980 South African Journal of Labour Relations 4 (2): 37: "Voluntarism, as a pure model, thus embodies the highest degree of industrial self-governance and automatically aligns itself with the principles of democracy in the Western connotation. Since it rejects any state interference, voluntarism complies in letter and spirit with the internationally adopted principles of freedom of association, the right to organize and to bargain collectively."

mandatory.[68] The extent to which the rules regulating jobs are created internally or externally is an indication of the role of the state[69] in any particular industrial relations system.

From a systematic point of view Bendix[70] integrates the dynamic rule making relationship between the three parties[71] by means of his distinction between inner[72] and outer[73] systems:

> "... in an industrial society embracing Western ethics, the industrial relations systems is encased by the political system; that, as an inner system, the industrial relations system generates change in the outer system; that the ethics of the inner and outer system have to be compatible; that a

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68 See Bendix 38: "... absolute mandatorism is a precondition for an industrial relations system in which the dichotomy between labour and employers is considered as unnatural; in which a fundamental opposition of interests is negated; in which the process of social accommodation constitutes an integrated, deterministic function of the State."

69 and for that matter of the role of the law (as a set of rules backed up by the state); see par 2.1 below.

70 Bendix 40.

71 See n 41 above.

72 The strict management-worker relationship.

73 The wider society where the state as the policy and rule making institution plays a central role. See also the following statement in the Wiehahn Commission Report part 5 ch 2 par 2.2.5: "Against this background the following different relationships between the poles may be identified: the relationship between employer and employee, which is the fundamental or primary relationship; the relationship between the State and the employer and his employee; the relationship between the labour object (or task) and the employer and employees as labour subjects; the relationship between employees; and, finally the relationship between the complex in the inner dimension of relationships on the one hand and society on the other. This last-mentioned relationship is tertiary in nature as society's interest in the employer-employee relationship is only of an indirect nature. Society plays a role in this complex of relations primarily through the medium of the State."

continuous, reciprocal process of alignment between the inner and outer systems takes place...."[74]

If the interaction between the systems is not open and free, and furthermore if the outer system is too rigid to accommodate the alignment process a very real danger exists that the forces operative in the inner system may be directed at exerting pressure on the outer system to such an extent that the latter may be in danger of collapsing.[75]

In short any society should make sufficient provision for the accommodation and realization of worker and management aspirations and these should be balanced equitably where they are in conflict. Equally important, however, is the fact that the interests of the state itself[76] should not overly interfere with the alignment process because this may endanger orderly, peaceful and equitable rule making and administration in the long term. The more state interests are in conflict with or excessively aligned with the interests of any one of the other two groups in the tripartite system, the more force[77] will have to be used to ensure the survival of the system itself, and consequently the system will enjoy less acceptability or legitimacy.

It is therefore necessary to realize that the system,[78] in the sense of the background against which rules

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74 Bendix 40.

75 Bendix 40.

76 its particular ideologies and policies.

77 such as the military or the police force.

78 whether it is voluntary or mandatory, free enterprise or socialist, etc.

are formulated and administered as well as the specific rules emanating from the system, should be capable of change.[79]

Perspectives on the rule making process should therefore not be formed by reference to the system only, but also by reference to the extent to which the actors within the system determine and are allowed to determine the nature of the system.[80] One should therefore consider both the positive and the behaviouralist aspects of rule making:

> "To define industrial relations in terms of rules is to emphasize the relatively defined, stable and regular aspects of employer - worker and management - union relationships; by the same token it is to play down the significance of conflicts of control in the labour market and over the labour process as manifestations of a fundamental and continuous antagonism of interest."[81]

It must be realized that the objectives of the parties to the employment relationship do not always coincide. On the contrary, they may even differ on the very context of rule making. Management may pursue the distribution of scarce resources in a capitalist environment as an aim, whereas workers may have as their aim the dismantling of capitalism and gaining worker control. This essentially political process is sometimes ignored by the

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79 Jackson 27 declares: "In this way the actor can be seen as creating the social structure and step-by-step may help to change it. Thus, the relationship between social structure and the actor is not one way: there is a complex inter-relationship."

80 See Goldthorpe, Lockwood, Bechofer & Platt The Affluent Worker: Industrial Attitudes and Behaviour 184: "The social action approach is one in which actors' own definitions of the situation in which they are engaged are taken as an initial basis for the explanation of their social behaviour and relationship." According to Silverman The Theory of Organizations 141 "the action approach stresses the way in which man influences the social structures and `makes society'".

81 Hyman Pluralism 34. See also in general Jackson 24-8.

assumptions underlying the pluralist approach to industrial relations.[82] Allowance should therefore be made for the political aspirations of the parties and the promotion of their interests.

1.2.2.1 **Conclusion**

In summary, an industrial relations system involves three parties, the state, management and workers. These parties are engaged in the creation of rules which can be both procedural and substantive and can be created locally between management and workers or centrally by means of legislation. Central and local rule making cannot be neatly separated. On the contrary, the processes should be capable of mutual influence in order to allow an acceptable alignment of the interests of the various parties. The system must also allow for a free flow of power. Whilst this is the ideal position, it is necessary in any particular society to utilize the law to adjust the power position between capital and labour in order to ensure an equitable distribution of scarce resources because no natural power balance exists. Whilst it is therefore correct to say that voluntarism in the sense of a natural balance of power is an unattainable ideal, it is also important to realize that absolute mandatorism is equally unacceptable because it over-emphasizes the role of the state vis-à-vis the other two parties and eliminates

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82 Hyman Pluralism 20-1 states: "Three such assumptions are of key importance. The first is that there are no undue concentrations of economic power, particularly in the labour market. Such power is either so extensively diffused that there exist no large accumulations; or else the power which, it is recognised, can be wielded by large corporations is more or less evenly balanced by that of organised labour. The second assumption is that, despite the plurality of sectional interest groups within contemporary society, it is meaningful to refer (usually without the slightest indication of the conceptual and theoretical difficulties entailed) to a `public' or `national' interest. Thirdly, the state is regarded as the more or less impartial guardian of this `public interest', not subject to excessive influence from the economically powerful (precisely because no such homogeneous group exists), but on the contrary able to deploy its own power to buttress the weak and restrain any groups which may display signs of undue aggrandisement."

competition. One means of adjusting the balance of power to acceptable levels is the law, which, as will be seen in chapter 2, is also a set of rules that can be used procedurally to regulate power.

1.3 Conclusion

It does not serve any practical purpose to adopt the unitary, pluralist or radical approach as a point of departure in a discussion on the institutionalization of conflict in industrial relations, since these approaches rest on assumptions that do not necessarily correspond with reality, with the result that they lose most of their value as analytical tools. The unitarists do not recognize the existence of conflict. Pluralism assumes a balance of power which does not exist, and radicalism propagates a utopia of worker control free of subordination which is not possible.

A far better approach is to focus on the concepts central to industrial relations without labelling them as any particular philosophy or ideology. Such an approach can be summarized as follows: Conflict is inherent in the management-worker relationship as a result of the parties' continuous competition for the allocation of the scarce resources generated by the undertaking. Conflict is institutionalized by converting the conflict into rules primarily and preferably (but not exclusively) by means of collective bargaining. The nature and outcome of the rule making process are determined by the reciprocal powers of the parties. The rules are both procedural (relating to how the parties participate in the allocation process) and substantive (relating to the actual outcome of the allocation process).

The allocation process is not voluntary in the sense that the rules are created only locally. No natural power

balance exists; therefore the state, as a third party, actively interferes in the bargaining process from a central level by partly determining the bargaining context or societal structure within which the allocation of scarce resources takes place and the power of management and workers. The state is therefore a third power in a tri-power institutionalization process in terms of which conflict over scarce resources is converted into rules. Its own interests should however not be biased by its giving undue preference to the interests of one group. The powers of management, workers and the state should be allowed to flow freely in order to influence dependencies so as to allow for an acceptable alignment of the interests of all three parties in any particular society. This process is dynamic and continuous and should be assisted, where necessary, by the law in a procedural rather than a substantive way. Voluntarism in its absolute form, where institutionalization is determined solely by the reciprocal powers of management and workers without interference by the law, does not exist. In the next chapter an appropriate role for the law in the institutionalization process is outlined.[83]

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83 Davis "Voluntarism and South African Labour Law - Are the Queensbury Rules an Anachronism?" in Labour Law (Davis Voluntarism) summarizes the essentials of voluntarism from the model adopted by Kahn-Freund in largely similar terms to this, except that the idea of classic voluntarism envisaged here is more "pure" in the sense that no legal interference takes place. The legal intervention advocated in ch 2 on the other hand goes further than Kahn-Freund's mere regulatory, supportive and restrictive functions and includes a guarantee and coercive function for the law (see Davis Voluntarism 45). See also the quotations by Quinney and Davis in ch 2 par 2 n 16 below with regard to the bias of necessity incorporated in the law as an instrument in the hands of the state.

CHAPTER TWO

THE LAW AND THE REGULATION OF INDUSTRIAL POWER

1 INTRODUCTION[1] (endnote)

The law is a set of rules designed to regulate conflict in society and is enforced by the state when necessary.[1] Since the law is supported by and ultimately enforceable by the powers of the state, the law can simply be defined as "power".[2]

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1 Llewellyn The Bramble Bush 2: "What, then, is this law business about? It is about the fact that our society is honeycombed with disputes. Disputes actual and potential, disputes to be settled and disputes to be prevented; both appealing to law, both making up the business of law .... This doing of something about disputes, this doing of it reasonably, is the business of law." See also the long title of the Labour Relations Act 28 of 1956 which focuses on the prevention and settlement of disputes. The law is a very important source of rules and without it life would according to Hobbes, be "solitary", "poor", "nasty", "brutish" and "short". See endnote 1 for further discussion.

2 Turk "Law as a Weapon in Social Conflict" in Evan The Sociology of Law: A Social-Structural Perspective 108 argues that the law is a set of resources for which people contend and with which they are better able to promote their own ideas and interests against others: "To say that people seek to gain and use resources to secure their own ideas and interests is, of course, to say that they seek to have and exercise power. While the meaning of power is far from settled, a convenient starting point is to view power as the control of resources, and the exercise of power as their mobilization in an effort to increase the probability of acceptable resolutions of actual or potential conflicts." He continues to break down the various kinds of resource control in order to enhance an understanding of the conceptualization of law as power: "I see five kinds of resource control, all represented in the cultural and social structural reality of law. These are (1) control of the means of direct physical violence, i.e. war or police power; (2) control of the production, allocation, and/or use of material resources, i.e., economic power; (3) control of decision-making processes, i.e., political power; (4) control of definitions of and access to knowledge, beliefs, values, i.e., ideological power; and (5) control of human attention and living-time, i.e., diversionary power." See also Thompson "Trade Unions Using the Law" in Corder (ed) Essays on Law and Social Practice in South Africa 335-48. Law as power is therefore not only a means of regulating conflict, but as a resource in itself it can also be a source and means of generating conflict, because people like to have as much of the law on their side as possible. Instead of merely asking how law regulates or generates conflict or in what ways and in what degree the use of legal power does both.

It can therefore be concluded that in regulating conflict the law represents to some extent the special interests of those in power, but also that those in power are better placed to achieve their objectives because of their relative control of the law and furthermore that attempts to gain and keep control of the law will generate more conflict. Lastly, those in power will not be able to maintain control over the law if they do not

(continued...)

Kahn-Freund who also views law as a form of power envisages a limited role for the law in industrial relations:

> "Law is a technique for the regulation of social power. This is true of labour law, as it is of other aspects of any legal system. Power - the capacity effectively to direct the behaviour of others - is unevenly distributed in all societies. There can be no society without a subordination of some of its members to others, without command and obedience, without rule makers and decision makers. The power to make policy, to make rules and to make decisions, and to ensure that these are obeyed, is a social power. It rests on many foundations, on wealth, on personal prestige, on tradition, sometimes on physical force, often on sheer inertia. It is sometimes supported and sometimes restrained, and sometimes even created by the law, but the law is not the principal source of social power. Labour law is chiefly concerned with this elementary phenomenon of social power. And - this is important - it is concerned with social power irrespective of the share which the law itself has had in establishing it."[3]

For him labour law used to operate in the framework of collective laissez-faire where industrial forces enjoyed autonomy and the law only interfered marginally in order to

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[2](...continued)

satisfy enough of the needs of those not in power. Compare the discussion in ch 1 pars 1.2.1 and 1.2.2 above.

Turk 112 concludes: "Given then the availability and amorality of legal power, the formulation and testing of propositions about the exercise of such power become central concerns for the scientific study of law as it is, as distinguished from doctrinal or applied research on behalf of law as someone believes it should or must be." See also the literal approach to interpretation of the law adopted in ch 5 par 2 below.

[3] Davies & Freedland Kahn-Freund's Labour and the Law 14 (Kahn-Freund).

adjust the power discrepancies between management and labour that threatened the successful operation of the independent negotiation machinery.[4] Law was, as it were, conspicuous by its absence in industrial relations in that it only contributed indirectly in an "auxiliary", "regulatory" and "restrictive" way to adjust industrial power where necessary.[5] It did not play a direct structural role, as the law did in America and South Africa for example.[6]

Kahn-Freund's approach, although not voluntary in the absolute sense of the word, can still be regarded as voluntarist in essence - an approach which is largely outdated throughout the world.[7]

In this thesis a more interventionist and clearly demarcated role for the law is envisaged with the ultimate aim of showing how the law as a technique for the regulation of social power can optimally assist in the legitimate and effective institutionalization of labour conflict. More particularly, attention is given to the regulation of managerial industrial power in the institutionalization of conflict in order to provide a model against which the lock-out in South African law can be discussed in the following chapters.

Briefly, the argument proceeds as follows in the ensuing paragraphs: In a capitalist system, conflict is always present between capital and labour as the buyers and

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4 See also Davis "Voluntarism in South African Labour Law - Are the Queensbury Rules an Anachronism?" in Labour Law 45 (Davis Voluntarism).

5 Kahn-Freund 15-16; Davis Voluntarism 45; see also Kahn-Freund "Industrial Relations and the Law. Retrospect and Prospect" in Barret, Rhodes & Beishon (eds) Industrial Relations and the Wider Society. Aspects of Interaction 386 (Kahn-Freund IR).

6 Davis Voluntarism 46-51.

7 See the discussion in ch 1 and Davis Voluntarism 47-8.

sellers of labour and in the allocation of scarce resources generated by the undertaking.[8]

This conflict must be institutionalized by the creation and application of rules between the parties in the allocation process (primarily and preferably by means of negotiation).[9]

Conflict gives rise to two kinds of disputes, namely disputes of interest (involving the allocation of scarce resources or the creation of rules) and disputes of right (involving the protection of allocated resources or the application of existing rules).[10]

When disputes are settled, use can be made of two final settlement mechanisms, namely negotiation[11] towards agreement and adjudication.[12] Various hybrid forms of settlement can be created by agreement.

Since no natural power balance exists, it is necessary for the law, as power, to promote collective bargaining by adjusting the dependencies of the parties by means of its guarantee, auxiliary and restrictive functions. This is achieved firstly, by promoting the free flow of power by giving substance to freedom of association (the potential for power), collective bargaining (the utilization of power) and industrial action (the implementation of power)[13] and secondly, by enhancing security of employment through

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8 See ch 1 in general, specifically the conclusion in par 1.2.3 above.

9 See ch 1 par 1.1.2 n 13 and par 1.2.2 above.

10 See par 3 below.

11 See par 4.1 specifically 4.1.2 below.

12 See par 4.1 specifically 4.1.1 below.

13 See par 5 specifically 5.3.1 below.

strengthening the allocation context (and thereby limiting, not prohibiting the use of alternative labour).[14] In this, the allocation of scarce resources (involving disputes of interest or the creation of rules), the law interferes procedurally, not substantively.

Where conflict arises from the protection of scarce resources (involving disputes of right or the application of existing rules) the law in its coercive function states clearly what a rule is and does not create new rules (ius dicere non facere). This implies that rules should be formulated as clearly as possible.

In structuring an effective and legitimate institutionalization structure, the law should direct disputes of interest through rule making negotiations towards agreement supported by the possibility of using its own power to induce agreement. It should be possible to refer disputes of rights directly to adjudication, but settlement negotiations prior to adjudication should be available on a voluntary basis.[15]

2 AN AIM FOR THE LAW

To define law as power is to recognize that it is biased,[16] but not necessarily to accept that state of

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14 See par 5.3.2 below.

15 See pars 5.4, 6 and 7 below.

16 Quinney The Social Reality of Crime 35: "Society is characterized by diversity, conflict, coercion and change rather than by consensus and stability. Second, law is a result of the operation of interests, rather than an instrument that functions outside of particular interests. Though law may control interests, it is in the first place created by interests of specific persons and groups; it is seldom the product of the whole society. Law is made by men, representing special interests, who have the power to translate their interests into public policy. Unlike the pluralistic conception of politics, law does not represent

(continued...)

affairs. In order to determine bias and to rectify it, actual legal rules must be evaluated against universally accepted values or standards.[17]

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[16](...continued)

a compromise of the diverse interests in society, but supports some interests at the expense of others." Davis "The Functions of Labour Law" 1980 CILSA XIII: 212 216 (Davis) argues along the same lines: "Labour law undoubtedly acts to preserve industrial peace, but its function is clearly not to promote industrial peace. The reason for this is as has been argued above, that the law acts to confine and contain those manifestations of conflict which are endemic to the entire system of industrial relations. In South Africa this has been achieved by legislation which has effectively suppressed any possibility of a unified worker front by ensuring that the government has sufficient armoury to stifle any Black worker movement which might threaten the present economic system in any fundamental way."

Nader & Gerber contend "that the powerful classes and groups shape the legal structure so that is serves their own narrow interests" ("Power as a Process in Regulation" in Evan 331). Chambliss & Giedman Law, Order and Power 53 see law as a "weapon in the hands of the dominant class".

Although it is true that the law reflects special interests as a result of the focus and distribution of power in society, Quinney and others overstate their case by arguing that all rules are created and operated for the benefit of the powerful. At most it can be stated that the law is not a completely value free, objective set of rules governing society in a disinterested way, but is partly designed in such a way as to preserve "the essential socio-economic structures of society" (Davis 214). He continues: "The State as the author of the law has as its major role the preservation of the very coherence of the society so as to protect the interests of those who essentially rule that society. The State cannot therefore be seen as a completely independent third part in the context of industrial legislation." Karl Marx writes: "Laws may perpetuate an instrument of production, e.g., land, in certain families. These laws assume an economic importance if large landed property is in harmony with the system of production prevailing in society, as is the case e.g., in England." (Marx "Zur Kritik der Politischen Oekonomie", quoted by Kelsen in "The Marx-Engels Theory of Law" in Evan 97.)

But: "Not all laws are created and operated for the benefit of the powerful ruling groups in society. Laws prohibiting murder, robbery, arson, incest, and assault benefit all members of society, regardless of their economic position. It is too broad an assumption that powerful groups dictate the content of the law and its enforcement for the protection of their own interests.... [A]ll kinds of groups are involved in law making, although the powerful groups do have substantial input into the law making process." (Vago Law and Society 14.)

17 These rules must not simply be accepted as Black "The Boundaries of Legal Sociology" in Evan 41 would have it in his pure sociology of law: "And if we are to have a strategically detached approach, our concept must be value neutral. We need a theoretical structure applicable to the law of the Nazis as well as American law, to revolutionary law and colonial law as well as the cumbersome law of traditional China." Absence of values could amount to "wilful ignorance". In his criticism of Black's pure sociology of law Nonet "For Jurisprudential Sociology" in Evan states: "Of course ignorance and impoverished education create their own risks of scientific error. In effect, we are asked to prefer the risks of error by ignorance to the risks of error from bias...."

Conflict in society is a function of what people value (their interests) and the power at their disposal to realize their interests.[18] The aim of the law should be to allow them to pursue their interests and to protect those interests legitimately and effectively:[19]

> "For the purpose of understanding the law of today, I am content to think of law as a social institution to satisfy social wants - the claims and demands involved in the existence of civilized society - by giving effect to as much as we need with the least sacrifice, so far as such wants may be satisfied or such claims given effect by an ordering of human conduct through politically organized society. For present purposes, I am content to see in legal history the record of a continually wider recognizing and satisfying of human wants or claims or desires through social control: a more embracing and more effective securing of social interests; a continually more complete and effective elimination of waste and precluding of friction in human

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18 Vago 14 argues that "in addition to laws reflecting special interests, the sheer availability of law is itself an impetus to social conflict because conflicting or potentially conflicting parties cannot risk the possible costs of not having the law - or at least some law - on their side".

19 Order will only be possible in the long term if everybody feels satisfied that he is allowed his maximum due in exchange for his willingness to conform to the system. Justinian D 1.1.10 states "I justitia est constans et perpetua voluntas / ius suum cuique tribuens", meaning justice is the constant and perpetual wish to render everyone his due. See Selznick Law, Society and Industrial Justice 29: "There is a demand that the rules be legitimate, not only in emanating from establishing authority, but also in the manner of their formulation, in the way they are applied, and in their fidelity to agreed-upon institutional purposes. The idea spreads that the obligation to obey has some relation to the quality of the rules and the integrity of their administration. A critical spirit emerges which insists that decisions be justified and that channels be available for effective review and the hearing of grievances.... All aspects of making and administering rules are to be scrutinized and pitilessly compared with the legal ideal."

enjoyment of the goods of existence - in that, a continually more efficacious social engineering."[20]

What the law should aim at in order to satisfy as wide a spectrum of human "wants", "claims" or "desires" as possible, is to recognize and give content to universally accepted values or rights. Whilst it is not easy to isolate exactly what people want and it is important to realize that different people and groups may want different things, the universal rights discussed below give some indication of what is generally accepted by the international community.

Wiehahn[21] postulates six basic rights which should be recognized in all democratic industrial relations systems. They are -

(a) the right to work;[22]
(b) the right to protection;[23]
(c) the right to improvement;[24]

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20 Pound My Philosophy of Law, quoted by Vago 19.

21 Wiehahn Inaugural Lecture 10. See also in general Van Jaarsveld & Coetzee Suid-Afrikaanse Arbeidsreg; Wiehahn Commission Report part 5 ch 2 422-30; Kachelhoffer "Arbeidsreg: Die Wiehahn- en die Riekert-verslag" 1979 Modern Business Law 1: 58; ILO Conventions and Recommendations; Poolman Principles of Unfair Labour Practice 1-4.

22 On the contractual right to work, see Brassey "The Contractual Right to Work" 1982 Industrial Law Journal (SA) 3: 247. This right is the cornerstone of security of employment law. In South Africa guidelines developed in terms of the unfair labour practice concept have largely fulfilled this purpose.

23 South African law makes some provision for this right. Compare for example s 66 of the Labour Relations Act 28 of 1956, the Machinery and Occupational Safety Act 6 of 1983 and the Mines and Works Act 27 of 1956. See also Gould The Right of Wage-Earners 104. Furthermore, various collective agreements contain provisions regulating this right.

24 In this regard, the Manpower Training Act 56 of 1981 is an important enabling piece of legislation. The unfair labour practice jurisdiction of the industrial court also provides a further potential source for development of this right.

(d) the right to associate freely;[25]

(e) the right to bargain collectively;[26]

(f) the right to take industrial action.[27]

It is the function of the law to recognize and give content to these rights, and also to balance them with employer rights (sometimes called prerogatives), such as the right to make business decisions, the right to generate profit, and other prerogatives concomitant with ownership.

The question that arises is how the law can give positive substance to these rights to assist in the ordering of industrial relations? Kahn-Freund[28] suggests three

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25 See ILO Convention 87 of 1948. In South Africa, freedom of association is allowed by the common law and is further regulated in s 78 of the Labour Relations Act. Important guidelines have also been developed by the industrial court under the auspices of the unfair labour practice concept.

26 See ILO Convention 98 of 1949. Collective bargaining is regulated extensively in the Labour Relations Act and is also governed by contract in the case of relationship agreements outside the official system in South Africa. Numerous studies on collective bargaining and aspects of it are in existence. For three comprehensive works, see Piron Collective Bargaining in South African Labour Law; Woudstra Die Kollektiewe Arbeidsooreenkoms and Kelling Aspekte van die Aard en Uitwerking van Arbeidsooreenkomste in die Suid-Afrikaanse Arbeidsreg.

27 The freedom to take industrial action is guaranteed by the common law subject to the dictates of contract. Extensive provisions regulating the freedom to take industrial action appear in the Labour Relations Act. Compare, for example ss 1, 65 and 79. Furthermore, various provisions are to be found in collective agreements (ie different kinds of peace clauses) and significant contributions have been made by the industrial court in terms of the unfair labour practice concept in the development of a right to take industrial action.

28 Kahn-Freund IR 386; see also Simpson "The Future of Law in Industrial Relations" in Kamenka & Erh-Soon Lay (eds) Law and Social Control 147-51. See also Kahn-Freund 15. Compare Raday "Status and Contract in the Employment Relationship" 1989 Israel Law Review 23 (1): 77 81-2 who argues that the interventionist approach is characteristic of 20th-century labour law. Legal intervention first regulated the physical well-being of employees, such as maximum working hours and holidays, safety, etc. Thereafter, it regulated the socio-economic well-being of employees such as the imposition of minimum wages, unemployment insurance and protection against dismissal. Thereafter collective bargaining was promoted. This ties in well with the functions of the law discussed below. Clarke "The Juridification of Industrial Relations: A Review Article" 1985 Industrial Law Journal (UK) 69 86 distinguishes by reference to limits four main methods of juridification: statutory regulation, administrative regulation, judicial decision, and "indirect steering".

different roles for the law, its auxiliary, regulatory and restrictive functions. To these must be added its guarantee and coercive functions.

The guarantee function of the law relates to the fact that certain freedoms such as freedom of association, collective bargaining and freedom to take industrial action are allowed by the common law in the sense that people are free to engage in these activities unless they are specifically restricted by the law.[29] Other examples are freedom of speech, movement and worship.

The auxiliary function refers to the supporting role the law fulfils in the collective bargaining process in the sense that it provides norms, sanctions and forums to stimulate the bargaining process. It supports not only collective bargaining but all kinds of negotiation, for example, it provides for the observance of concluded agreements such as those arising from individual bargaining.[30]

The regulatory function of the law is to provide a code of substantive rules to govern terms and conditions of employment. In a way, it is a substitute for collective bargaining:

> "The importance of this regulatory function of the law will be inversely proportional to the strength and coverage of collective bargaining. That is, the more people are covered by effective norms and sanctions emanating from the autonomous processes of

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29 Compare Kahn-Freund 29-37.

30 Kahn Freund IR 386. In South Africa the Labour Relations Act for example provides for the registration of industrial councils or the application for conciliation boards, the common law makes provision for the enforcement of recognition agreements and other contracts such as out of court settlements, etc.

collective bargaining, the fewer will depend on the regulatory function of the law; and, a point of immense practical importance, the richer in content collective agreements are, the less important the supplementary rules provided by legislation."[31]

The restrictive function of the law operates to provide the rules of the game in conducting industrial hostilities. The parties must be protected from each other and, above all, the public interest, that is the interests of the community, consumers and individuals, must be secured. Although it is commonly used, the term "public interest" does not have a clear meaning. It is a term with a prescriptive rather than a descriptive content and its meaning differs depending on the interest of the user itself.[32] It is

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31 Kahn-Freund IR 386. Good examples of the regulatory function of the law in South Africa are the Wage Act 5 of 1951, the Basic Conditions of Employment Act 3 of 1983, the Machinery and Occupational Safety Act 6 of 1983 and the Mines and Works Act 27 of 1956. To a certain extent, the unfair labour practice jurisdiction of the industrial court is strongly reminiscent of the regulatory function of the law in that it represents an inroad on collective bargaining. Another good example of regulation to protect basic freedoms is s 66 of the Labour Relations Act, which deals with victimization.

32 Sections 65 and 79 of the Labour Relations Act, which deal with the legality of industrial action and the legitimate furtherance of such action respectively, are good examples of the restrictive function of the law. See also Kahn-Freund IR 386. With regard to "public interest" Hyman "The Concept of `Public Interest' in Industrial Relations" in Wedderburn & Murphy (eds) Labour Law and the Community: Perspectives for the 1980's 95 declares: "A simple definition should suffice to indicate why appeals to the `public interest' held little initial attraction to the British employing class. Most usage of the term involves three elements. Firstly, the `public' (or `public opinion') is presented as an impartial force adjudicating in conflict between capital and labour; secondly in organic `common interest' is postulated, transcending class or sectional divisions within society; thirdly, the state is regarded as the mouthpiece and representative of this mutual and consensual public."

McCarthy "The Notion of Public Interest in Labour Disputes: A Note" in Wedderburn & Murphy 117-18 agrees with Hyman that the term "public interest" has no objective meaning and states: "I think the term has usually been used to refer to the interests of those damaged by industrial action who are not the direct participants. Clearly the interests of consumers and producers are to some extent in conflict. But not all consumers have identical interests and the interests of some producers are opposed to others. In any case, we are all, at one and the same time, both consumers and producers. Man, as consumer, is not inherently right and just and superior to man as producer. Otherwise, there would be no case against slavery." Compare also ch 3 par 3.4 below where the utility of the concept "public policy" as an alternative to contract is discussed.

however correct to say that there are people other than the disputing parties who may potentially have an interest in the method and outcome of dispute settlement.

The coercive function of the law sees to it that rights and duties, that is the rules regulating the relationship between the parties, in industrial relations are enforced when necessary:

> "By coercion, I mean the threat of negative sanctions for non-performance of the desired course of action .... The basis of the relation of law to political organization lies primarily in the fact that at certain points the question must inevitably arise as to the use of physical force or its threat as a means of coercion; that is, a means of assertion of the bindingness of the norm .... Force is, at least in the preventive sense, the ultimate negative sanction."[33]

From the discussion of the five functions of the law, it is clear that the law assists with the creation as well as the enforcement of rules, either directly or indirectly - it assists with the institutionalization of conflict. In this process the law, as a technique for the regulation of social power, should create an acceptable balance between the interests of capital and labour, management and workers in giving substance to inter alia the six basic rights:

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33 Parsons "The Law and Social Control" in Evan 63. Turner "Legal System Evolution: An Analytical Model" in Evan 377 contends that "all legal systems reveal four basic elements: (1) a body of law, (2) law-enacting processes, (3) adjudicating procedures and courts, and (4) enforcement agencies". Examples in South Africa of the coercive function of the law are all the adjudicatory mechanisms such as the courts, arbitration and the industrial court - also the police as the primary enforcement agency. With the promulgation of emergency legislation, the distinctions made by Turner may become blurred in some areas of social activity, including aspects of industrial relations.

> "Within this framework, voluntarism has a limited role in that the law has a major function, not only in defining and constructing the ring, acting as referee and enforcing the rules, but also in handicapping the parties to ensure that the fight takes place between parties who are both in the same fighting division."[34]

The law not only regulates, supports and restricts the voluntary exercise of power, but actively interferes in determining the size and use of power in the allocation process. Furthermore, the law through its coercive function effectively protects scarce resources once allocated by being prepared to give effect to, for example, substantive collective agreements for certain agreed periods of time.

As long as the structure of society remains one of capitalism and free enterprise, the law as a technique for the regulation of power will continue to regulate social power in such a way that an economic power discrepancy will remain.[35] However, to maintain the structure by means of force only, without acceptance by the people governed by the law, can present problems for the long-term survival of such a legal system.[36]

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34 Davis Voluntarism 67.

35 Fox "Industrial Relations: A Social Critique of Pluralist Ideology" in Barret, Rhodes & Beishon (eds) Industrial Relations and the Wider Society. Aspects of Interaction 310 (Fox Social Critique) states: "Yet to enjoy control of resources - a control upheld by the law and in the last resort by the armed forces of the state - seems such a decisive advantage that the fact of many people believing in the existence of a power balance presents us with a puzzle."

36 especially if the majority of the population does not enjoy the opportunity to participate in the formulation of the rules at central, government level, as is the case in South Africa. Compare ch 4 par 1 below.

A further power discrepancy does not only manifest itself on an economic level but is inherent in the very hierarchical nature of the employment relationship:

> "There can be no employment relationship without a power to command and a duty to obey, that is without this element of subordination in which lawyers rightly see the hallmark of the `contract of employment'. However, the power to command and the duty to obey can be regulated. An element of co-ordination can be infused into the employment relationship. Co-ordination and subordination are matters of degree, but however strong the element of co-ordination, a residuum of command power will and must remain."[37]

These economic and hierarchical parameters[38] (amongst others) of the industrial relations structure as demarcated by the law against a free enterprise background, imply of necessity that the employment relationship should be capable of termination by either employer or employee. It is the specific function of the law to regulate power within

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37 Kahn-Freund 18.

38 For an interesting discussion in this regard, see also Collins "Market Power, Bureaucratic Power and the Contract of Employment" 1986 Industrial Law Journal (UK) 15 (1): 1. He states (2): "This description of the dual source of the subordination which characterises the employment relation draws upon a distinction between market power and bureaucratic power. Market power is the product of ownership of resources, the potential transaction costs of utilizing those resources, the costs of inaction and constraints established by prior commitments. In turn, these potentialities and constraints depend upon the width of the discretion accorded by the law to dispose of capital and labour as one wishes and the acceptance by the bulk of society of the legitimacy of that allocation of legal rights. In contrast, bureaucratic power is a product of how much power is assigned to a particular role by the rules of the organisation and how adroitly the person occupying the role can manipulate others to achieve his goals within the framework of rules. Like other political systems, bureaucratic power depends ultimately for its existence upon an acceptance by members of the organisation of the legitimacy of the authority of those higher up in the system of ranks and of the system itself. Of course, at the level of the board of directors of a company, bureaucratic and market power may be combined in one person, for a directors' authority may be grounded both in ownership of shares and in his position in the system of ranks."

the parameters of the employment relationship, but also in the final event, to lay down with certainty when the relationship itself may be terminated. The parties should not be allowed to pursue their interests with impunity, without proper regard for the interests of the other parties in the tripartite system and the public in general. Parties should not be made absolutely dependent on each other, they should be allowed to sever the relationship and make use of alternative labour (or jobs) in appropriate circumstances.

Kahn-Freund warned that "the law is not the principal source of social power":[39]

> "... Acts of Parliament, however well intentioned and well designed, can do something, but cannot do much to modify the power relation between labour and management .... The law seeks to restrain the command power of management. How far it succeeds in doing so depends on the extent to which the workers are organised. The law also seeks to restrain the power of the unions. How far it can do so depends on the attitude of the employers."[40]

In South Africa, for example, the recognition of full freedom of association and the introduction of the unfair labour practice concept dramatically changed the power balance between capital and labour. These and other changes show that the law can make a significant difference to the power balance, depending on the nature of the society in which it operates.[41]

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39 Kahn-Freund 14.

40 Kahn-Freund 19-20.

41 Full freedom of association has sanctioned the formation and protection of collectivities which have restrained the traditional command power of management and protected security of employment. Under the auspices of the unfair labour practice concept collectivities (continued...)

With regard to security of employment the law should not protect jobs absolutely, nor should it allow termination at will, but it should state clearly under which circumstances it is no longer prepared to protect the parties within the employment relationship in order to allow for competition without exploitation. Whilst it is realized that security of employment cannot be protected absolutely, some measure of security of employment must be provided in clear terminology.

At the same time, the law should promote bargaining by recognizing fundamental rights such as freedom of association, collective bargaining and industrial action.

In short, the dependencies of the parties should be adjusted by the law to acceptable levels, serving the interests of capital and labour in a free enterprise environment by giving effect to universally accepted rights.

This topic will be elaborated on further in paragraph 5 (especially paragraph 5.3) below.

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[41](...continued)
have increased employers' dependency on employees (and have enhanced the latter's power base). See also Davis Voluntarism 49-51 especially 68: "The absence of an institutionalized democratic culture, an economy in recession, and massive socio-economic cleavages in a country where the skewed distribution of wealth makes it decidedly inegalitarian, provide compelling reasons for State intervention and render remote the likelihood of a system of industrial self-government based on the principles of collective laissez-faire."

3 DISPUTES OF INTEREST AND DISPUTES OF RIGHTS[2] (end note)

In the introduction in paragraph 1 it was stated that the main aim of the law should be the legitimate and effective institutionalization of labour conflict. In paragraph 2 a more interventionist role for the law than the classical model of Kahn-Freund was foreseen. In this paragraph the distinction between disputes of interest and disputes of rights is considered in order to demarcate the area of legitimate legal intervention more clearly and especially to show where the law should not interfere. This is important in order to gain a perspective on the appropriate use of managerial industrial power (that is the lock-out) in the institutionalization of industrial conflict.

The "focus in law schools on `disputes' as litigation ignores the more fundamental question of whether a dispute ought to be adjudicated rather than arbitrated, mediated, negotiated, investigated by a body of fact-finders, or submitted to a `mini-trial'".[42] Not all disputes are amenable to adjudication. For dispute settlement to be effective it is necessary first to concentrate on the nature of the dispute and once this is established to find or create a mechanism that will best be capable of solving such a dispute.[43] Apart from the principal or classic settlement mechanisms, viz negotiation and adjudication, a number of related and equally well-known mechanisms such as mediation,

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42 Green "A Comprehensive Approach to the Theory and Practice of Dispute Resolution" 1984 Journal of Legal Education 34: 245 247.

43 Green 248 states: "To correct this narrowness of vision, lawyers and policy makers must begin to think comprehensively and strategically about `disputes' rather than about `litigation', or, for that matter, about mediation, negotiation, arbitration, or any other single dispute resolution process. To think strategically and comprehensively about dispute resolution, one must first understand the characteristics, dynamics, advantages, disadvantages, costs, and benefits of each dispute resolution process and how each process interacts with the others. One must also understand how each process fulfils or reflects larger political, cultural, and social values, and the practical barriers to the use of each process."

arbitration and fact-finding exist. Other hybrid or alternative mechanisms can also be used or created.[44]

The term "dispute" can be defined in a number of ways depending on the purpose for which the definition is needed:

> "Generally, the provisions define a labour dispute by reference to the parties thereto (employers or their organizations and workers or their organizations) and the subject-matter of the dispute (terms and conditions of employment and sometimes trade union rights and the labour-management relationships itself)."[45]

For the purpose of this discussion, it can be assumed that the term "dispute" relates to dissatisfaction which arises between employer and employee (or their organizations) or more broadly between capital and labour about the allocation of scarce resources and their protection in the context of the employment relationship as demarcated by the law.

The nature of a dispute itself is more important for the purpose of choosing a mechanism to settle the particular dispute (that is, the subject-matter of the dispute) than the parties involved.

If one defines institutionalization as the conversion of conflict into rules,[46] it is best to define "dispute" in terms of rules also in order to be consistent.

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44 Some of these are briefly referred to in par 4.2 below.

45 International Labour Office Conciliation and Arbitration Procedures in Labour Disputes: A Comparative Study 3 (ILO Comparative Study). Compare s 24 of the Labour Relations Act 28 of 1956.

46 See ch 1 par 1.2.2 above.

In general, it can firstly be said that capital and labour are in conflict regarding the allocation of scarce resources. They therefore have to create rules in terms of which scarce resources are allocated. For example, trade union A claims a wage increase of 40% from company B which is only prepared to grant an increase of 20%. The parties' demands in this economic dispute of interest differ by 20%. The dispute will not be settled until they agree on a mutually acceptable percentage. The gap between 40% and 20% represents the size of the conflict between the parties. The parties have to compromise on their demands gradually until a mutually acceptable point is reached and the conflict is eliminated. This point is the new allocation rule that will apply until the parties lodge further demands.

Secondly, capital and labour can be in conflict regarding the protection of scarce resources. After the parties have agreed on a percentage increase of, say, 30% (in the above example), the company may renege and claim that the agreement was for 28% and not 30%. The union may deny this and insist on 30%. In this example, the allocation has taken place on the basis of a 30% increase. The union now insists that its allocated resources be protected by claiming a right to them in terms of the prior agreement. This involves the application of the 30% rule already agreed to.

From the above example, it is clear that the resolution of the first dispute involves a movement of the parties towards each other in order to bridge the gap between their interests. This gap may be wide or narrow, but resolution of the dispute eventually depends on whether an acceptable common point can be reached. The resolution of the second dispute depends on fact, that is, whether the parties agreed to 30% or not. If 30% is in fact the rule agreed to, the union will have its way and the company will have to accept the outcome. This resolution process presupposes the

availability of a disinterested third party who is capable of determining whether the parties in fact agreed to 30% or not, and furthermore, that both parties will accept or be forced to accept the third party's finding.

The settlement of the first dispute involves the two parties only. The outcome of the institutionalization process or the allocation result (or rule) depends primarily on the reciprocal powers of the two parties. The settlement of the second dispute presupposes the presence of a third party which can compel the party which is wrong about what the rule in fact is, to accept and adhere to it.

This simple example serves to illustrate two broad kinds of disputes and two broad settlement mechanisms. The dispute about the creation of the rule is called a dispute of interest and the dispute about the application of the rule is called a dispute of righta.[47] The mechanism used to bridge the interest gap in the first example is called negotiation which results in settlement by agreement. The mechanism used to decide what the principle is and to enforce it is called adjudication.[48]

It is important to note that both types of disputes can be settled by both settlement mechanisms. The dispute concerning the creation of rules (or the allocation of scarce resources) can be settled by adjudication. This is clearly undesirable because the third party does not know as well as the parties themselves do what their interests are. The dispute relating to the application of an existing rule can be settled by negotiation. This is done in one of a number of ways. The company can accept that it in fact agreed to a 30% increase in wages and adhere to this, or the union may

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47 See n 50 below.

48 See the general discussion in par 4.1 below.

agree to the 28% increase, or they may agree on a percentage increase between 28% and 30%. It is clear, however, that this process involves a reallocation of scarce resources which is undesirable from the point of view of effectiveness and good order. On the other hand, the outcome may be mutually acceptable to both parties, and this is conducive to a more lasting peace.

It is the function of the law in any dispute resolution process to structure disputes and settlement mechanisms in such a way that maximum legitimacy and effectiveness are achieved in the creation and application of the rules governing the institutionalization process.[49]

As far as disputes are concerned therefore, the distinction between disputes of interest and disputes of rights can be defined as "the distinction between the making of rules and their application".[50]

In more practical terms, Spielmans[51] describes the distinction as follows:

> "Disputes `on rights' concern the application, interpretation, or violation of `laws' regulating industrial relations. Such `laws' may be the terms of labour agreements; yet they may also be, and frequently are, public statute laws of sufficiently uncertain standing so as to invite violations and thus furnish issues for disputes.

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49 See par 2 above.

50 Kahn-Freund 72. Cheadle "The New Industrial Court" 1980 South African Law Journal 97: 137 138 describes the distinction between disputes of rights and disputes of interest in similar terms as the distinction between "the existence of rules and their creation". See also Davis Voluntarism 52-61.

51 Spielmans "Labour Disputes on Rights and on Interests" 1939 American Economic Review 29: 299 300; Thompson De Kock's Industrial Laws of South Africa.

> In contrast to these are disputes over issues not regulated by any law or agreement, but caused by the clash of conflicting economic interests. In a state of functioning trade unionism, in which the employers bargain as a matter of course with the workers' organizations, disputes on interests concern mostly the employment terms to be adopted for new agreements. Where, on the other hand, trade unionism is only struggling to achieve this stage, the bitterest disputes on interests are apt to be those over the principles of unionism itself, that is, over the effective right to organize and to bargain collectively."

The distinction between disputes of interest and disputes of rights is unfortunately not always clear-cut.[52] What Spielmans calls "statute laws of sufficiently uncertain standing" are nothing other than rules that are not clearly defined and which cause discrepancies between rule and fact, which in turn "invite violations and thus furnish issues for disputes".

Aaron[53] explains the lack of clarity of the distinction in colourful terms:

> "However, the line between disputes over rights and conflicts over interests is not always an impregnable wall, rather, it sometimes is more analogous to a semi-permeable membrane, through which disputes that are nominally of one type pass and are handled under procedures usually reserved for disputes of the other type."

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52 Thompson 620J feels that "these concepts are notoriously difficult to separate".

53 Aaron "Settlement of Disputes over Rights" in Blanpain (ed) Comparative Labour Law and Industrial Relations 337.

A good example of the blurring of the line between rights and interests is the widely defined unfair labour practice concept in South Africa. Thompson[54] argues as follows:

> "The question of whether a labour practice is unfair or not depends on an interpretation of the Act and is therefore a question of law. As such, it concerns a dispute of right. This proposition remains technically valid notwithstanding the fact, that in effective terms, the industrial court is creating or building out a new body of substantive standards with virtually every determination that it issues and as such appears to be busy with disputes of interest. The sleight of hand is achieved by courtesy, once again, of the very expansive definition of an unfair labour practice which allows applicants to claim up `rights' which are immanent in that definition. De facto, they are seeking to win rights that, historically, they never enjoyed before. None the less, in administrative law terms, the court is discharging a (quasi-) judicial function, not a legislative one."

With widely defined legal rules like the unfair labour practice a very real danger exists that legal bias

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54 Thompson 620J. Cameron, Cheadle & Thompson The New Labour Relations Act: The Law After the 1988 Amendments 97 agree that whether a labour practice is unfair or not has clearly depended upon an interpretation of the Act and has therefore constituted a question of law. For a similar view, see also Rycroft & Jordaan A Guide to South African Labour Law 129-31. Cockrell "`Fair is Foul and Foul is Fair': The Unfair Labour Practice in South African Law" 1986 Responsa Meridiana 5: 83 101 declares "that the unfair labour practice gives rise to a dispute of interest, not a dispute of right", but admits that "the distinction is often a hazy one". Davis Voluntarism 54 agrees that the distinction is difficult. His solution is that "the ambit of voluntarism must be redefined and restricted to the product of bargaining rather than to the process adopted (in which the State and the law inevitably play a major role)". This is better than Cameron, Cheadle & Thompson's restriction of the role of the law to "collective bargaining" and "employment justice" concerns (100).

will be introduced in the creation of rules (that is, the allocation process itself) through the wide discretion that the presiding officer enjoys.

The parties themselves should determine the allocation of scarce resources, not the law. The law should merely assist procedurally in order to facilitate the rule making process by means of negotiation and should not determine the outcome:

> "The court should stand in the same relationship to the processes of collective bargaining as the Supreme Court stands in relation to administrative acts. Its concern should be how the parties resolve their differences as opposed to what the outcome is or should be."[55]

Therefore, when legal rules are compiled, care should be taken to formulate them clearly so as not to create unnecessary discrepancies between these rules and the facts they are supposed to regulate. Failure to do so opens the door to legal bias in the protection of scarce resources (that is, the application of existing rights).[56]

Nevertheless (and however trite this truth may be), barring simple examples like the one above, there will always be some discrepancy between rule and fact for the simple reason that we are imperfect people living in an imperfect world and we are incapable of knowing exactly what is available and what we need. Even if this were possible,

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55 Cheadle "Strikes" in Brassey, Cameron, Cheadle & Olivier The New Labour Law 259.

56 See Fuller "The Forms and Limits of Adjudication" 1978 Harvard Law Review 92: 353 370 (Fuller Adjudication): "In this connection it is interesting to recall that Langdell once argued that although there are rights at law, there is no such thing as `a right in equity'." See also Kahn-Freund 74: "One wonders whether we do not need a Jeremy Bentham in the world of industrial relations."

people do not possess the means or semantics to articulate absolutely what the position is in fact.

Kahn-Freund,[57] however, overstates the position as far as collective bargaining is concerned. He argues that however much scholars have elucidated the principle of precedent, no-one has ever succeeded in lifting the dark veil which surrounds the relationship between law-finding and law-making in the common law. And just as in the common law the judge is simultaneously rule maker and decision maker, in the dynamic system of collective bargaining the parties ignore the difference between interpreting a rule and making a new one. The common law develops not through deductive syllogisms, but through analogical reasoning from previous fact situations, and similarly new collective rules are made out of existing conflicts by asking "how have we dealt with similar situations in the past?" But, as in the common law, the fluidity of the substantive norm in this method of collective bargaining is balanced by the firmness of the code of procedure.

He continues:

> "The expectation of the parties to know in advance what the decision will be may often remain unprotected, but they can at least rely on the strict observance of rules as to how it will be made. In so far as the predictability of the decision is safeguarded, this is done less through logical processes of reasoning from the general to the particular than through a regulated method of bilateral, that is dialectical argument. For decades British statutes spoke of terms and conditions of

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57 Kahn-Freund 73: "A dispute over an existing agreement is settled internally. Hence, the law and the conceptual baggage of `rights talk' has no place: the law plays almost no role in this area of labour relations." (Quoted in Davis Voluntarism 52.)

> employment established by machinery of negotiation or arbitration, where elsewhere legislation speaks of collective agreements or awards, and this practice still prevails. It is the `machinery' which counts, the procedure, the `remedy', not its product, the agreement, the `code', or the `right'."[58]

Returning to the example given above, Kahn-Freund would have had no difficulty with the fact that the employer immediately after having reached agreement on a 30% wage increase, demanded an increase of 28% as long as the procedure followed was acceptable. However legitimate this way of bargaining may be, it is not effective since at some stage bargaining must stop and the parties must be able to plan ahead with certainty and get on with the production process. Davies & Freedland point out that dynamic bargaining is not necessarily a good thing, because it blurs the distinction between disputes of interest and disputes of rights, and continue:

> "Contrariwise, there seems no reason in principle why a joint, standing body should not adopt a `contractual' model of bargaining, i.e. of periodic meetings to settle all outstanding issues between the parties...."

Davis concludes:

> "[T]he conceptual framework of collective bargaining boils down to the following: the voluntarist model applies only to matters of socio-economic interest. To ascertain what constitutes such an interest, a distinction must be drawn between disputes of right

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58 Kahn-Freund 74.

> and interest. The former deals with issues relating to the process of bargaining, the latter with the product thereof: a neat formula, but one which is difficult to implement."[59]

The fact that the formula is difficult to implement does not make the distinction invalid. To the scope of rights disputes must be added all rights issues, not just procedural disputes of rights such as the duty to bargain in good faith. Further examples include disputes regarding dismissal and termination, discrimination issues, enforcement of substantive agreements and wage regulating measures, enforcement of promulgated industrial council agreements and wage determinations and contraventions of labour legislation in general. In short, rights disputes include all contraventions of existing rights.

Davis continues:

> "My argument concedes that rights are not simply reducible to the available techniques for dealing with their violation. It suggests that the boundary between rights and interests is to be found by examining the socio-economic context in which the search takes place. Within a market economy certain matters cannot be resolved by the courts without undermining the very raison d' être of the economic system.
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> Once this outer boundary is established, the exact areas occupied by rights and interests can be found by using the basic principles contained in the applicable statutes."[60]

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59 Davis Voluntarism 54-5.

60 Davis Voluntarism 66.

It is submitted that for the institutionalization process to be effective, rules must be sufficiently specific and clear to be capable of being enforced, and to be legitimate, rules should be subject to periodic not continuous change. The law should regulate the bargaining procedure effectively but this is not its only task: It should be prepared to enforce the substantive outcome of rule making by agreement for certain fixed periods of time. Although the socio-economic context is an important aid in determining the existence and the content of rights, the law should endeavour to define rights as precisely as possible in the first place. The regulation of the widely defined unfair labour practice in South Africa is a good example of how it should not be done.[61]

According to Spielmans[62] the distinction between disputes of interest and disputes of rights works well in certain countries, such as Finland, Iceland, Austria, Switzerland, Argentina, Chile, Columbia, Peru, Germany, the United States, Sweden, Norway, Venezuela, Denmark and France, and is highly desirable for any institutionalization system to be both legitimate and effective:

> "Not that such arrangements would by themselves bring about eternal peace in industry, but if the adjustment machinery itself were this clearly to

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61 The unfair labour practice in South Africa is discussed in more detail in ch 3 par 6 below. See also Davis's discussion of a number of industrial court cases dealing with the distinction (Davis Voluntarism 55-61). In South Africa, the minority legislature did not have the political will to legislate rights; the vague unfair labour practice definition has empowered a proxy body, the industrial court, to bear this burden. It is now time for the legislature to shoulder the responsibility comprehensively and clearly.

62 Spielmans 305; Blanc-Jouvan "The Settlement of Labour Disputes in France" in Aaron (ed) Labour Courts and Grievance Settlement in Western Europe 8-9; Ramm "Labour Courts and Grievance Settlement in West Germany" in Aaron 93-4; Schmidt "The Settlement of Employment Grievances in Sweden" in Aaron 204; De Givry & Schregle "The Role of Third Parties in the Settlement of Grievances at Plant Level" 1967 International Labour Review 334.

distinguish between rights and interests, new patterns of industrial behaviour might be expected to develop, such as seen already to have formed in the railroad industries. According to these patterns, settlement of disputes on rights would come to be sought, as a matter of course, through quasi-judicial methods, while strikes and lock-outs would be used only as ultimate weapons in the struggle of conflicting interests too vital to the parties concerned to be entrusted to the disinterested decision of outsiders.

All methods of settling disputes would then assume a truly constructive role: adjudication to keep existing agreements operating, and mediation, quasi-legislative arbitration, or well-considered stoppages to arrive at new agreements, would in fact, constitute the static and dynamic principles of emergent industrial law in a comparatively uncoerced, reasonably peaceful society."[63]

Distinctions between individual and collective disputes and procedural and substantive disputes are sometimes made, but these are not important for the purposes of this discussion.[64]

4 SETTLEMENT MECHANISMS

In this section the two primary forms of dispute settlement, namely agreement (through negotiation) and adjudication, are discussed first in order to assess what kinds of dispute settlement functions can be assigned to

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63 Spielmans 312.

64 Both individual and collective disputes and procedural and substantive disputes can be disputes of interest or disputes of rights depending on whether a rule is created or applied; see also Rycroft & Jordaan 129.

them. Thereafter, mention is made of various auxiliary and hybrid forms of dispute resolution in order to gain an idea of their role in the institutionalization process. These are not discussed in detail, but some introductory remarks are necessary in order to promote a proper understanding of the use of power in the institutionalization process. The use of power is elaborated, since the lock-out is a power mechanism. It must be remembered that simply allowing a dispute to die because an aggrieved party does not have the energy or will to pursue it may also bring the dispute to an end. This "lumping" of a dispute is however not a settlement mechanism.

4.1 Adjudication and Negotiation

> "More than 90 percent of all civil cases are settled privately, without full-blown adjudication. Roughly, the same percentages apply to criminal cases. The percentage of `disputes' resolved by mutual agreement or through arbitration or other non-adjudicative dispute resolution processes is even higher if one includes within the relevant field of inquiry, all grievances, claims and disagreements, and not just those that mature into law suits. Thus, numerically, negotiation, mediation, arbitration, and settlement are the normal modes of dispute resolution; adjudication resulting in a binding judicial decision is the uncommon alternative."[65]

Lately, a vast amount of literature has sprung up in the United States detailing the value of alternative dispute resolution processes (ADR)[66] as opposed to the disadvantages of adjudication. This trend is so strong that one wonders whether adjudication as a settlement process is still

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65 Green 245-6.

66 See par 4.2 and end note 3 below.

considered to have any legitimacy. The ADR movement has its critics however. Fiss[67] argues that ADR makes settlement appear to be a perfect substitute for judgment by trivializing the remedial dimensions of a lawsuit, and by reducing the social function of a lawsuit to one of resolving private disputes. When ADR is used, settlement appears to achieve exactly the same purpose as judgment - peace between the parties - but at considerably less expense to society. Two quarrelling neighbours turn to a court in order to resolve their dispute, and society makes courts available because it wants to aid in the achievement of their private ends or to secure the peace.

He continues:

> "In my view, however, the purpose of adjudication should be understood in broader terms. Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle."

It is not possible in a thesis of this nature to discuss all kinds of dispute settlement mechanisms in depth. An attempt is merely made to provide clarity on the

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67 Fiss "Against Settlement" 1984 Yale Law Journal 93: 1073 1085.

differences, advantages and disadvantages of the two primary or final settlement mechanisms, agreement (through negotiation) and adjudication, in order to obtain an indication of which mechanism is best suited to settle a particular kind of dispute. Although an abundance of material is available, reference is made to the works of Eisenberg[68] and Fuller.[69] In the extracts by Green and Fiss quoted above, adjudication is seen as public decision making by the courts which appears to exclude arbitration. The approach adopted in this work is that arbitration is a form of adjudication, although it is referred to as an ADR mechanism.[70] The ultimate purpose of this discussion is to view the lock-out as an auxiliary power mechanism to promote negotiation and agreement on disputes of interest in its proper context vis-à-vis other dispute settlement mechanisms.

4.1.1 **Adjudication**[3] (end note)

Fuller argues that "there are two forms of social ordering: organization by common aims and organization by reciprocity".[71] These forms of ordering represent the two basic ways in which parties may, by coming together, secure an advantage for all participants. The conditions which make the one principle of ordering effective are diametrically opposite to those of the other: "To make organization by reciprocity effective, the participants must want different things: organization by common aims requires that the participants want the same thing or things."[72] A contract

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68 Eisenberg "Private Ordering Through Negotiation: Dispute Settlement and Rulemaking" 1976 Harvard Law Review 89 (4): 637 et seq.

69 Fuller Adjudication 353 et seq.

70 See par 4.2 and end note 3 below.

71 Fuller Adjudication 357.

72 Fuller Adjudication 358.

represents reciprocity in its formal and explicit form and elections are the most familiar formalization of organization by common aims.[73] To demonstrate the proper relationship between adjudication, reciprocity and organization by common aims, Fuller[74] submits the following argument:

> "Adjudication, contract and elections are three ways of reaching decisions of settling disputes of defining men's relations to one another. Now I submit that the characteristic feature of each of these forms of social ordering lies in the manner in which the affected party participates in the decision reached. This may be presented graphically as follows:

Form of social ordering	Mode of Participation by the Affected Party
Contract	Negotiation
Elections	Voting
Adjudication	Presentation of proofs and reasoned arguments"

He then continues to define adjudication as "a device which gives formal institutional expression to the influence of reasoned argument in human affairs"[75] and concludes that "this higher responsibility toward rationality is at once the strength and the weakness of adjudication as a form of social ordering".[76]

Adjudication can only function if participation is conducted in the form of a claim of right (that is, a demand

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73 Fuller Adjudication 363.

74 Fuller Adjudication 363.

75 Fuller Adjudication 366.

76 Fuller Adjudication 367.

supported by a principle) or an accusation of fault. Fuller motivates this point as follows:

> "(1) Adjudication is a process of decision that grants to the affected party a form of participation that consists in the opportunity to present proofs and reasoned arguments. (2) The litigant must therefore, if his participation is to be meaningful, assert some principle or principles by which his arguments are sound and his proofs relevant. (3) A naked demand is distinguished from a claim of right by the fact that the latter is a demand supported by a principle; likewise, a mere expression of displeasure or resentment is distinguished from an accusation by the fact that the latter rests upon some principle. Hence, (4) issues tried before an adjudicator tend to become claims of right or accusations of fault.
>
> We may see this process of conversion in the case of an employee who desires an increase in pay. If he asks his boss for a raise, he may, of course, claim `a right' to the raise. He may argue the fairness of the principle of equal treatment and call attention to the fact that Joe, who is no better than he, recently got a raise. But he does not have to rest his plea on any ground of this sort. He may merely beg for generosity, urging the needs of his family. Or he may propose an exchange, offering to take on extra duties if he gets the raise. If, however, he takes his case to an arbitrator he cannot, explicitly at least, support his case by an appeal to charity or by proposing a bargain. He will have to support his demand by a principle of some kind, and a demand supported by principle is the same thing as a claim of right. So, when he asks his boss

> for a raise, he may or may not make a claim of right; when he represents his demand to an arbitrator he must make a claim of right."[77]

Adjudication therefore has to meet a test of rationality or of principle that is not applied to contracts and elections,[78] and "is not a proper form of social ordering where the effectiveness of human association would be destroyed if it were organized about formally defined rights and wrongs". Using the example of a wage demand in paragraph 2 above, adjudication would be an ineffective mechanism to bridge the gap between the 40% wage increase demand and the 20% wage increase offer since it cannot be said which interest is right and which is wrong.[79]

Fuller then investigates where the parties and the adjudication get their respective "reasons" from[80] and asks: "Which comes first, courts or rules?"[81] This fundamental question does not need to be addressed here, since, for the proper structuring of mechanisms for the creation and enforcement of rules in the institutionalization process, it will be argued that negotiation is the best way to create rules and that adjudication should as a matter of proper structuring only come into the picture once rules have been created and need to be enforced.

Difficulties may, however, arise with principles like the widely defined unfair labour practice concept because,

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77 Fuller Adjudication 369.

78 Fuller Adjudication 370.

79 "[C]ertain kinds of human relations are not appropriate raw material for a process of decision that is institutionally committed to acting on the basis of reasoned argument." (Fuller Adjudication 371.)

80 Fuller Adjudication 372-81.

81 Fuller Adjudication 372.

although there are rights at law, there is no such thing as "a right in equity".[82]

To rely on adjudication without a properly defined rule is to substitute critical judgment for "a naive trust in good intentions"[83] and to "forget that you cannot be fair in a moral and legal vacuum".[84] Such reliance "ignores the fact that adjudication cannot function without some standard of decision, either imposed by superior authority or willingly accepted by the disputants. Without some standard of decision, this requirement that the judge be impartial becomes meaningless. Similarly, without such a standard, the litigant's participation through reasoned argument loses its meaning. Communication and persuasion presuppose some shared context of principle".[85]

To demand of a court simply to resolve issues "fairly" without recourse to established principles "is to ask the court to decide something about which the parties themselves could not agree and for the determination of which no standard exists".[86]

The next question to address is: "what kinds of tasks are inherently unsuited to adjudication?"[87] In other words, what are the issues or the kinds of disputes that should not be submitted to adjudication?

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82 Langdell, quoted by Fuller Adjudication 370.

83 Fuller Adjudication 372.

84 Fuller Adjudication 372-3.

85 Fuller Adjudication 373.

86 Fuller Adjudication 373.

87 Fuller Adjudication 393. See also the discussion in par 4.1.2 below.

Fuller describes such issues as "polycentric",[88] that is, issues that are many centred akin to the "movement of a spider web",[89] where "there would be no clear issue to which either side could direct its proof and contentions".[90] Fuller concludes:

> "Generally speaking, it may be said that problems in the allocation of economic resources present too strong a polycentric aspect to be suitable for adjudication."[91]

Where adjudication is used to solve polycentric problems, a number of things may happen.[92] Firstly, the adjudicative solution may fail because unexpected repercussions may make the solution unworkable. Secondly, the proposed adjudicator may require judicial principles that do not exist and try out solutions, consult parties not represented at the hearings and guess at facts. Third, he may instead of adapting his procedures to the nature of the problem, reformulate the problem so as to make it amenable to adjudication.

Fuller concludes, however, that polycentricity is a matter of degree and that "there are polycentric elements in

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88 Fuller Adjudication 394. See also Davis Voluntarism 66 who describes "a `polycentric task', which cannot be resolved on the simple basis of whether there is a right and a corresponding duty to receive and pay an exact wage". The prefix "poly-" denotes "many or much" and "-centric" when used to form an adjective means "having a centre" (The Concise Oxford Dictionary). "Polycentric" therefore literally means having many centres and would when used as an adjective to a dispute (of issues) suggest a dispute that is not simple and clear but one which depends on many variables for its resolution.

89 Fuller Adjudication 395.

90 Fuller Adjudication 394.

91 Fuller Adjudication 400.

92 Fuller Adjudication 401.

almost all problems submitted to adjudication".[93] When a problem becomes too polycentric, the best way to tackle it would be by way of managerial direction and contract (the latter mechanism being based on reciprocity).[94]

Finally, Fuller discusses a number of "mixed parasitic and perverted forms"[95] of social ordering involving adjudication. These may be handy hybrids to employ depending on the nature of the dispute in the settlement process.[96]

Adjudication, in conclusion, is a mechanism which depends for its effective functioning on reasoned argument by reference to principle in dispute situations where principles (or rules) are clear and not multifaceted. It is best suited for the settlement of disputes of rights.[97]

4.1.2 **Negotiation**[98]

> "Although negotiation is commonly taken to be a unified process, it consists in fact of two very different strands, found both alone and in combination. One strand is, like adjudication, directed toward settling disputes arising out of past events. I shall refer to this strand as dispute-negotiation. The other strand is, like

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93 Fuller Adjudication 397. This is the same as saying that there will always be a discrepancy between a legal rule and the facts it purports to regulate. See ch 1 par 1.2.1 particularly n 35 above and ch 3 par 3.2.3 below.

94 Fuller Adjudication 398.

95 Fuller Adjudication 405-9.

96 Some of the forms are briefly referred to in par 4.2 below.

97 See the discussion on disputes of interest and disputes of rights in par 3 above.

98 See also endnote 8 for material on bargaining.

> legislation, directed toward establishing rules to govern future conduct, as through contracts, treaties, and protocols. I shall refer to this strand as rule making-negotiation."[99]

Negotiation can be utilized to apply rules and to create rules, in other words for the settlement of disputes of rights and disputes of interest.[100] In what follows, the discussion is therefore subdivided into dispute negotiation (involving the application of rules) and rule making negotiation (involving the creation of rules) in order to distinguish negotiation from adjudication as a process and to determine the subject-matters for which these mechanisms are suitable. This discussion, especially the part on rule making negotiation, also clarifies the proper use of industrial power (that is, of the parties themselves) in the institutionalization process.

4.1.2.1 **Dispute Negotiation**[101]

> "Adjudication is conventionally perceived as a norm-bound process centred on the establishment of facts and the determination and application of principles, rules and precedents. Negotiation, on the other hand, is conventionally perceived as a relatively norm-free process centred on the transmutation of underlying bargaining strength into agreement by the exercise of power, horse-trading, threat, and bluff."[102]

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99 Eisenberg 638.

100 See par 3 above.

101 See in general Eisenberg 638-65.

102 Eisenberg 638. See also the discussion on adjudication in par 4.1.1 above.

This conventional distinction between adjudication and negotiation is generally correct, but it is also true that negotiation like adjudication consists largely of the invocation, elaboration, and distinction of principles, rules and precedents and that the outcome of negotiation is to a large extent determined by what the parties invoke regarding principles, rules and precedents.[103] Eisenberg also correctly argues that settlements reached through negotiation have a precedential effect and that the fact that they have such an effect is taken into account by the parties when they negotiate.[104]

Dispute negotiation therefore has a lot in common with adjudication as far as adherence to principle and the precedential effect of a settlement are concerned, but negotiation, unlike adjudication, it is conventionally argued, involves a compromise of principle. Eisenberg explains the fallacy in this by reference to conflicting, colliding and person-orientated norms: Firstly, norms may be said to conflict when they are mutually inconsistent across the entire spectrum of their applicability. For example, the doctrine of contributory negligence is inconsistent with the doctrine of comparative negligence. Typically, when two norms conflict one becomes dominant, in the sense that it is generally accepted as being the "better" or "valid" norm. The other norm, while subordinate, may, however, be given some degree of continued recognition.

Secondly, norms may be said to collide where each has a sphere of action within which it is admittedly valid, but they point in opposite directions in cases in which their respective spheres of applicability intersect. For example, in a number of recent cases involving suits for damages

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103 Eisenberg 639 649-50.

104 Eisenberg 653.

against the media, the principle of the right to privacy has pointed to a verdict for the plaintiff, while the principle of freedom of speech has pointed to a verdict for the defendant.

Thirdly, norms may be said to be person - rather than act -orientated where their applicability depends on the personal characteristics of the disputants rather than on the nature of their acts. For example, in a society that does not recognize testamentary disposition, the norm that "sons inherit" is act orientated; its applicability does not usually depend on the personal characteristics of a particular father and son. In contrast, a norm such as "brothers should help each other" may be described as person orientated, because, despite its apparent generality, its application depends almost entirely on the personal characteristics of the individual parties - a wealthy brother should not seek economic help from a poor one; an unkind brother may well be entitled to no help at all.[105]

In adjudication the universe and generation of norms are highly stylized and tightly controlled. Where norms conflict, a court will treat one norm as not only subordinate, but totally invalid. Where norms collide, a court will characteristically select one as determinative of the outcome of the case and reject the other as inapplicable. Person orientated norms are generally treated as invalid or irrelevant by the courts.[106]

In contrast, the universe and generation of norms in dispute negotiation are typically open-ended in that each

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105 Eisenberg 643-4.

106 Eisenberg 644.

norm is accorded its relative applicability and weight.[107] Eisenberg therefore concludes:

> "Because adjudication is often regarded as the paradigm of principled decisionmaking, disputes-settlement processes in which the universe and operation of norms differ sharply from adjudication are often perceived as not turning heavily on principle for that reason alone. But whether a process turns heavily on principle depends on the extent to which principles determine the outcome, not on the nature of the principles nor the precise manner in which they determine the outcome."[108]

Negotiation, like adjudication, revolves to a large extent around principles, but treats them differently. What then are the differences between dispute negotiation and adjudication and how should these two processes be regulated by the law within an institutionalization structure?

The "discontinuities", as Eisenberg puts it, between dispute negotiation and adjudication "cluster around two deep cleavages: the graduated character of dispute-negotiation as against the binary character of adjudication, and the intimacy of dispute-negotiation as against the role of the stranger in adjudication".[109] "Graduated character" means that, when reaching and rationalizing outcomes, any given norm or factual position can be taken into account according

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107 Eisenberg 644.

108 Eisenberg 645.

109 Eisenberg 654."Binary" means "dual", "of or involving pairs" or "something having two parts" (The Concise Oxford Dictionary). In the context used here, it means two variables only, that is, either right or wrong.

to the degree of its authoritativeness and applicability or probability respectively.[110]

In adjudication, on the other hand, when reaching and rationalizing outcomes, "any given proposition of fact is normally found to be either true or false, colliding norms are generally treated as if only the more compelling norm were applicable, conflicting norms are generally treated as if only the dominant norm were applicable, and each disputant is generally determined to be either `right' or `wrong'".[111]

The impact of the stranger in adjudication makes itself felt across every element of the two processes: the selection and application of norms, the determination of facts, the choice of remedy and the emotional effect of participation.[112]

As far as the selection of norms[113] is concerned, a stranger is more inclined to invoke act orientated rather than person orientated norms and is likely to treat as irrelevant some of the principles which the parties themselves consider to be relevant. Consequently, the adjudicator may make up his mind with less than the sum total of potentially applicable principles, and adjudication may therefore be a less principled process than dispute negotiation.

When determining the facts,[114] what can be quickly agreed to in dispute negotiation, must be laboriously

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110 Eisenberg 654.

111 Eisenberg 654.

112 Eisenberg 655.

113 Eisenberg 655-7.

114 Eisenberg 657-8.

reconstructed to the stranger's satisfaction. Because he has to reach a decision, it is possible for the adjudicator to make a finding in a situation where he may be genuinely undecided. Fact determination in adjudication may be less efficient and less reliable than in dispute negotiation.

The choice of remedy[115] is restricted for the adjudicator since he is not equipped to decide on person-orientated remedies, such as apologies, handshakes and invitations. Furthermore, remedies that are not logically connected to the process are not available to him.

Lastly, participation in adjudication has a detrimental emotional effect[116] on the participants. They feel that they are not in control, but that they are judged by a stranger. In negotiation, both parties share control and decide together. Pursuant to adjudication, one party is found to be "right" and the other "wrong". This generates tension and may drive the parties irreconcilably apart, whatever the outcome of the adjudication.

Eisenberg also points out that apart from the discontinuities discussed above, there are important economic differences between the two processes:

> "Adjudication normally involves heavier transaction costs, in terms of both time and money, than dispute-negotiation. Moreover, because of the binary nature of traditional adjudication the most unfavourable outcome each disputant may incur is usually worse than the most unfavourable outcome he may incur in negotiation. All other things being equal, application of the minimax principle (that

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115 Eisenberg 658.

116 Eisenberg 658-660.

> each party to a contest will choose a strategy minimizing the other party's maximum possible gain, and maximizing his own minimum possible gain) will give rise to a preference for a nonbinary process."[117]

Yet there may be cases where adjudication may be preferred, for example where an authoritative declaration of right and wrong is desired or where a disputant is interested in establishing a principle.[118] The latter consideration is important, because ultimately adjudication is responsible for the authoritative declaration of what the law is in a particular society. A society without authoritative laws will, moreover, not be able to accommodate dispute negotiation effectively.

From the above discussion it appears that dispute negotiation holds distinct advantages over adjudication and that it is desirable that negotiation concerning disputes of rights be allowed before such disputes are referred to adjudication. Adjudication as a mechanism is however essential as an authoritative declarator of principle in the final event if the parties desire it.[119]

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117 Eisenberg 660 and n 63. See also in general the discussion in par 4.1.1 above.

118 Eisenberg 660. See also in general the discussion in par 4.1.1 above.

119 Eisenberg 660-5 also discusses the use of affiliates and argues that such affiliates can serve two major types of functions: Firstly, they can facilitate the negotiation process, by relieving the respondent of the embarrassment of admitting fault or by representing a disputant who has a distaste or a disability for negotiating personally. Secondly, they can introduce an adjudicative element into dispute negotiation. A good example of this Janus-like role, where each affiliate faces "the other as an advocate of his principal, and facing his principal as an advocate of that which is reasonable in the other's position", is pre-trial settlement negotiations (Eisenberg 664).

4.1.2.2 **Rule Making Negotiation**[120]

Rule making negotiation "is negotiation to establish rules to govern future conduct".[121] Examples are collective bargaining, international treaty making, negotiation of commercial contracts and negotiation among legislators.

Eisenberg summarizes his theory about rule making negotiation as follows:

> "The critical variable in rulemaking-negotiation is the existence or non-existence of dependence between the negotiating parties. Under conditions of nondependence (as in the negotiation of commercial contracts by previously unrelated parties) basic terms are shaped almost entirely by bargaining power and appeals to self-interest, while subsidiary terms are shaped to a large extent by reasoned elaboration and the invocation of precedent. Under conditions of dependence (as in collective bargaining) most terms are shaped by both bargaining power and norms."[122]

Rule making negotiation between non-dependent parties does not revolve around principles, instead, each party tries to convince the other that his own minimum disposition is close to the point professed and that the other's interests

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120 Eisenberg 665-80.

121 Eisenberg 665.

122 Eisenberg 665. See also Emerson "Power-dependence Relations" 1962 American Sociological Review 27: 31. He states (32) the following: "[P]ower is a property of the social relation; it is not an attribute of the actor." He continues: "Social relations commonly entail ties of mutual dependence between the parties. A depends upon B if he aspires to goals or gratifications whose achievement is facilitated by appropriate actions on B's part. By virtue of mutual dependency, it is more or less imperative to each party that he be able to control or influence the other's conduct. At the same time, these ties of mutual dependence imply that each party is in a position, to some degree, to grant or deny, facilitate or hinder, the other's gratification." He concludes: "In short, power resides implicitly in the other's dependency." See the also discussion in par 5 below.

would be served by a disposition at that point. Apart from persuasion it also proceeds by a series of reciprocal concessions by each party (which should be timed well in order not to give rise to unnecessary expectations) and rhetoric ("a technique for putting out non-binding clues indicating the settlement-point he actually deems acceptable").[123]

Rule making negotiation in the context of dependence does not allow a party to satisfy its objectives by turning to a third party depending on the level of dependence:

> "The dependence may be mutual and evenly balanced, mutual but uneven, or unilateral. As the differential in dependence increases so does the bargaining power of the less dependent party, since it is easier for him than for the more dependent party to satisfy elsewhere those needs that otherwise fall within the ambit of the relationship."[124]

Dependence influences the willingness to negotiate as well as the elements of negotiation. In a union-management relationship, management may for example be so powerful that it does not want to negotiate at all because of the availability of alternative labour on the market.[125]

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123 Eisenberg 668.

124 Eisenberg 672.

125 It is in this area that the law has an auxiliary function to fulfil in order to regulate dependence (power) by allowing power formation, utilization and implementation through giving full recognition to collective rights, freedom of association, collective bargaining and industrial action as well as by securing the bargaining context by protecting security of employment in dismissal and termination situations. See also par 5.3 below and ch 3 par 6 below.

Eisenberg sketches rulemaking negotiation in mutually interdependent, longer term relationships, such as those between union and management, along the following lines:

> "Rulemaking-negotiation between actors involved in a heavily and mutually interdependent long-term relationship - for example, union-management, partnership, marriage, or wartime alliance - normally centres on proposals for readjustments in the terms of the relationship. While often founded largely on bargaining power, such negotiation is also likely to involve a strong claim-of-right element. This normative or claim-of-right element may be involved because the proposal for readjustment arises out of a past dispute that remains unsettled or was settled in a manner that one party regards as unsatisfactory. More fundamentally, since the actors are locked into a relationship with one another, and typically cannot deal with third parties to satisfy those needs that fall within the ambit of the relationship, each may believe himself <u>entitled</u> to those changes in the terms of the relationship that are required to keep it fair in light of changing circumstances. Finally, since each actor can punish as well as reward, and since the prosperity of each depends on the other's continued viability, getting one's way through the use of bargaining power, unalloyed by persuasion based on either norms or appeals to the other actor's self-interest, may be highly inadvisable.
>
> While the claim-of-right element is likely to be strongest in those relations that are defined in terms of joint interest, trust, and confidence (such as partnerships), it is also present in heavily interdependent relationships that are defined in

adversarial terms. For example, in negotiating a new collective bargaining agreement, union negotiators will support a wage demand not simply by stressing that failure to satisfy the demand will precipitate a strike, but also by arguing that the proposed new wage is fair, based on principles (real wages should not go down; gains from increased productivity should be shared between capital and labour in an equitable manner) and precedents (comparable wages in the company's other plants, in the industry, in the area). Management, on its part, will respond in like terms.

The question arises whether such argumentation is real or specious. The answer is, it is both. Because such negotiation has a significant dispute element, the actors genuinely believe that norms are relevant. Because it has a significant rule making element, the actors also genuinely believe that it is proper to bring bargaining power to bear."[126]

The principles and precedents referred to above are not legal principles and precedents in the sense that they are supported by the power of the state. They are not existing rights but merely arguments in favour of a desired position.

Eisenberg's approach is essentially pluralistic[127] in that it assumes equality of bargaining power, reasonable demands and satisfaction with the bargaining context. In a

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126 Eisenberg 676-7.

127 For a discussion on pluralism see ch 1 par 1.1.2 above. See also par 5.1 below.

more radical context, conflict and the use of power to promote interests may increase dramatically.[128]

Dependency or power is a critical factor in rule making negotiation because it supports the desired position. The law should endeavour to regulate power in such a way that the negotiation process is efficient and its outcome is, as far as possible, acceptable to both management and workers and to the public. In other words, the law should permit the formation, utilization and implementation of power aimed at the creation of rules (the allocation of scarce resources). Implementation should only be allowed as a last resort so as not to disrupt the production process unnecessarily. The lock-out as a form of implementation of management power is therefore an effective means of promoting managerial interests, but the law should only allow it to be utilized when all else has failed.[129]

4.1.3 **Conclusion**

From the discussion of adjudication and negotiation (towards agreement) it is clear that these are the only two final settlement mechanisms and that, of the two, negotiation is more acceptable and effective. It is necessary, however, that adjudication should be available if the parties desire to make use of it and as the authoritative formulator and protector of the principles governing society. Before deciding which of the two mechanisms should be used in a particular dispute situation, it is of the utmost importance to analyse the nature of the dispute. Disputes of rights may be settled by adjudication but disputes of interest should

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128 For a discussion on the radical approach to industrial relations, see ch 1 par 1.1.3 above.

129 The use of power in dispute situations is discussed in par 5 below and the lock-out specifically in ch 5 below. How the law regulates power is discussed in par 5.2 below. See also ch 3 par 6 below.

be settled by negotiation. A negotiated settlement is also desirable in dispute of rights situations as long as the option of adjudication is available. Power should only be used as a last resort in the settlement of disputes of interest.

Voluntary combinations of those processes can be used or even created by the parties depending on the nature and complexity of their dispute. A few comments are made on alternative dispute settlement in the following paragraph in order to show the creative role that negotiation and agreement can play in the settlement of disputes thus avoiding the need for the parties to resort to either formal adjudication or the iplementation of industrial power.

4.2 **Alternative Dispute Resolution (ADR)**[4] (end note)

All dispute resolution processes, other than negotiation, operate to break negotiation impasse situations in which the parties, at least temporarily, have concluded that further direct discussions will not lead to an agreement settling the dispute:

> "Direct negotiation between disputing parties and final in-court adjudication are the polar extremes of a continuum of possible disputes resolution processes. The processes on that continuum can be categorized, among other things, by their degree of coerciveness, that is, whether they are non-binding or binding; and if non-binding, the extent to which the parties are otherwise subject to the influence or persuasion of a third party."[130]

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130 Marks, Johnson & Szanton Dispute Resolution in America: Processes in Evolution 39.

Parties may, for example, be brought to a court against their will and be bound by its decision. Usually all parties must agree to submit their disputes to binding arbitration, whereas the mediation procedure is informal and voluntary allowing the parties to withdraw at any stage. It is clear that adjudication is the most coercive settlement mechanism and voluntary negotiation is the most voluntary.[131] It is desirable that the law should allow dispute settlement mechanisms to operate in such a way that the non-coercive mechanisms, like negotiation, be exhausted before recourse is had to adjudication (in cases of disputes of rights) or the implementation of bargaining power (disputes of interest). With regard to the latter form of coercion, it is important to note that the parties themselves are allowed to coerce agreement whereas with adjudication a third party makes a binding decision enforceable by the law. ADR is not concerned with the implementation of own power (that is, strikes and lock-outs) and therefore the use of power in the settlement process is discussed separately.[132]

Marks, Johnson & Szanton[5] (end note) divide ADR mechanisms broadly into non-binding third-party techniques and binding third-party techniques. In labour relations, mediation is a good example of non-binding third-party intervention, and arbitration an example of binding third-party intervention.[133]

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131 Marks, Johnson & Szanton 11-12 39-40.

132 See par 5 below where it is argued that own power supports negotiation and legal power adjudication.

133 For more detail on third-party intervention, see inter alia,De Givry & Schregle 333; McGillicuddy, Welton & Pruitt "Third Party Intervention: A Field Experiment Comparing 3 Different Models" 1987 Journal of Personality and Social Psychology 33: 104; Murray "Third Party Intervention: Successful Entry for the Uninvited" 1984 Albany Law Review 48: 573; Van der Merwe "Using Third Party Intervention to Regulate Industrial Conflict" 1985 South African Journal of Labour Relations 9 (4): 4; Young "Intermediaries: Additional Thoughts on Third Parties" 1972 Journal of Conflict Resolution 16: 51.

Quite a number of hybrid mechanisms incorporating elements of negotiation, mediation, arbitration, adjudication (in courts) and fact finding have already developed which show characteristics of coercion and non-coercion in varying degrees depending on whether aspects of adjudication or negotiation predominate.[134] These hybrid forms can however not be discussed in detail. Suffice it to know for the purpose of this thesis, that most of these hybrid forms are dependent for their operation on the consensus of the parties, especially those forms containing strong elements of negotiation, and that for all practical purposes it is only in formal adjudication (and arbitration in essential services) that the parties can be taken to adjudication against their will.[135] A duty to bargain (and to bargain in good faith) exists in some systems of industrial relations, but in a voluntarist system, bargaining should not be unnecessarily interfered with by the law - it should be determined by power - or else the danger exists of introducing legal bias into the allocation process.[136]

In what follows a brief overview of the underlying reasons for the ADR movement as well as some of its manifestations will be given.[137]

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134 See the examples referred to in the discussion below.

135 Fiss 1073; McMillan & Siegel "Creating a Fast Track Alternative Under Federal Rules of Civil Procedure" 1985 Notre Dame Law Review 60: 431; Fleming "Reflections on the ADR Movement" 1986 Cleveland State Law Review 34: 519 528. Court annexed ADR is as part of the adjudication process and therefore not voluntary. Brunet "Questioning the Quality of Alternative Dispute Resolution" 1987 Tulane Law Review 62 (1): 10.

136 The danger of legal bias means the danger involved in submitting a widely defined legal rule (such as the unfair labour practice concept) with its strong polycentric characteristics, to adjudication where the adjudicator has no principles to follow and therefore has no curb on his discretion. See n 116 above and also the discussion in ch 3 par 6 below.

137 For reference material on the ADR movement in general, see end note 4 below.

> "Ideally, all conflicts should be resolved by agreements formulated in negotiation, assisted if necessary by mediation. Next best is voluntary arbitration, conducted under terms of submission, and negotiated and jointly accepted by the parties to the dispute. Litigation belongs at the bottom of the list because it exacerbates antagonisms and produces wins and losses in place of solutions."[138]

ADR, like other social movements, draws much of its vitality from the forces it challenges. It is invigorated by a variety of criticisms most of which focus on the legal profession and the courts. It criticizes the fact that lawyers aggravate and sometimes create conflict by their zeal for combat. It propagates a return to a simpler and more reasonable type of justice - a disengagement from the formalities and dysfunctions of the adversarial process in exchange for a dispute settling process that is more personal and comprehensible.[139]

Some of the more important criticisms of adjudication are the following:[140]

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138 Kahn "The Outlook for Dispute Resolution in the United States" 1987 Pepperdine Law Review 14: 791.

139 Adler "Is ADR a Social Movement?" 1987 Negotiation Journal 59 61; Levin & Golash "Alternative Dispute Resolution in Federal District Courts" 1985 University of Florida Law Review 37: 29; Fleming 528 warns however: "ADR is not a substitute for the courts, nor should it be. ADR is not even a single idea applicable to all kinds of solutions. At its best, it is a congeries of ideas for encouraging disputants to play a greater role in settling their own differences for providing greater flexibility in processing their own claims and for doing so in less complex, less costly, and less time-consuming manner." See also Sander "Alternative Methods of Dispute Resolution: An Overview" 1985 University of Florida Law Review 37 (1): 1. Fiss 1073 et seq argues that ADR can and should never replace formal adjudication in the courts since adjudication as authoritative interpreter of societal values cannot be replaced: "To be against settlement is only to suggest that when the parties settle, society gets less than what appears, and for a price it does not know it is paying" (1085).

140 See in general Marks, Johnson & Szanton 9-12. See also the discussion in par 4.1 above and the authority quoted there.

(a) Court-based litigation can be very costly.

(b) It very often involves unnecessary delays.

(c) It can be unfair in that the outcome favours experienced and wealthy litigants.

(d) It is inadequate because remedies deal only with the consequences of disputes not their causes.

(e) Adjudication furthermore presupposes that a standard of decision exists which may be applied to conflict. This is not always the case, and the danger exists that legal bias may be infused into the dispute settling process.[141]

(f) The process is characterized by a "winner takes all" outcome which is not conducive to lasting settlements especially in disputes of interest.[142]

(g) Adjudication is wedded to consistency and precedent in its search for general rules which are applicable to entire classes of cases. Justice in particular cases may therefore suffer in the interest of legal certainty. Because of its fixation with principle, adjudication is therefore not a flexible, creative process for the settlement of new situations, especially those arising from rapid social change.

(h) Adjudication adheres to strict procedural rules and therefore judges, in order to make effective decisions, are dependent on the parties and their representatives. As a result "adjudication is a highly specialized

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141 Howard "Adjudication Considered as a Process of Conflict Resolution: A Variation of Separation of Powers" 1969 Journal of Public Law 348.

142 Howard 348; Lieberman & Henry "Lessons from the Alternative Dispute Resolution Movement" 1986 University of Chicago Law Review 53: 424.

> type of third party decision making which may be applied to a relatively narrow range of social conflicts".[143]

One of the most important limitations of adjudication, especially in disputes of interests, is the fact that a stranger is introduced into the disputing process. The participation of the stranger necessitates the laborious reconstruction of facts, and rules of evidence may exclude certain relevant facts with the result that the adjudicator never really becomes part of the actual world of the disputants. He is furthermore under an obligation to decide and may therefore do so without taking cognizance of all the relevant facts. The disputants themselves are not in control of the process but have to submit to a stranger and, instead of getting closer together and settling their dispute, they may be driven apart forever.[144]

Adjudication is not designed as a rule making process and is therefore unsuitable for disputes of interest. To a certain extent, all applications of rules (that is, dispute of rights solutions) involve the making of new law because there is always a discrepancy between principle and fact, but the clearer the principle and the less complicated the facts, the more effective adjudication will be. However, the more vague the principle and the more complicated the facts, the more ineffective adjudication becomes, and the danger of introducing bias into the disputing process increases. Adjudication in the latter instance may in fact become a legislative process instead of a process where rights are applied. Parliament and not judges are best placed to

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143 Howard 359 365 369. See also the discussion in par 4.1.1 above.

144 Howard. See the discussion of the theory of Eisenberg in par 4.2.1 above.

formulate acceptable legal rules purely on the basis of policy.[145]

Proponents of ADR[146] believe that the settlement results achieved through alternative mechanisms are often superior to those reached through adjudication, because, unlike adjudication, they are not bound by zero-sum parameters; participants in ADR can go beyond the legal definition of the scope of their dispute and can employ creative solutions to the problems that gave rise to their dispute.

In matters involving complex institutions like large companies negotiations conducted by executives are likely to yield superior results to those conducted by lawyers because the executives are far more familiar with the nuances of their business than their lawyers. They can respond quickly and creatively to proposals raised by their counterparts without having to take further instructions or to refresh their memories from time to time. Moreover, direct involvement of the client minimizes difficulties arising from the self-interest of lawyers.

ADR techniques, while not necessarily involving adjudication methods, can be more systematic than the rudimentary characteristics of conventional settlement

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145 See n 107 above. See also Reichman & Mureinik "Unfair Labour Practices" 1980 Industrial Law Journal (SA) 1: 1 with regard to the industrial court and the widely defined unfair labour practice concept. See also the discussion in ch 3 par 6 below.

146 For example Lieberman & Henry 429-31. With regard to the use of expert private neutrals referred to below "Rent-a-judge" procedures have become quite popular in America: see inter alia Coulson "Private Settlement for the Public Good" 1982 Judicature 66: 7; Glantz "Analysis of the First Amendment Challenge to Rent-a-Judge Proceedings" 1987 Pepperdine Law Review 14: 989; Gnaizda "Secret Justice for the Privileged Few" 1982 Judicature 66: 6; Katz "The Judicial Gold Rush" 1988 California Lawyer 8: 10; "Note: The California Rent-a-Judge Experiment: Constitutional and Policy Consideration of Pay-as-you-go Courts" 1981 Harvard Law Review 94: 1592; Thompson "Rented Justice" 1988 California Lawyer 42; Vangel "Private Judging in California: Ethical Concerns and Constitutional Considerations" 1988 New England Law Review 23: 363.

negotiations. The use of properly designed ADR processes increases the chances that settlement decisions will be based on the merits of the disputes.

Finally, ADR is conducive to better outcomes because parties can submit their disputes to private third parties selected for their proficiency, who possess greater expertise in their particular subjects than coincidence in the courtroom may afford.

Strategies[147] required to achieve a reduction in the workload of the courts, limitations to court access, the costs of litigation and to achieve the superior results enumerated above, include changes to -

(a) the process of dispute resolution;
(b) the dispute resolvers;
(c) the rules of decision making; and
(d) the responsibilities of the parties.

Dispute resolution initiatives, implementing a combination of these strategies, can be viewed as falling into several "families":[148]

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147 Marks, Johnson & Szanton 10-11.

148 Marks, Johnson & Szanton 11. With regard to the adjustment of the adjudication process, see inter alia the following material on "managerial judging" and "pre-trial" procedures: Elliot "Managerial Judging and the Evolution of Procedure" 1986 University of Chicago Law Review,53: 306; Enslin: "Should Judges Manage Their Own Caseloads?" 1987 Judicature 70: 200; Flanders "Blind Umpires - A Response to Professor Resnick" 1984 Hastings Law Journal 35: 505; McGovern "Towards a Functional Approach for Managing Complex Litigation" 1986 University of Chicago Law Review 53: 440; Peckham "Judicial Response to the Costs of Litigation: Case Management, Two Stage Discovery Planning and Alternative Dispute Resolution" 1985 Rutgers Law Review 35: 235; Peckham "The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition" 1981 California Law Review 69: 770; Rude & Wall "Judicial Involvement in Settlement: How Judges and Lawyers View it" 1988 Judicature 72: 175; Anderson "The Self-executing Pre-trial Conference: An Exceptional Tool for Handling Small Law Suits" 1987 Judicature 71: 55; Kleiman "A Step Forward: Tulsa Pre-court Hearing Program" 1986 Judicature 70: 170.

(a) Court reform through which the adjudication process itself is adjusted, for example, by management improvements, procedural limitations, diversion of certain matters from courts, changes in early in-court handling of disputes and in-court settlement facilitation.

(b) Forums and procedures independent from the courts, such as arbitration, mediation, internal dispute handling mechanisms in institutions and businesses, and private resolution and counselling services.

(c) Systematic changes affecting the handling of large classes of disputes through delegalization, regulatory innovations and low cost access to legal services.

To conclude,[149] ADR in its narrowest sense -

"can be defined and explained as an evolving toolbox of techniques that are used toward other ends, most often but not always, dispute settlement. Most contemporary inventories of ADR begin with the core processes of arbitration,[6(end note)] mediation,[7(end note)] and factfinding.[150] A fuller but still incomplete inventory of ADR methods would include (in no particular priority): factfinders without recommending authority; voluntary mediation;

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149 Quotation from Adler 59-60.

150 Facts are the most important ingredients in any dispute settlement process - they provide a common base or point of departure for both the creation as well as the application of rules. Fact finding is not a final settlement mechanism, but it can be used to facilitate (in many forms) both the settlement of disputes of interest and disputes of rights whether by means of negotiation or adjudication.

mandated mediation; therapeutic mediation; Med-Arb;[151] contractual, final offer,[152] and court-ordered[153] arbitration; mini-[154] and summary jury trials;[155] negotiated investment strategies; policy

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151 Med-arb is a process whereby a third party is asked to mediate between disputants and to make a decision on their behalf if they do not reach agreement.

152 See inter alia Adams "Final Offer Arbitration: Time for Serious Consideration by the Courts" 1987 Nebraska Law Review 66: 213; Bazerman & Farber "Arbitrator Decision Making - When Are Final Offers Important?" 1975 Industrial and Labour Relations Review 39[152] (1): 76; Farber "An Analysis of Final-Offer Arbitration" 1980 Journal of Conflict Resolution 5: 683; Feuille "Final Offer Arbitration and Negotiating Incentives" 1977 Arbitration Journal 32: 203; Long & Feuille "Final Offer Arbitration: `Sudden Death in Eugene'" 1974 Industrial and Labour Relations Review 186: 27; Nelson "Final Offer Arbitration: Some Problems" 1975 Arbitration Journal 30: 50; Singh "Final Offer Arbitration in Theory and Practice" 1986 Industrial Relations Journal (UK) 17: 329; Starke & Notz "Pre and Post War Intervention Effects of Conventional vs Final Offer Arbitration" 1981 Academy of Management Journal 24 (4): 832; Whitney "Final Offer Arbitration: The Indianapolis Experience" 1973 Monthly Labour Review 96: 20; Wood "Last Offer Arbitration" 1985 British Journal of Industrial Relations 22 (3): 414.

153 See inter alia Branson & Wallace "Court-ordered Consolidated Arbitrations in the U.S.A.: Recent Authority Assures Parties the Choice" 1988 Journal of International Arbitration 5: 89; National Institute for Dispute Resolution Dispute Resolution Forum (August 1985); Hensler "What We Know and Don't Know about Court Administered Arbitration" 1986 Judicature 69: 270; Levin "Court Annexed Arbitration" 1983 University of Michigan Law Reform 16: 537; Marvell "Caseload Growth - Past and Future Trends" 1987 Judicature 71: 151; Prado "Court Annexed Arbitration" 1988 Texas Bar Journal 51: 45; Schuck "The Role of Judges in Settling Complex Cases: The Agent Orange Example" 1986 University of Chicago Law Review 53: 337; Sherman "Reshaping the Lawyer's Skill for Court Supervised ADR" 1988 Texas Bar Journal 51: 47; Simoni "Court Annexed Arbitration in Oregon: One Step Forward and Two Steps Back" 1986 Willamette Law Review 22: 237; Wolff & Ostermeyer "Dispute Resolution Centres: Citizen Access to Justice" 1988 Texas Bar Journal 51; 51.

154 See Brewster, Finck & Palmer "An Overview of the Texas Bar Foundation on Cost Control at the Courthouse" 1987 St Mary's Law Review 10: 507 519: "The mini-trial merges the formal style of litigation with aspects of mediation, arbitration and negotiation. The mini-trial appeals primarily to corporate litigants and its goal is to effect an expedient resolution of disputes by paring the often complex collateral issues from the main legal issue, thus producing a more readily solvable business problem. Therefore, the attendance at the mini-trial of a person with authority to bind a corporate litigant, such as the Chief Executive Officer, greatly enhances the probability of settlement." See also "Mini-trials: Opportunities for Compromise" 1988 Texas Bar Journal 51: 34; "Practice and Potential of the Advisory Jury" 1987 Harvard Law Review 100: 1363.

155 See Brewster, Finck & Palmer 521: "This confidential type of alternative dispute resolution attempts to simulate trial, but in an abbreviated, informal and confidential manner.... This type of ADR is most appropriate in a case involving a single factual question which would normally require a separate trial." See also Hittner "The Summary Jury Trial" 1988 Texas Bar Journal 51: 40; Lambros "The Summary Jury Trial - An

(continued...)

dialogues; and the use of special masters[156] and referees appointed by judges for purposes of settlement, factfinding, or arbitration."

Of central importance in this brief survey of the ADR movement is the new way of thinking by parties once they commit themselves to the proposition that a mutually acceptable settlement can be achieved: Their ability to devise procedures to augment the accomplishment of such a settlement increases; and these enhanced settlement procedures in turn enhance settlement prospects.

This way of thinking is extremely valuable when parties create systems for dispute settlement in industrial relations. It not only contributes to the avoidance of unnecessary litigation in order to achieve an acceptable and legitimate settlement, it also prevents a party from implementing own power in the bargaining process. Creative thinking and a willingness to institutionalize conflict peacefully, therefore, go a long way towards avoiding the implementation of power in the settlement of disputes. It is of the utmost importance in this process that parties seek novel and case-specific solutions by concentrating first on the nature of the dispute itself and thereafter devising a mechanism by agreement which can settle the dispute effectively and to the satisfaction of all the parties concerned.

155(...continued)
Alternative Method of Resolving Disputes" 1986 Judicature 69 (5): 286; Lambros & Shunk "The Summary Jury Trial" 1980 Cleveland State Law Review 29: 43; Posner "The Summary Jury Trial and Other Methods of Alternative Dispute Resolution" 1986 University of Chicago Law Review 53: 366.

156 See inter alia Brazil "Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication" 1986 University of Chicago Law Review 53: 394; Brazil, Kahn, Newman & Gold "Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution" 1986 Judicature 69: 279; Cooley "Could Settlement Masters Help Reduce the Costs of Litigation and the Workload of Federal Courts?" 1984 Judicature 68: 59; Susskind "Court Appointed Masters and Mediators" 1985 Negotiation Journal 1: 295.

4.3 CONCLUSION

There are two final settlement mechanisms at the extreme ends of a continuum of settlement mechanisms, namely negotiation (and agreement) and formal adjudication in the courts. A series of hybrid mechanisms exist in between which the parties can create voluntarily or which the courts can order the parties to adopt. Most of the hybrid mechanisms show a preference for negotiation and have been developed primarily in reaction to the inadequacies of adjudication. Severe criticism notwithstanding, adjudication serves as the ultimate preserver of rights in a particular society and is therefore an indispensable component of any dispute settlement structure.

From a structural point of view, the law should encourage maximum creativity by the parties themselves to facilitate the voluntary settlement of disputes, especially disputes of interest, but also as far as possible disputes of rights. Direct access to adjudication should, however, not be denied in disputes of rights, because all parties should be afforded the opportunity to obtain immediate protection of allocated resources without having to endure a process of negotiation again. This approach serves the ends of both efficiency and legitimacy.

5 THE USE OF POWER IN NEGOTIATION

In the previous paragraph, two ultimate forms of dispute settlement and its various hybrid manifestations were briefly outlined. At the one end of the spectrum lies adjudication, backed up by the coercive power of the law, and at the other end lies negotiation, backed up by the economic power of the parties themselves.[157] Adjudication and the

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157 See in general par 4 above.

enforcement of court orders is the ultimate manifestation of the coercive function of the law as power.[158]

Industrial action (strikes and lock-outs) is the ultimate manifestation of the economic power of the parties themselves.[159] Industrial action is not a final settlement mechanism, it is an auxiliary means of furthering the negotiation process towards reaching agreement (that is, creating rules).[160]

It is the function of the law to sanction the formation, utilization and implementation of power by parties in the negotiation process so that they can maximize on their gains in the allocation of scarce resources.[161] The use of power should, however, be guaranteed, supported and restricted[162] procedurally by the law as a method for the regulation of social power in such a way that it ensures an equitable outcome in the institutionalization process without directly determining the substance of the outcome. In short, the law should regulate bargaining procedurally, but not interfere substantively.[163]

When determining which type of dispute is suitable for settlement by industrial action, the distinction between disputes of interest and disputes of rights is important.[164]

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158 See the discussion on the coercive function of the law in par 2 above.

159 See par 5.3 below. See also chapter 5 below.

160 It is therefore an auxiliary mechanism to induce agreement in dispute of interest situations (see also par 3 above).

161 See par 5.3.1 below. See also par 2 above on the guarantee, auxiliary and restrictive functions of the law.

162 See n 161 above.

163 See Cheadle in Brassey, Cameron, Cheadle & Olivier 259 and par 3 above.

164 See the discussion in par 3.

Resort to industrial action should be restricted to the settlement of disputes of interest. The use of economic power to create rules (or allocate scarce resources) should be allowed but not its use to enforce such rules (or protect allocated resources). This is desirable in order to promote industrial peace for certain periods of time and thus to ensure a healthy production process for the benefit of the parties and the public interest.[165]

Recourse to industrial action (or the use of own power) should therefore only be allowed in rule making negotiations and not settlement negotiations.[166] The subject-matter of the latter (that is, a dispute of rights) should be reserved for ultimate settlement by the court (or the use of the coercive function of the law) if no alternative settlement mechanism is successful. In short, own power (subject to procedural guidance by the law) should be permitted to create rules, whereas legal power should be allowed to enforce rules. Legal power may also be used procedurally to assist in the creation of rules, but not substantively to determine the actual formulation of those rules.[167] This structure will be effective if the parties are satisfied with the outcome of the allocation process and the clarity of formulation of rules to describe the outcome. Furthermore, parties will only be satisfied if they are allowed to participate.

Finally, the law not only regulates the use of power in the allocation process, it also demarcates the allocation

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165 See par 3 above.

166 See the distinction between rule making and settlement negotiations in par 4.1.2.2 and 4.1.2.1 above respectively.

167 In other words, the function of the law is ius dicere non facere. See n 134 above.

context.[168] This means that the law secures the relationship between the parties; if it did not, one party could decide to sever the allocation context and enter into another one. Traditionally, this context was demarcated by contract[169] in a free enterprise society, which left either party free to terminate the context (relationship) at will. Since employers have generally been economically more powerful than the individual employee, the latter has suffered exploitation in the allocation process. Although freedom of association and the formation of collectivities have alleviated this power discrepancy to a certain extent, the context of the power play has remained vulnerable. In many countries, the law (by means of for example the concept of fairness or equity) has tried to strengthen this context by prohibiting unfair dismissal and termination of employment by reference to the facts pertaining to a particular situation.[170]

It is desirable to protect the allocation context, but this protection should not be unconditional, for it may become necessary for either party to withdraw from the allocation context and enter into another which is more bearable or suitable. Briefly, if power in the allocation context becomes unbalanced or is exercised recklessly, the parties must have the final choice to terminate their relationship.[171] If not, employees may be exploited or employers driven to bankruptcy. To find the right balance involves a continuous process of adjustment depending on the

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168 See the discussion in par 5.3.2 below. The allocation context means the employment relationship as demarcated by the law; in other words, the profit generated by particular capital employing particular labour has to be distributed in that particular distribution context as demarcated by the law.

169 See the discussion in ch 3 below.

170 See ch 3 par 6 below.

171 See ch 1 par 3 above; 5.3.2 below and ch 3 par 6 below.

market. What constitutes power is a question of fact.[172] In most circumstances facts only become known when power is actually exercised, or put differently, when the facts (or perceived facts) are specifically relied on.[173]

5.1 The Nature of Power[174]

In this section an attempt is made to explain the dynamics of power in the institutionalization process, primarily by reference to the approach adopted by Emerson.[175]

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172 See ch 1 par 1.2.1 above and par 5.1 below.

173 See ch 1 par 1.2.1 above and par 5.1 below.

174 The concept "power" is notoriously difficult to define and more difficult to quantify, if this is at all possible.

175 Emerson "Power-dependence Relations" 1962 American Sociological Review 27: 31-41. Emerson's view of power can be termed "pluralist" or "one-dimensional" in the terminology of Lukes Power: A Radical View 12: "A has power over B to the extent that he can get B to do something that B would not otherwise do." Lukes 12 19 criticizes this one-dimensional view of power (and what he terms the two-dimensional view of power) on the basis that too much emphasis is on the study of concrete, observable behaviour. Lukes 24-5 prefers a three-dimensional view: "In summary, the three-dimensional view of power involves a thorough-going critique of the behaviourial focus of the first two views as too individualistic and allows for consideration of the many ways in which political issues are kept out of politics, whether through the operation of social forces and institutional practices or through individuals' decisions. This moreover can occur in the absence of actual observable conflict which may have been successfully averted though remains here an implicit reference to potential conflict. This potential, however, may never in fact be actualised. What we may have here is a latent conflict, which consists in a contradiction between the interests of those exercising power and the real interests of those they exclude. These latter may not express or even be conscious of their interests, but as I shall argue, the identification of those interests ultimately always rests on empirically supportable and refutable hypotheses."

Although Lukes's view of power may be more sophisticated as a sociological attempt to determine the nature and extent of power in relationships, Emerson's view does not contradict it and is more than adequate as an indicator of where and how the law can influence the size and exercise of industrial power. This thesis is not ultimately concerned with the quantification of industrial power, but with its proper place in a legitimate and effective institutionalization structure and what the law can do to facilitate it. It may, for example, be rewarding to analyse the "mobilization of bias" inherent in the classical contractual model from Lukes's point of view (16). To a certain extent, this is done in ch 3 below albeit not with the overt assistance of Lukes's three-dimensional view.

Emerson begins by arguing that it is a fallacy to conceive power as though it were an attribute of a person or group. To say that "X has power" is meaningless, unless it is specified "over whom".[176] This leads him to his first proposition, that is, that "power is a property of the social relation; it is not an attribute of the actor".[177] He proceeds to argue that social relations entail ties of mutual dependence between parties. Party A depends upon party B if he aspires to goals or gratifications the acquisition of which is facilitated by appropriate actions on B's part. Power to control or influence another therefore resides in control over the things the other values: "In short, power resides implicitly in the other's dependency."[178]

Applied to the employer-employee relationship, it can be said that the employer A is dependent (to a certain extent) on the labour of employee B and the latter (to a certain extent) on the remuneration paid by employer A.

Emerson accordingly arrives at the following proposition regarding the directional relationships involved:

> "Dependence (Dab). The dependence of actor A upon actor B is (1) directly proportional to A's motivational investment in goals mediated by B, and (2) inversely proportional to the availability of those goals to A outside of the A-B relation."[179]

He emphasizes, however, that the precise nature of the interaction, motivational investment in goals and

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176 Emerson 31-2.

177 Emerson 32.

178 Emerson 32.

179 Emerson 32.

availability of those goals, is an empirical question. In other words, it depends on the facts of each power relationship.[180]

If the dependence of one party provides the basis for the power of the other, that power must be defined as a potential influence:

> "Power (Pab). The power of actor A over actor B is the amount of resistance on the part of B which can be potentially overcome by A."[181]

It is important to note that the power defined above is not necessarily observable in every interaction between A and B, but it exists as a potential to be explained, tested and occasionally employed by the participants. "Pab" will be manifest empirically only if A makes a demand, and only if the demand runs counter to B's desires. Emerson concludes:

> "The premise we began with can now be stated as Pab = Dba; the power of A over B is equal to, and based upon, the dependence of B upon A. Recognizing the reciprocity of all social relations, we can represent a power-dependence relation as a pair of equations:[182]

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180 Emerson 32. He explains further: "In this proposition `goal' is used in the broadest possible sense to refer to gratifications consciously sought as well as rewards unconsciously obtained through the relationship. The `availability' of such goals outside of the relation refers to alternative avenues of goal achievement, most notably other social relations. The costs associated with such alternatives must be included in any assessment of dependency."

181 Emerson 32.

182 Emerson 33. "Availability" and "motivational investment" are akin to supply and demand in economic context. This insight can be valuable for an operational perspective of power in industrial relations, but since supply and demand for labour and pay are not the only goals in the relationship between employer and employee supply and demand alone would be too narrow a perspective on the dependencies operative. Although they are perhaps the most

(continued...)

"*Pab = Dba*
Pba = Dab "

The notion of reciprocity raises the question of equality or inequality or of a balance of power:[183]

> "A balanced relation and an unbalanced relation are represented respectively as follows:
>
> "
> *Pab = Dba* *Pab = Dba*
> *V V*
> *Pba = Dab* *Pba = Dab* "

That balance does not neutralize power, for each party may exert control over the other. It may even be meaningful to talk about the parties being controlled by the relation itself in the sense of complete interdependence.[184]

Reciprocal power does not cancel considerations of power but provides a basis for studying three more features of power-dependence relations:

> "First, a power advantage can be defined as Pab minus Pba, which can be either positive or negative (a power disadvantage); second, the <u>cohesion</u> of a relationship can be defined as the average of Dab

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182(...continued)
important dependencies which shape the power dynamics in a free enterprise environment, they are not the only ones. An operational definition of power in any industrial relations scenario will have to be made more empirical in its point of departure, concentrating on the specific facts operative in a particular situation. To arrive at such a definition would therefore not be a function of legal research.

183 Emerson 34.

184 Emerson 34. This would be in line with the pure pluralist perspective of a balance of power.

> and Dba ... and finally, it opens the door to the study of balancing operations as structural changes in power-dependence relations which tend to reduce power advantage."[185]

It is especially with regard to the possibility of balancing operations that the law as a source of power and a technique for the regulation of social power becomes important.[186]

Emerson proceeds to deal with balancing processes which operate through changes in the variables which define the structure of the power-dependence relation as such:

> "The formal notation adopted here suggests exactly four generic types of balancing operation. In the unbalanced relation
>
> $$\begin{matrix} Pab = Dba \\ V \quad\quad V \\ Pba = Dab \end{matrix}$$
>
> balance can be restored either by an increase in Dab or by a decrease in Dba. If we recall that dependence is a joint function of two variables, the following alterations will move the relation toward a state of balance:
>
> 1. If B reduces motivational investment in goals mediated by A;
> 2. If B cultivates alternative sources for gratification of those goals;

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185 Emerson 34.

186 See the discussion in par 2 above and par 5.2 below.

3. If A increases motivational investment in goals mediated by B;
4. If A is denied alternative sources for achieving those goals."[187]

Although it is possible to apply all those balancing operations to the field of industrial relations, it is especially operation number two, the "extension of the power network",[188] and more important, operation number four, the "coalition formation",[189] which provide valuable insight on power formation in the labour movement:

> "In operation number four it achieves balance through collapsing the two-relational network into one group-person relation with the emergence of a `collective actor'. Operation number two reduces the power of the stronger actor, while number four increases the power of weaker actors through collectivization."[190]

In a general way, Karl Marx was asking for balancing operation number four when he called on the workers of the world to unite and to loose their chains. Of the four balancing operations, coalition formation is the one most

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187 Emerson 35. While these four types of balancing operations are dictated by the logic of the scheme, Emerson suggests that each corresponds to well-known social processes. The first operation yields balance through motivational withdrawal by B, the weaker member. The second involves the cultivation of alternative social relations by B. The third is based upon "giving status" to A, and the fourth involves coalition and group formation. Emerson warns, however, that in discussing any one of these balancing operations, it must be remembered that a prediction of which one (or what combination) of the four will take place must rest upon an analysis of conditions involved in the concrete case at hand.

188 Emerson 36.

189 Emerson 37.

190 Emerson 37.

commonly recognized as a power process.[191] It is of course also possible for employers to unite (operation number four) or to make use of alternative labour, especially in a lock-out situation (operation number two), etc.

Emerson concludes by suggesting that both theoretical and empirical research be done in two main directions:

> "First, the interaction process should be studied to locate carefully the factors leading to perceived power and dependency in self and others and the conditions under which power as a potential, will be employed in action. Secondly and, in the long run, more important, will be study of power networks more complex than those referred to here, leading to more adequate understanding of complex power structures."[192]

In chapter 5 below it will become clear how the lock-out as regulated in South Africa empowers the employer primarily by enabling it to make use of alternative labour through weakening security of employment in a legal lock-out situation.

From the above analysis, it is clear that the law as a technique for the regulation of social power can adjust the dependencies of the parties in two important ways, firstly by increasing the motivational investment of the employer in the goals of employees, by making it less possible for the employer to make use of alternative labour. This can be done by providing security of employment. Secondly, the law can limit the alternative resources open to the employer by allowing coalition formation amongst employees and by so

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191 Emerson 37.

192 Emerson 41.

doing promoting employer concession through collective bargaining against the background of the possibility of withdrawal of labour (strike action).

5.2 The Law and Power

Law is power: As such it is a technique for the regulation of social power.[193] To have the law on its side enables a particular party to influence the institutionalization process at both the central and local levels of rule making more effectively.[194]

Turk[195] lists the following specific benefits of having the law on one's side: Firstly, it implies that one can use or call upon others (allies, champions, or the authorities claiming jurisdiction over the area, people, or matters involved) to use violence to support one's claims. Decisions by the authorities (who alone are legitimately able to exercise violence) are accompanied by the implied threat of physical coercion should any of the affected parties refuse to act in accordance with such decisions.

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193 See the discussion in par 2 above on how this definition is arrived at and some of its implications. See Turk "Law as a Weapon in Social Conflict" in Evan 108: "The empirical reality of law - apparently well understood in practice if not in theory - seems, then to be that it is a set of resources for which people contend and with which they are better able to promote their own ideas and interests against others, given the necessity of working out and preserving accommodative relationships with strangers. To say that people seek to gain and use resources to secure their own ideas and interests is of course, to say that they seek to have and exercise power." For complete reference and for what is meant by the term "resources", see par 1 n 2 above. In Emerson's language it can simply be stated that the law (supported by the state) is power because of people's dependence on the law. To have the law on one's side increases the dependency of the one side, eg protection of security of employment by the law increases the dependency of the employer. For an elementary discussion of law and power, see Trollip & Gon Power, Law and Procedure: A Contemporary Guide to Industrial Relations.

194 See the discussion in ch 1 above for the distinction between central and local rule making.

195 Turk 109-11.

Secondly, people's chances in life are decisively affected by the extent to which their economic power is enhanced or ordered by law. "Radicals" seek modifications of the law so as to change the criteria for reward, and very often also to reduce the range of rewards; "liberals" seek modifications so as to ensure at least a "decent" minimum in the range of rewards, and may accept - if they do not seek - a reduction in the range; "conservatives" resist modifications, but may accept a "decent minimum". Radical economic changes, therefore, become increasingly difficult to effect by legal reasoning to satisfy the postulates of a body of law, but rather a new set of postulates and thus a new body of law.[196]

Thirdly, the formulae and procedures of legal decision making are integral to the workings of politically organized societies. For example, decisions by a company may be influenced by and expressed through legal decisions. The law as a culture and a social structure provides the basis for articulating, interpreting and implementing organizational norms and decisions:

> "As a substantive and procedural model and as an ultimate support for institutional normative structures, the law contributes - as Selznick [Law, Society and Industrial Justice] (1969) and many others have demonstrated - to private as well as public social ordering, and provides some of the weightiest criteria for assessing proposed changes and resolving internal as well as inter-organizational conflicts. While non-legal factors clearly effect political struggle in general and organizational decision-making in particular, the law - as the most authoritative record of events and

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196 The terms "radicals", "liberals" and "conservatives" are used by Turk 109.

> as the definitive model, criterion, and arbiter of rightness - is itself a political resource of major importance."[197]

Fourthly, law as culture has a strong impact on the frames of reference that people use to give meaning to their situations:

> "Those definitions of the real, the true, and the worthy given legal expression or approval are thereby given the support of what is not only one of the most prestigious of cultural structures, but also that structure most directly supported by the apparatus of political control.... the greatest importance of law as an ideological resource probably lies ... in the fact that legalism is the cultural bedrock of political order."[198]

Fifthly, human attention and living time are finite resources. The average person does not in his lifetime give much attention to the law. This "reinforces the sense of law as an overwhelming, scarcely challengeable reality and criterion of reality".[199]

From the above, it is clear that the law as power can enhance the bargaining position of a particular actor significantly by decreasing dependencies in a number of general ways. In the following section, a closer look will be taken at how the law should regulate security of employment and allow power formation, utilization and implementation in very broad terms in order to promote maximum efficiency and legitimacy in the institutionalization

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197 Turk 109-10.

198 Turk 110.

199 Turk 110.

of conflict in the industrial relations context. The focus will firstly be on the procedural regulation of industrial power around freedom of association, collective bargaining and the right to take industrial action. The focus will secondly be on the structure of dispute settlement mechanisms around the concepts of disputes of interest and disputes of rights. Thirdly, attention will be given to regulation of security of employment (or demarcation of the allocation context). Since this thesis ultimately focuses on the use of the lock-out as a bargaining mechanism, attention will primarily be given to the use of power in settling disputes of interest and how this should be regulated procedurally.

It is the task of empirical sociological research to try to quantify the amount of power each actor posseses in a given situation (if this is at all possible). In a legal thesis, no more can be done than to isolate the rules governing the implementation of power and to suggest possible areas for empirical research where a discrepancy between the assumptions inherent in the legal rule and the factual position may exist.

5.3 The Procedural Regulation of Power in the Allocation of Scarce Resources (Disputes of Interest)

In this section, attention is given to the manner in which the law regulates power in a dispute of interest situation with a view to further enhancing the perspective on the use of power by employers in the collective bargaining context.[200] The focus is primarily on the formation, utilization and implementation of power in order to support

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200 See ch 5 below for a discussion on the lock-out in South Africa.

negotiation as a means of allocating scarce resources,[201] and secondly on the demarcation of the allocation context. The allocation context means the employer-employee relationship as demarcated (secured) by the law. If, for example, the law does not protect security of employment to some extent, employers may, in situations where unemployment is high and alternative labour is readily available, not be keen to continue the relationship and bargain with their own employees, but will rather replace them with employees who are willing to work at reduced rates. The employers will be less dependent on their employees and therefore more powerful. Conversely, absolute security of employment in a free enterprise environment is intolerable from the point of view of a weak employer, because it can be driven to bankruptcy if it is not in a position to terminate the employment relationship. In short, employers must not be made absolutely dependent on particular employees by the law.

Loss of employment and bankruptcy are two extreme situations. Somewhere in between these extremes employers and employees have a choice as to how scarce resources should be allocated in a competitive environment. The outcome of the allocation process (namely agreement) is a function of power, and the lock-out is the strategy mechanism based on employer power in the negotiation process. In this work, the lock-out in South Africa is evaluated by reference to the procedural regulation thereof, both as far as the creation of power and the protection of the allocation context are concerned.[202]

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201 Freedom of association is seen as the basis for power formation - it is the potential for power. The right to bargain collectively is a power procedure of the type described by Ury, Brett & Goldberg Getting Disputes Resolved as "power-based negotiation, typified by an exchange of threats" and the right (or freedom) to take industrial action as a "power contest, in which the parties take actions to determine who will prevail". In summary, freedom of association is the potential for power, collective bargaining is the utilization of power and industrial action is the implementation of power in a power contest.

202 See ch 5 below.

The regulation of collective bargaining[8(end note)] and security of employment[203] are vast subjects that have been addressed elsewhere. This section will do no more than outline how these topics should ideally be regulated and explain a desired institutionalization structure which can serve as a model or background for the evaluation in the chapters that follow. In other words, the dynamics of the guarantee, auxiliary and restrictive functions of the law will be shown in operation. The regulatory and coercive function will not receive much attention.[204]

5.3.1 The Formation, Utilization and Implementation of Power

"The freedom of association[205] and the right to organise, synthesised into universal principles and extended in the International Labour Conventions 87 and 98 of 1948 and 1949 respectively, represent the corner stones of any industrial relations system. They are pre-requisite to the functioning of any social system that purports to structure human relations in production with the optimum consensus of all its participants. In short, the unfettered freedom of association and the right to organise

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203 See ch 3 par 6.4.4 below for references to material on security of employment.

204 See the discussion in par 2 above for the guarantee, auxiliary, restrictive, regulatory and coercive functions of the law.

205 This has been the subject of extensive commentary in industrial relations and legal writings. The following are some of the works: Bendix & Swart "The Freedom of Association and the Right to Organise. Their Relevance to South Africa" 1979 South African Journal of Labour Relations 3 (1): 5; Cassim "Workers' Freedom of Association" 1980/1981 Natal University Law Review 3: 622; Promotion of Equality Department Equality of Rights Branch Restrictions on Freedom of Association and the Right to Organise in South Africa (May 1985); Von Prodzynski "Freedom of Association in Modern Industrial Relations" 1984 Industrial Relations Journal (UK) 15 (1): 9; Pankert "Freedom of Association" in Blanpain (ed) Comparative Labour Law and Industrial Relations 173-95; Louw A State of Emergency, Security Legislation and Freedom of Association in South Africa; Leader Minority Freedom Within the Non-voluntary Private Association.

have become inextricably enmeshed, stand in fact synonymous, with the notion of democracy. The step from democracy in sociopolitical terms to industrial democracy[9(end note)] in the wide ranging connotations of their mode with a concomitant transfer of its key elements is only a small one. Yet, it becomes only too obvious that in the ancient dispute on democracy, no consensus has been reached as to its demarcation and procedural realisation."

The recognition by the law of full freedom of association fosters coalition formation and the building of power by means of the creation of collectivities by both employers and employees in the bargaining context.[206] By allowing individual members of society to stand together in support of common goals, the law gives them an input in the allocation process which in turn promotes greater satisfaction, legitimacy and eventually effectiveness of that outcome. In other words, the rules that are created in an institutionalization process in which workers participate fully will be more acceptable and will therefore contribute materially to the promotion of industrial peace on a consensus basis.

Articles 2 and 10 of ILO Convention 87 state:

"Article 2. Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation....

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206 Emerson's fourth balancing operation; see par 5.1 above.

> Article 10. In this Convention the term `organisation' means any organisation of workers or of employers for furthering and defending the interests of workers or of employers."[207]

Joining an organization is a matter of choice for the individual, regardless of sex, race or creed. The individual may not be forced by the law to belong to an organization.[208] The right is given on a parity basis to both employers and employees.[209] The only qualification is compliance with the rules of the organization itself.

The above are the best known international standards on freedom of association and have been ratified by an

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207 quoted from Bendix & Swart 7. Article 8(1) of Convention 87 provides that the law of the land should be respected in the exercise of freedom of association, but article 8(2) stipulates clearly that the law of the land shall not impair the guarantees of the convention (Bendix & Swart 7). For an example of where the law of the land (particular security and state of emergency legislation in South Africa) greatly impaired the guarantees in Convention 87, see Louw 19-40.

208 The debate surrounding the closed shop, sole bargaining rights and other exclusionary mechanisms is relevant here. For material on the closed shop, see Albertyn "Opening the Door of the Closed Shop" 1985 Indicator South Africa 2 (2): 14; Bendix "Britain's Closed Shop Code of Practice" 1983 Industrial Relations Journal (SA) 3 (3): 33; Ewing & Rees "Closed Shop Dismissals 1974-1980: A Study of Retroactive Compensation Scheme" 1983 Industrial Law Journal (UK) 12: 148; Le Roux "The Closed Shop and the Industrial Conciliation Act" 1980 Modern Business Law 2: 69; Le Roux "The Closed Shop" 1981 Modern Business Law 3: 63; National Manpower Commission Report on the Closed Shop in the Republic of South Africa (Report 1/1981); Reynders "The Closed Shop in Industrial Agreements. Principle, Dogma or Realism Within the Free Enterprise System?" 1982 Industrial Relations Journal (SA) 2 (2): 5; Van Zyl "The Closed Shop: Developments in South Africa" 1982 South African Journal of Labour Relations 6 (2): 10; It is submitted that, from a purely theoretical perspective, the closed shop represents an in-road on the freedom of association concept and paves the way for power discrepancies and legal bias towards minorities. Similarly, it is submitted that sole bargaining rights will interfere with freedom of association and represent bias on the part of the law (see Pankert 181 for a similar view). Compare also in general Landman "Freedom of Association in South African Labour Law" in Labour Law 89.

209 This is important insofar as it relates to the regulation on a parity basis of the lock-out in South Africa; see ch 5 below.

exceptionally high number of countries.[210] They can therefore safely serve as a basis for the formation of power in the industrial relations context in any democratic system.

The formation of power should be utilized effectively and legitimately in a proper collective bargaining structure. Here, the law in its auxiliary capacity can do a great deal to create acceptable collective bargaining structures and procedures and encourage (and if necessary force) parties to make use of them. It is important, as will be seen in the following paragraph,[211] that the parties should not be allowed to implement power until they have exhausted good faith bargaining.

Convention 98 on the Right to Organise and Collective Bargaining, 1949 consists of only 6 articles but, together with the 11 articles of Convention 89 (articles 2 and 10 of which are quoted above), it has set up a significant set of guidelines on the regulation of collective bargaining. For example, the convention establishes guarantees against anti-union discrimination, the discouragement of union activities and interference in occupational organizations by employers. It aims to promote the practice of voluntary collective bargaining without undue interference by the law.[212]

Articles 4 of Convention 98 states that "measures appropriate to national conditions shall be taken, where necessary to encourage and promote the full development and

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210 Pankert 174. He also mentions other important ILO instruments for the regulation of freedom of association: "Convention (No. 135) and Recommendation (No. 149) concerning Organisations of Rural Workers and their Role in Economic and Social Development, 1975, Convention (No. 151) and Recommendation (No. 159) concerning Protection of the Right to Organise and Procedures Determining Conditions of Employment in the Public Service, 1978 as well as Convention (No. 153) and Recommendation (No. 164) concerning the Promotion of Collective Bargaining, 1981."

211 See par 5.4 below.

212 See Bendix & Swart 9-10 for a more comprehensive discussion.

utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers organisations with a view to the regulation of terms and conditions of employment by means of collective agreement".[213]

Pankert[214] summarizes some of the most important principles regarding collective bargaining adopted by the Committee on Freedom of Association. First, the right to bargain is a fundamental trade union right. Second, legislation may not exclude certain matters from the ambit of collective bargaining or provide that collective agreements may not set out terms more favourably than those provided for in the law. Third, collective agreements must not be made dependent on approval by public authorities for their validity. Fourth, government interference with collective bargaining by the introduction of stabilization measures may only be resorted to in exceptional circumstances.

It can be concluded that the collective bargaining model envisaged by the ILO is essentially voluntarist, allowing for the free flow of power in the allocation process without unnecessary interference by the law. The law may assist procedurally in setting up the structures for the allocation process, but may never interfere with the substance (or outcome).[215] Moreover, structures for collective bargaining will be ineffective if power cannot actually be implemented towards inducing agreement.

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213 quoted from Pankert 189.

214 Pankert 189-90.

215 This is in line with the well-known principle of ius dicere non facere applicable to adjudication in the courts.

The ILO instruments, Conventions 87 to 98, do not mention the right to take industrial action. The Committee on Freedom of Association has, however, recognized the right to strike subject to certain restrictions. The basic principles are as follows:[216]

(a) A general prohibition of strikes, except as a temporary measure in a state of emergency, is not acceptable.

(b) Provisions allowing public authorities to prohibit strikes prejudicial to the public order are inadmissible.

(c) The prohibition of purely political strikes is admissible.

(d) Temporary restrictions on strikes are admissible, for example during conciliation and arbitration procedures, during the currency of a collective agreement, or before the lapse of a strike notice.[217]

(e) Restrictions with regard to strikes by public and essential service employees are admissible provided speedy alternative procedures, such as arbitration, exist.

(f) Restrictions aimed at ensuring compliance with statutory safety requirements are in order.

On the whole, the lock-out does not receive nearly as much attention as strikes in international and local writing.[10(end note)] The lock-out is also not recognized on a parity basis with strikes in all countries. This is because of the particular circumstances prevailing and the social,

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216 See Pankert 190-1.

217 This is material as far as the design of an institutionalization structure is concerned. Compare for example s 65 of the Labour of Relations Act 28 of 1956.

political, economic and industrial relations values operative in different societies.

Countries which do recognize lock-outs on a parity basis with strikes like South Africa are Germany and Sweden, and to a lesser extent, Canada and the USA. Other countries, like France and Italy, believe that only the strike guarantees the necessary balance in the collective bargaining process.[218] An evaluation of the balance of power is a function of empirical research. Regrettably, it is impossible to undertake an empirical evaluation of strikes and lock-outs in this work, however desirable this may be from the point of view of possible power discrepancies and legal bias. But for the purpose of this discussion, the need for both strikes and lock-outs is recognized in principle.

Birk[219] defines strikes and lock-outs as follows:

"Most legal systems regard a strike as the organised or co-ordinated full or partial stoppage of work by a group of workers in order to exert pressure on the employer for fulfilment of certain demands. According to the circumstances, purpose and organisational execution there are several legally relevant forms such as the wage strike, protest

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218 Birk "Industrial Conflict: The Law of Strikes and Lock-outs" in Blanpain 401 413. Birk 407 summarizes the position with regard to the regulation of strikes and lock-outs as follows: "Essentially, we can find three different answers in modern industrialised states:

1. the right to industrial action consists substantially in a comprehensive right to strike (France, Italy);
2. the right to industrial action includes both parties in the labour market (USA, Canada);
3. the right to industrial action is part of a comprehensive law of industrial action; this law of industrial action and the collective autonomy to conclude agreements are closely connected (FR Germany, Sweden)."

219 This is one set of definitions. Many others are possible depending on the circumstances and context within which a definition is required. However, definitions serve as a useful point of departure from a parity perspective.

> strike, token strike, sympathy strike, work-to-rule, official strike, wildcat strike and others.
>
> The lock-out involves the reverse situation. As an essential weapon of the employer, it is a work stoppage caused by one or more employers closing down a plant in order to exert pressure on the workers to abandon their demands or to accept the demands of their employers. As with the strike, we can also subdivide the lock-out into various types."

Although there is nothing wrong with these two definitions, the following shorter versions are suggested: A strike is a collective interference with the provision of labour in order to induce an employer to accept employee and union demands. A lock-out is a refusal to provide work and/or compensation in order to induce employees to accept employer demands.

The effectiveness of both these mechanisms turns on the dependency of the employer and the employees on each other for work (labour) and remuneration respectively. An alternative means of earning more with another employer makes the employees more powerful, whilst the availability of alternative labour at a lower price makes the employer more powerful. Although not the only factor, supply and demand of labour is therefore a very important determinant of dependencies and therefore power in the bargaining process.[220]

The law can also have a material effect on power by the way in which it defines or creates strikes and lock-outs

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220 See the discussion on the nature of power in par 5.1 above.

and by the procedures it prescribes for their implementation.[221]

5.3.2 The Demarcation of the Allocation Context

The law must state very clearly to what extent it is prepared to strengthen the allocation context to ensure that the parties (employers and employees) are not free to terminate the bargaining context (employment relationship) at will. This determines to what extent and when an employer may make use of alternative labour or an employee may seek another job, if available. In essence, it involves the whole question of job security or the "right to work".[222]

The position at common law (the law of contract) is well known: Termination of the contract of employment by either of the parties is effected by notice or pay in lieu of notice. The period of the notice (or pay in lieu thereof calculated on the basis of the notice period) depends on the terms of the contract or, if not provided for in the contract, on the relevant pay cycle, for example a weekly or monthly pay cycle. The contract of employment can be summarily terminated by a party pursuant to a serious breach of the contract by the other party. In this instance no notice is required. Where the employer has wrongfully cancelled the contract of employment (for example dismissal), the courts have been loathe to order specific performance and the wronged party has had to make do with compensation.[223]

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221 In ch 5 below a closer look is taken at how the lock-out is regulated in South African law and the implications it has on power.

222 Hepple "Security of Employment" in Blanpain 475-502.

223 Compare for example Schierhout v Minister of Justice 1926 AD 99; Venter v Livni 1950 (1) SA 524 (T); Myers v Abrahamson 1952 (3) SA 121 (C); Grundling v Beyers 1967 (2) SA 131 (W) and Brassey "Specific Performance - A New Stage for Labour's Lost Love" 1981 Industrial (continued...)

A summary of the unfair dismissal guidelines laid down by the International Labour Organization is necessary to show how these guidelines contemplate the ideal regulation of security of employment. Both ILO Convention 158 and Recommendation 166 lay down two basic requirements that have to be satisfied before a dismissal can be said to be justified. The first is that an employer must have a substantive reason for the dismissal. The second is that in order to ensure that the employer does have a substantive reason, a procedure must be followed to establish it.

5.3.2.1 Substantive Reason

Valid reasons for dismissal fall under one of three categories.

First, a valid reason can relate to the conduct of the worker. Here the common-law grounds for dismissal of a country serve as a point of departure. Article 5 of Convention 158 reads:

> "The following, inter alia, shall not constitute valid reasons for termination:
>
> a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;
>
> b) seeking office as, or acting or having acted in the capacity of, a workers' representative;

223(...continued)
Law Journal (SA) 2: 57 et seq. Since the early 1980's the Supreme Court has, however, been willing to order specific performance: see for example NUTW & others v Stag Packings 1982 (4) SA 151 (T).

c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;

d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;

e) absence from work during maternity leave."

The convention further provides that temporary absence from work because of illness or injury does not constitute a valid reason for dismissal, nor does absence due to compulsory military service or age (subject to retirement practice).

The worker is entitled to know what the consequences of his misconduct will be, especially where rules peculiar to the employer exist. Knowledge of criminal law, such as the prescriptions relating to assault and theft, can be assumed. Only rules reasonably necessary for the orderly management of an undertaking should be introduced. Worker conduct should not be unreasonably restricted. For example, a rule prohibiting yellow clothing simply because the managing director does not like the colour will be unreasonable.

Second, a valid reason can relate to the capacity of the worker. Recommendation 166 clause 8 reads:

"The employment of a worker should not be terminated for unsatisfactory performance, unless the employer has given the worker appropriate instructions and written warning and the worker continues to perform

his duties unsatisfactorily after a reasonable period of time for improvement has elapsed."

Where the "incapacity" of a worker is wilful it should be classified as a case of misconduct, but where the incapacity is due to objective factors such as illness and injury, the employee is faced with termination on the basis of impossibility of performance. Generally during probation, a period during which the employer can determine the suitability of an employee's qualifications, a worker's services can usually be freely terminated for incapacity.

Third, a valid reason can relate to the operational requirements of the undertaking. It is generally accepted throughout the world that an employer can justly terminate a contract of employment for economic and technological reasons. When a contract is terminated for these reasons, termination is not attributable to the fault of the worker. Care has, therefore, to be taken to terminate the contract with as little prejudice as possible to the workers concerned, and only after exhausting alternatives as far as possible. Guidelines are contained in Convention 158 articles 13 and 15 and Recommendation 166 clauses 19 to 26.

5.3.2.2 **Procedural Fairness**

Procedural fairness is required for pre-dismissal and post-dismissal procedures. Convention 158 division B and Recommendation 166 clauses 7 to 13 contain provisions in regard to procedure prior to or at the time of termination of employment. Pre-dismissal procedures can be subdivided into those relating to individual dismissals and those relating to collective dismissals.

Individual pre-dismissal procedures include the following:

(a) Prior warning for misconduct falling short of conduct justifying summary dismissal at common law. This is especially important in the case of poor work performance.

(b) Clear notification to the worker of the misconduct alleged against him in order to enable him to defend himself properly.

(c) A proper inquiry before dismissal. This is the most important requirement and the hearing should be held within a reasonable time before an adjudicator who is neither the complainant nor a witness in the matter. The accused should be present throughout the inquiry together with his representative if desired. All evidence must be led and the accused should be allowed to question the witnesses and to give and lead evidence himself. Interpreters should be made available if necessary. The adjudicator should first establish on sufficient evidence whether the misconduct is established as alleged and thereafter decide on appropriate punishment.

When deciding on appropriate punishment the adjudicator (convenor) must consider the nature and seriousness of the misconduct, the sanction imposed upon other employees for similar misconduct, the employee's service record and his personal circumstances. Lastly, the convenor must make sure that the proposed punishment is in line with relevant stipulations in the contract of employment. Thereafter the worker should be informed of the findings clearly and preferably in writing.

Individual post-dismissal procedures usually provide for recourse to a court or tribunal to decide on the justification for the dismissal and to confirm the dismissal or to grant appropriate relief where necessary. In some systems provision is made for interim relief pending the exhaustion of conciliation procedures such as mediation.

Collective procedural fairness is not discussed in any detail. The steps appropriate and possible depend on the circumstances of each case. The number of people, the nature of their jobs, and so on are all variables and can affect the implementation of collective procedural fairness. Suffice it to say that in cases of collective dismissal both substantive and procedural fairness are required as far as is practically possible. Employers should be seen to have acted reasonably and with circumspection in all cases of mass dismissal.

The guidelines regarding dismissal summarized above concentrate on the termination of the employment relationship for reasons relating to conduct, capacity or operational requirements. Although this is not the case in all countries, it is important to note that termination can also take place for strategy reasons as part of the lock-out mechanism in order to induce or compel employees to agree to employer demands after certain procedures have been exhausted.[224] Unlike termination for operational requirements, the job opportunity continues to exist (similar to the position in dismissal for disciplinary reasons). But the employer chooses a different incumbent for the job, or the same person in the

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224 See in general also Hepple quoted in n 202 above. It is important to note that the guidelines refer to "dismissal" throughout and do not make the valuable distinction between "dismissal" for disciplinary reasons and "termination" for reasons other than discipline, such as for capacity or on the basis of operational requirements. This distinction was made by the South African legislator in the definition of the unfair labour practice concept in the 1988 amendments to the Labour Relations Act 28 of 1956 but was unfortunately dropped in the 1991 amemdments. Furthermore, the word "termination" has other meanings as will be seen below and in ch 5 below.

case of strategic termination and offers re-employment if the latter is willing to agree to the terms of the job.[225]

From the above discussion it is clear that security of employment is not guaranteed absolutely. It is also clear that the protection which is afforded by the law is of a procedural rather than a substantive nature.

5.3.3 **Conclusion**

It can be concluded that ideally the law should regulate the power dependencies of parties by allowing the formation, utilization and implementation of power procedurally in order to allow the maximum flow of power in the allocation process and thus to facilitate allocation by consensus without interfering substantively. The law should secure the allocation context procedurally in order to allow for some security of employment. Security of employment should, however, not be guaranteed absolutely; if it is little choice will remain for the participants and the law may destroy the very competitive nature of the allocation process in a free enterprise system.[226]

5.4 **The Place of Industrial Power in an Institutionalization System**

Industrial relations systems for the institutionalization of conflict vary from country to

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225 See for example "termination" in the definition of "lock-out" in s 1 of the Labour Relations Act 28 of 1956 which will be discussed in more detail in ch 5 below.

226 See Hepple 478-9 for the distinction between dismissal for disciplinary reasons and dismissal for operational requirements. See also endnote 11 for a schematic explanation of the role of the law in the regulation of power.

country.[227] No ideal system exists, but it is necessary when designing a system to take cognizance of certain "principles of design" with a view to creating a system which is both legitimate and effective. In this section, some of these principles are scrutinized by reference to the work by Ury, Brett & Goldberg on the design of systems to cut the costs of conflict.[228]

Ury, Brett & Goldberg propose that there are three ways of solving disputes. Parties may try to reconcile their interests and/or determine who is right and/or determine who is more powerful.[229]

A dispute begins when one party makes a claim or demand on another who rejects it.[230] Interests are needs, desires, concerns, fears - the things people care about or want.[231] Rights may be formalized in law or may be socially accepted standards of conduct such as reciprocity, precedent, equality and seniority.[232] Power is the ability to coerce someone to do something he would not otherwise do. To exercise power is to impose costs on the other side or to

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227 Bendix & Piron "The System of Settling Labour Disputes in the USA" 1982 Industrial Relations Journal (SA) 2 (3): 18; Bendix & Piron "The French System of Handling Labour Disputes" 1982 Industrial Relations Journal (SA) 2 (4): 40; Bendix & Piron "The System of Settling Labour Disputes in Britain" 1982 Industrial Relations Journal (SA) 2 (2): 29; Kamfer "Conflict Handling Processes for South African Industrial Relations" 1982 Industrial Relations Journal (SA) 2 (4): 35; Kaplan "Is Labour a Widget? A Comparative Study" 1985 Tulane Law Review 60 (7-8): 1517; Ozabi "Labour Relations in the Public Service: Two Labour Disputes and Their Settlement" 1987 International Labour Review 126 (4): 405.

228 Ury, Brett & Goldberg Getting Disputes Resolved.

229 Ury, Brett & Goldberg 4-9.

230 Ury, Brett & Goldberg 4.

231 Ury, Brett & Goldberg 5.

232 Ury, Brett & Goldberg 7.

threaten to do so.[233] Who is more powerful depends on who is less dependent on the other.[234] How dependent a particular party is is a function of the existence of alternatives to satisfy his needs.[235] To determine who is more powerful without a power contest is difficult since power is ultimately a matter of perceptions unless actively implemented.[236]

From the descriptions taken from Ury, Brett & Goldberg above it is evident that the terms "dispute", "interests", "right" and "power" are very loosely defined. The distinction between "disputes of interest" and "disputes of rights"[237] is largely ignored. In other words, the term "dispute" refers to any demand and the rejection thereof, whereas an interest is simply something a particular party wants regardless of whether he is entitled to it or not. A right is not a strictly legal term, but any demand which can be justified by reference to principle, whether such principle is legal in nature or not.

Ury, Brett & Goldberg, when they refer to interests, rights and power, do not refer to the nature of the dispute, but to the nature of the mechanism designed to settle it. In other words, what they say by implication is that all disputes, regardless of whether they are interest or rights disputes, must first be subjected to an attempt to reconcile interests, by means of negotiation, "the act of back-and-forth communication intended to reach agreement (A procedure is a pattern of interactive behaviour directed towards

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233 Ury, Brett & Goldberg 7.

234 Ury, Brett & Goldberg 8. See also the discussion in par 5.1 above.

235 Ury, Brett & Goldberg 8. See also par 5.1 above.

236 Ury, Brett & Goldberg 8. See also ch 1 n 30 and par 5.1 above.

237 See the discussion in par 3 above.

resolving a dispute). Another interest-based procedure is mediation in which a third party assists the disputants in reaching agreement."[238]

If interest based procedures fail, then the parties may "rely on some independent standard with perceived legitimacy or fairness to determine who is right. The prototypical right procedure is adjudication, in which disputants present evidence and arguments to a neutral third party who has the power to hand down a binding decision".[239] Public adjudication is conducted by the courts and administrative agencies and private adjudication by arbitrators.

Lastly, if both interests and rights based procedures fail, recourse may be had to power: "Power procedures are of two types: power-based negotiation, typified by an exchange of threats, and power contests, in which the parties take actions to determine who will prevail." The lock-out belongs to the latter category.[240]

In summary, when dispute settlement mechanisms are structured vis-à-vis one another, the parties should first exhaust interest based negotiation, then rights based procedures and then utilize their own power according to Ury, Brett & Goldberg. They justify this structure by reference to four possible criteria.[241] Firstly, it is more cost effective because the parties themselves control the process and the cost involved in litigation and, for example, strikes is avoided, the latter being the most costly exercise usually.

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238 Ury, Brett & Goldberg 6. See also the discussion in par 4.1.2 above.

239 Ury, Brett & Goldberg 7. See also the discussion in par 4.1.1 above.

240 Ury, Brett & Goldberg 8. See also the discussion in par 5.3.1 above and ch 5 below.

241 Ury, Brett & Goldberg 11-18.

Secondly, the parties' mutual satisfaction with the outcome is important. Adjudication is seldom satisfactory to the loser, whereas to lose in a power contest may be devastating.

Thirdly, the long-term effect on the relationship is important. Here negotiation is the best solution without recourse to outsiders or coercion.

Lastly, the durability of the solution and the likely recurrence of the dispute are important:

> "To sum up, we argue that, in general, reconciling interests is less costly than determining who is right, which in turn is less costly than determining who is more powerful. This proposition does not mean that focusing on interests is invariably better than focusing on rights and power, but simply means that it tends to result in lower transaction costs, greater satisfaction with outcomes, less strain on the relationship, and less recurrence of disputes."[242]

The sequence interests, rights and power in the settlement of disputes is valid. Unfortunately, Ury,Brett & Goldberg do not make the distinction between disputes of interest and disputes of rights peculiar to labour law. Rights disputes are not amenable for settlement by means of

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242 Ury, Brett & Goldberg 15. With regard to low-cost ways of determining rights and power, they declare (18): "Rights-based negotiation is typically less costly than a rights contest such as court or arbitration. Similarly, power-based negotiation, marked by threats, typically costs less than a power contest in which those threats are carried out. Different kinds of contests incur different costs. If arbitration dispenses with procedures typical of a court trial (extensive discovery procedural motions, and lengthy briefs) it can be much cheaper than going to court. In a fight, shouting is less costly than physical assault. A strike in which workers refuse only overtime work is less costly than a full strike."

industrial power and interest disputes should as far as possible not be referred to adjudication.[243]

When the distinction between disputes of interest and disputes of rights is introduced, then Ury, Brett & Goldberg's general proposition must be qualified in the following way: Interest based procedures (that is, dispute negotiation) should first be followed in the settlement of disputes of rights before adjudication is resorted to and interest based procedures (power based negotiation as opposed to a power contest) should first be exhausted before recourse is had to industrial action such as strikes and lock-outs. This qualification is necessary, because with a typical dispute of interest, the parties try to reach consensus in a polycentric situation,[244] whereas with disputes of rights direct access to adjudication should be allowed since the issues are more binary[245] in nature and therefore suitable for adjudication. In disputes of interest the parties deal with the allocation of scarce resources, whereas in disputes of rights they deal with the protection of allocated resources. In the first instance, rules are created by means of own power (industrial power), whereas in the latter case rules are applied, therefore direct access to legal power by means of adjudication (that is, the law in its coercive function)[246] should be possible.

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243 See the discussion in par 3 above.

244 See the discussion in par 4.1.1 above.

245 See the discussion in par 4.1.2.1 and n 88 above. Although direct access to adjudication is allowed, the opportunity should also exist for the parties to settle their dispute by dispute negotiation (for example by out of court settlement) if they wish.

246 See the discussion in par 2 above.

6 THE DESIGN OF AN INSTITUTIONALIZATION MODEL

It now possible to design an institutionalization model incorporating most of what was discussed in the previous paragraphs (and chapter 1). Before the model itself is described it is instructive to have a brief look at the principles of designing an effective dispute resolution system proposed by Ury, Brett & Goldberg.[247]

The first important principle is to put the focus on interests.[248] Everything possible should be done to solve disputes on a consensus basis. Therefore, consensus mechanisms such as negotiation and mediation should enjoy preference to adjudication mechanisms such as the courts and arbitration, especially with regard to disputes of interests. With disputes of rights, dispute negotiation should be encouraged, but direct access to adjudication mechanisms should be possible in order to promote speedy and effective dispute resolution and also to allow for authoritative development of principle.

Secondly, "loop-backs" to negotiation should be built into the system.[249] A good example of such a loop-back mechanism is the status quo provision regulated in section 43 of the Labour Relations Act 28 of 1956 which encourages (after temporary legal interference) the parties to negotiate a settlement to their disputes in unfair labour practice cases. Other examples of loop-back from rights contests are information procedures, advisory arbitrations and mini-trials. Looping back from a power contest can take the form of cooling-off periods, crisis negotiation procedures and the involvement of third parties to promote agreement.

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247 Ury, Brett & Goldberg ch 3 41-64.

248 Ury, Brett & Goldberg 42-52.

249 Ury, brett & Goldberg 52-6.

A third principle makes provision for final resolution based on rights or power if interests based negotiation fails.[250] Examples based on rights discussed by Ury, Brett & Goldberg are arbitration,[251] med-arb[252] and final offer arbitration.[253] Low-cost procedures to determine power are voting, limited strikes and rules of prudence.[254] The mere existence of such procedures encourages the use of negotiation.

A fourth principle provides for consultation before and feedback after in order to prevent disputes that arise from misunderstanding.[255]

The fifth principle discussed by Ury, Brett & Goldberg arranges procedures in a low-to-high-cost sequence, for example from interest based negotiation to loop-back procedures to low-cost rights and power backups.[256]

Lastly, it is important for a dispute resolution system to work effectively so that potential participants are motivated to make use of it.[257] The best motivation for making use of a system is if it attains legitimacy and the best way of promoting legitimacy is to allow prospective

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250 Ury, Brett & Goldberg 56-61.

251 Ury, Brett & Goldberg 56. A neutral third party makes a binding decision which is simpler, quicker and less expensive than court procedures.

252 Ury, Brett & Goldberg 56. Here the mediator serves as an arbitrator if mediation fails.

253 Ury, Brett & Goldberg 57. Here the arbitrator accepts one of the final offers as his decision.

254 Ury, Brett & Goldberg 60. Rules of the game are agreed to in order to limit the destructiveness of power tactics.

255 Ury, Brett & Goldberg 61-2.

256 Ury, Brett & Goldberg 62-4.

257 Ury, Brett & Goldberg 64.

users of the system the opportunity to participate in its design.

In conclusion, a model dispute resolution system emphasizes negotiation and agreement. Access to adjudication should, however, not be barred especially in disputes of rights situations where an authoritative decision of principle is required.

7 AN INSTITUTIONALIZATION MODEL

In a capitalist, free enterprise system conflict will always exist between capital and labour as the buyers and sellers of labour and in the allocation of scarce resources generated by the undertaking.

This conflict must be institutionalized by means of the creation of rules between the parties in the allocation process primarily and preferably by means of negotiation.

Since no natural power balance exists, it is necessary for the law as power to adjust the dependencies of the parties in its guarantee, auxiliary and restrictive functions, firstly, to promote a free flow of power by giving substance to freedom of association (the potential for power), collective bargaining (the utilization of power) and industrial action (the implementation of power) and, secondly, to ensure security of employment by strengthening the allocation context (and thereby limiting not prohibiting the use of alternative labour). In the allocation of scarce resources (involving disputes of interest or the creation of rules) the law should interfere procedurally not substantively.

Conflict also arises in the protection of scarce resources (involving disputes of rights or the application

of existing rules). In these cases the law in its coercive function states clearly what a rule is and does not create new rules (ius dicere non facere).

When disputes are settled two final settlement mechanisms can be used, namely negotiation towards agreement and adjudication. Various hybrid forms of settlement can be created by agreement.

In structuring an effective and legitimate institutionalization structure, the law should direct disputes of interest through rule making negotiation towards agreement supported by the possibility of using own power to induce agreement. Disputes of rights should be allowed direct access to adjudication, but settlement negotiations prior to adjudication should be possible on a voluntary basis.

The sketch below gives a schematic idea of how settlement mechanisms should be structured.

Figure 2

The use of **power** to **support** negotiation and agreement in disputes of interest situations as opposed to adjudication in rights disputes (which are final).

1 Blue represents disputes of interest supported by the power of the parties towards agreement.

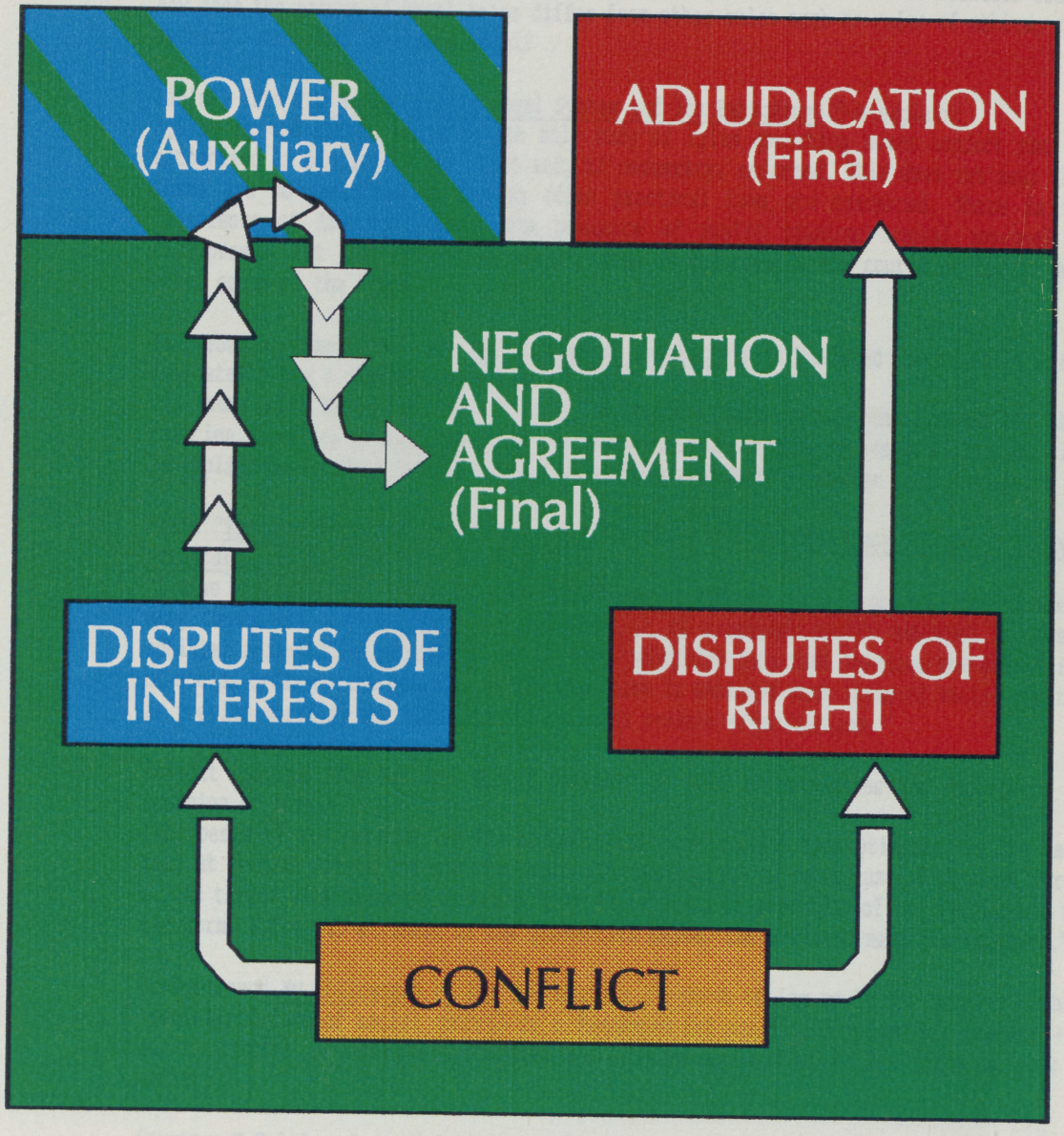
2 Red represents disputes of rights which may be referred directly to adjudication for final settlement.

3 Green represents a broad consensus area which is preferable as a means of settlement before

recourse is had to either adjudication or industrial power.

(Compare negotiation and most ADR mechanisms)

Figure 2: MODEL INSTITUTIONALIZATION STRUCTURE



END NOTES

1. Hobbes states in Leviathan ch XIII that without law man would be "in that condition which is called war, and such war as of every man against every man ... In such condition, there is not place for Industry .... and consequently no culture of the Earth, no Navigation ... no commodious building ... no Knowledge of the face of the Earth, no account of Time, no Arts, no Letters, no Society, and, which is worst of all, continual fear and danger of violent death; and the life of man, solitary, poor, nasty, brutish and short."

The existence of conflict creates a need for legal rules to be enacted to maintain order. How does the nature of legal rules differ from other rules such as rules of ethics, good manners, etc? When is a rule legal?

Hahlo & Kahn The South African Legal System and its Background 3-4 explain:
"[L]aw in the strict sense is the only body of rules governing human conduct that is recognized as binding by the State and, if necessary, enforced. This does not mean that there are no sanctions as far as other practical laws are concerned. There is the conscience of the individual; the pressure of public opinion; social approval or disapproval. But only law in the strict sense is enforced by the courts of law or some other organ of the State."

Max Weber in Rheinstein (ed) Law in Economy and Society (translated Edward Shils & Max Rheinstein) has a similar perception of law:
"An order will be called law if it is externally guaranteed by the probability that coercion (physical or psychological), to bring about conformity or avenge violation, will be applied by staff of people holding themselves specially ready for that purpose."

Black "The Boundaries of Legal Sociology" in Evan (ed) The Sociology of Law: A Social-Structural Perspective 40 also states:
"I like to define law simply as *governmental social control.* This is one possibility among many consistent with a positivist strategy. It is a concept easily employed in cross-societal analysis, encompassing any act by a political body that concerns the definition of social order or its defence. At the same time it excludes such forms of social control as popular morality and bureaucratic rules in private organizations."

Talcott Parsons "The Law and Social Control" in Evan 63 emphasizes the importance of coercion or force:
"The basis of the relation of law to political organization lies primarily in the fact that at certain points the question must inevitably arise as to the use of physical force or its threat as a means of coercion; that is, a means of assertion of the bindingness of the norm. Force is, at least in the preventive sense, the ultimate negative sanction."

Roscoe Pound My Philosophy of Law 249 states: "I think of law as in one sense a highly specialized form of social control in a developed and politically organized society - a social control through the systematic and orderly application of the force of such a society."

Lawrence M Friedman Law and Society, An Introduction 11 also emphasizes two ways in which the law plays an important role in social control:
"In the first place, legal institutions are responsible for the making, cure and preservation of those rules and norms which define deviant behaviour; they announce (in a penal code for example) which acts may be officially punished and how and which ones may not be punished at all. In the second place, the legal system carries out many rules of

social control. Police arrests burglars, prosecutors prosecute them, juries convict them, judges sentence them, prison guards watch them, and parole boards release them."

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5 Marks, Johnson & Szanton 40-2. Although not always strictly relevant to labour relations, Marks, Johnson & Szanton's tabular summary of alternatives to formal in-court adjudication is provided for its valuable perspective on kinds of disputes and mechanisms suitable to settle them:

"Tabular Summary

The table that follows presents the range of current dispute resolution techniques in terms of the three general categories -binding, non-binding and systemic - just presented and a set of organising subcategories. It describes the dispute-handling technique, notes the disputing area in which it is most often used, and compares the techniques in terms some of the characteristics of the disputes which are most often subjected to the strategy. Within each category, the processes are generally listed in an order that progresses from the less to the more coercive.

ALTERNATIVES TO FORMAL, IN-COURT ADJUDICATION, SUMMARY OF TECHNIQUES

I. NON-BINDING THIRD-PARTY TECHNIQUES

A. Facilitative Techniques

(Third-party usually does not recommend resolution, but only facilitates mutually agreeable settlement)

ADR Strategy 1. Mediation by part-time lay persons.

Kinds of Disputes for which usually used		Intra-family and inter-neighbour disputes
Characteristics of Strategy		Ordinarily equal bargaining power - individual v individual. Often courts not accessible to disputants, because of either cost or nature of dispute, unless and until dispute escalates into assault or other crime. Most involve essentially emotional issues.
ADR Strategy	2.	Mediation by human relations professionals and/or lawyers.
Kinds of Disputes for which usually used		Divorce, custody and related disputes
Characteristics of Strategy		Ordinarily relatively equal bargaining power - individual v individual. Ordinarily disputes must be handled by the courts at some time, if only to ratify the disputants' agreement. Disputes involve mix of economic and emotional issues.
ADR Strategy	3.	Mediation by part-time lay persons or lawyers.
Kinds of Disputes for which usually used		Consumer, landlord-tenant, and other disputes arising out of economic transactions.
Characteristics of Strategy		Usually unequal bargaining power - individual v private institution.
ADR Strategy	4.	Mediation by part-time lay persons or panels composed of representatives of interested groups.
Kinds of Disputes for which usually used		Administrative action or inaction (in prisons, hospitals, public housing projects, etc.)
Characteristics of Strategy		Usually unequal bargaining power - individual v government (often mitigated by political sensitivity of government administrators).
ADR Strategy	5.	Mediation, usually by professional mediators, but in some cases by "community boards", which are panels of part-time lay mediators.
Kinds of Disputes for which usually used		"Community disputes" (variety of issues involving substantial numbers of citizens from one neighbourhood neighbourhood or community).
Characteristics of Strategy		Usually relatively equal bargaining power -group v group or group vs. government agency.
ADR Strategy	6.	Mediation by professional mediator
Kinds of Disputes for which usually used		Major multi-party disputes over specific decision (eg: land use, environment, energy, etc.)

Characteristics of Strategy		Typically involves complex multi-issue dispute with large economic and social stakes. Courts often accessible to disputants, but complexity and multiple parties tend to result in lengthy, expensive litigation. Courts also lack remedies and expertise to arrive at optimal resolutions.
ADR Strategy	7.	Consensus-building - generally facilitated by professional mediator
Kinds of Disputes for which usually used		Policy creation disputes (over creation or modification or legislation, administrative regulations, etc.)
Characteristics of Strategy		Typically involves multiple interest groups and multiple issues.

B. Third-Party Persuasion

(Third-party recommends resolution or offers opinion on key matters in dispute; persuasive effect of third-party action often reinforced by rewards and/or sanctions short of coercion)

ADR Strategy	1.	Recommendations based on comprehensive or limited (e.g., by telephone or correspondence) "inquisitorial" investigation by third party.
ADR Strategy	°	Ombudsman
Kinds of Disputes for which usually used		Governmental and institutional action and inaction
Characteristics of Strategy		Unequal bargaining power - but bureaucrats often responsive to administrative discipline and possible public exposure. Many disputants cannot gain access to courts, either because of stakes or because within scope of administrator's discretion.
ADR Strategy	°	Media complaint program
Kinds of Disputes for which usually used		Consumer, landlord-tenant
Characteristics of Strategy		Unequal bargaining power - individual vs. private institution. Businesses may be responsive to threat publicity. Other institutions may be less responsive.
Kinds of Disputes for which usually used		Government benefits; governmental administrative action and inaction.
Characteristics of		Unequal bargaining power; bureaucrats may be somewhat responsive to

Strategy		threat of public exposure. Courts not accessible for most of these disputes, because of low stakes or dispute being within scope of administrator's discretion.
ADR Strategy	°	Some government consumer affairs agencies
Kinds of Disputes for which usually used		Consumer
Characteristics of Strategy		Unequal bargaining power, but businesses often responsive to threat of possible prosecution. No access to courts for many such disputes, because of ratio of stakes to litigation costs, even in small claims courts.
ADR Strategy	°	Court-based and private neutral fact-finders and experts.
Kinds of Disputes for which usually used		Diverse subject matter, e.g., complicated business disputes; institutional disputes.
Characteristics of Strategy		Usually relatively equal bargaining power. Either under court jurisdiction Strategy or by private arrangement; court-appointed special masters, neutral experts and fact-finders may play inquisitorial role in developing facts and recommending decision to court or providing opinion relevant to settlement negotiations.
ADR Strategy	2.	Recommendations based on presentations by opposing parties, with varying degrees of formality and adversaries.
ADR Strategy	°	Court-based and private settlement conferences.
Kinds of Disputes used		Nearly all subject matters, e.g., business disputes; for which usually insurance claims cases.
Characteristics of Strategy		Varying degrees of bargaining power. Sitting or former judge hears Strategy presentations of parties' substantive and settlement positions, and, usually, recommends appropriate settlement.
ADR Strategy	°	Court-based and private "persuasive" mediation.
Kinds of Disputes for which usually used		Diverse subject matters, but primarily tort claims matters.
Characteristics of Strategy		Varying degrees of bargaining power. Court appointed panels of lawyers or experts informally hear parties' cases and recommend appropriate resolution. In some situations, may be minor sanction for failure to accept recommendation.
ADR Strategy	°	Summary jury trials.
Kinds of Disputes		Various subject matters, but primarily tort claims matters.

for which usually used.		
Characteristics of Strategy		Varying degrees of bargaining power. Advisory jury empanelled by court; hears truncated presentations by attorneys; renders non-binding verdict. Verdict, and opportunity for parties to question jurors through their attorneys, provide information aimed at breaking settlement impasse, where impasse is based on very different perceptions of likely jury verdict on liability and/or damages.
ADR Strategy	9	Mini-Trials.
Kinds of Disputes for which usually used		Usually business disputes.
Characteristics of Strategy		Usually relatively equal bargaining power. Mini-trail process agreed to by contract, either before or after dispute arises; lawyers present summary cases to business principals or client representative and to experienced former judges or distinguished lawyers, who may be asked to render advisory opinion about likely court outcome of post-mini-trial negotiations do not lead to settlement.
ADR Strategy	9	Court-annexed "compulsory" arbitration programs (with right of trial de novo in courts).
Kinds of Disputes for which usually used.		Nearly all subject matters, but usually maximum limit on stakes involved
Characteristics of Strategy		Varied bargaining power, since all types of disputes under certain amount must be handled through arbitration process; may be minor financial penalty if party seeking trial de novo does not better position; usually informal adversarial presentations, either to former judges or lawyer arbitrators.

II. BINDING THIRD-PARTY DISPUTE RESOLUTION TECHNIQUES

A. "Voluntary" Coercion

(Disputants agree to be bound by third-party's decision)

ADR Strategy	1.	Voluntary arbitration (parties reach agreement to arbitrate after dispute arise and select mutually agreeable arbitrator(s)).
Kinds of Disputes for which usually used		Diverse subject matter.
Characteristics of Strategy		Usually equal bargaining power. Disputants generally have access to courts. Arbitration chosen to lower costs, avoid delay and/or gain expertise of decision-maker.

ADR Strategy	2.	Contractual arbitration (parties agree in contract to arbitrate future disputes, but usually pick mutually agreeable arbitrator after dispute arises).
Kinds of Disputes for which usually used.		Usual subject areas include commercial disputes, individual employee grievances under union contract, uninsured motorist claims.
Characteristics of Strategy		Usually equal bargaining power, at least between parties to underlying contract.
ADR Strategy	3.	One-way arbitration (either by contract or after dispute arises, one party agrees to be bound even though other is not, although may be some sanction for failure to agree to award)
Kinds of Disputes for which usually used		Consumer complaints
Characteristics of Strategy		Usually unequal bargaining power, but more powerful party is one agreeing to be bound.
ADR Strategy	4.	Contractual arbitration (one party imposes arbitration on other through adhesion contract)
Kinds of Disputes for which usually used.		Usual subject areas include hospital malpractice disputes, other disputes over services, some leases, and real estate transactions.
Characteristics of Strategy		Usually unequal bargaining power. Even though essentially coerced into arbitration, less powerful party may benefit from this forum, in comparison with courts. Courts generally accessible, but with unfavourable litigation/cost ratios.

B. Modified Adjudication

(Third-party's decision is binding upon parties without their prior consent)

ADR Strategy	1.	Modified adversarial decision-making process.
Kinds of Disputes for which usually used		Small claims, landlord-tenant, traffic offenses. Diverse subject matter, with limit on amount in controversy.
Characteristics of Strategy		Parties rather than lawyers investigate and present evidence (sometimes with government-provided out-of-court assistance).
		Usual rules with regard to pretrial preparation modified, as to limit number of depositions, interrogatories and the like.
ADR Strategy	2.	Inquisitional decision-making process
Kinds of Disputes for which usually		Traffic offenses, small claims, some landlord-tenant.

used

Characteristics of Strategy		Judge rather than parties questions witnesses and otherwise assumes fact-finding responsibilities.
ADR Strategy	3.	Enhanced inquisitional process
Kinds of Disputes for which usually used		Housing
Characteristics of Strategy		Judge also has investigators who can conduct field investigations.
ADR Strategy	4.	Trial by written declaration
Kinds of Disputes for which usually used		Traffic offenses
Characteristics of Strategy		Judge decides on basis of review of parties' written statements of facts instead of oral hearing. Written statements often prepared by parties (i.e., police officers and those who have been cited in traffic cases) without help of lawyers.
ADR Strategy	5.	One-Party oral hearings
Kinds of Disputes for which usually used		Traffic Offenses
Characteristics of Strategy		Judge decides on basis of one party's oral response (eg: alleged traffic offender) to other party's written statement of facts (e.g., traffic citation form).
ADR Strategy	6.	Private judging (judicial arbitration, as under "order of reference" statute)
Kinds of Disputes used		Diverse subject areas, but disputes usually involve high stakes.
Characteristics of Strategy		Experienced former judges employed by parties to hear and decide disputes which usually already have been filed in court. Many court procedures are eliminated or simplified in these forums. Hearings are expedited.

III OTHER MODIFICATIONS OF DISPUTE PROCESSING SYSTEM

ADR Strategy	**A.**	**Elimination of mandatory judicial processing of certain legal events**
Kinds of Disputes for which usually used		Uncontested probate of estates; uncontested divorces.

Characteristics of Strategy		Eliminates requirement that parties obtain judicial permission to accomplish certain legal arrangements. Most of these are "non-disputes", in sense that both parties agree on the outcome they mutually desire.
ADR Strategy	**B.**	**Simplification of legal rules**
Kinds of Disputes for which usually used		Divorces; accident compensation.
Characteristics of Strategy		Certain issues, generally defendant's fault and sometimes causation, are eliminated as prerequisites for recovery. Intended effects include reduction in number of disputes that must be litigated and simpler, shorter proceedings in those that go to trial.
ADR Strategy	1.	Fee-shifting
Kinds of Disputes for which usually used		Diverse subject matter, but usually involve dispute over contracts, since fee-shifting provisions ordinarily apply only if incorporated in a contract. Relatively large number of statutes provide for one-way fee shifting - plaintiff may recover fees if successful.
Characteristics of Strategy		Losing party at trial must pay winning party's costs, usually including reasonable attorneys' fees.
ADR Strategy	2.	Payment-into-court and offers of judgment.
Kinds of Disputes for which usually used		Diverse subject matter.
Characteristics of Strategy		Payment-into-court is common process in England. Civil defendant deposits with the court a sum equal to its "final offer" to plaintiff. If plaintiff refuses this payment and insists on trial, he or she must obtain verdict higher than payment-into-court or be compelled to pay defendant's costs, including reasonable attorneys fees. Offer of judgment available in many U.S. forums, but sanction does not include attorney's fees. Both processes raise equity issues when one party significantly poorer than other."

6 A discussion of arbitration and its possible uses is a comprehensive subject and cannot be included here. For the purpose of this thesis, it is sufficient to know that it is a process akin to adjudication (in fact it is a less formal form of adjudication) and therefore best suited to settle disputes of rights although it is sometimes useful for settling disputes of interest especially in essential services. It is also usually a final settlement mechanism. The following is some material on the use of arbitration:

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For material on the lock-out see ch 5 n 2.

11 Explanation of Sketch

1 A (black block) represents the economically more powerful individual employer.

2 B (small black block) represents the economically weak individual employee.

3 C (small black block outside) represents alternative individual labour.

4 Small green blocks represent other individual employees working for employer A who associate to belong to union D in order to adjust the power balance between the individual employer and the employee.

5 Green arrows represent the promotion of collective bargaining between employer A and union D.

6 The blue line represents the contract of employment the traditional mechanism used to demarcate the employment relationship (allocation context).

7 The thick green area represents security of employment strengthened beyond the parameters of contract by the law.

8 The black dotted line represents the possibility that the employer (A) has of making use of alternative labour (C).

Summarized, the green areas represent involvement of the law as a technique for the regulation of social power to adjust the power balance between A and B in the following ways:

- Allowing freedom of association and power formation (4)

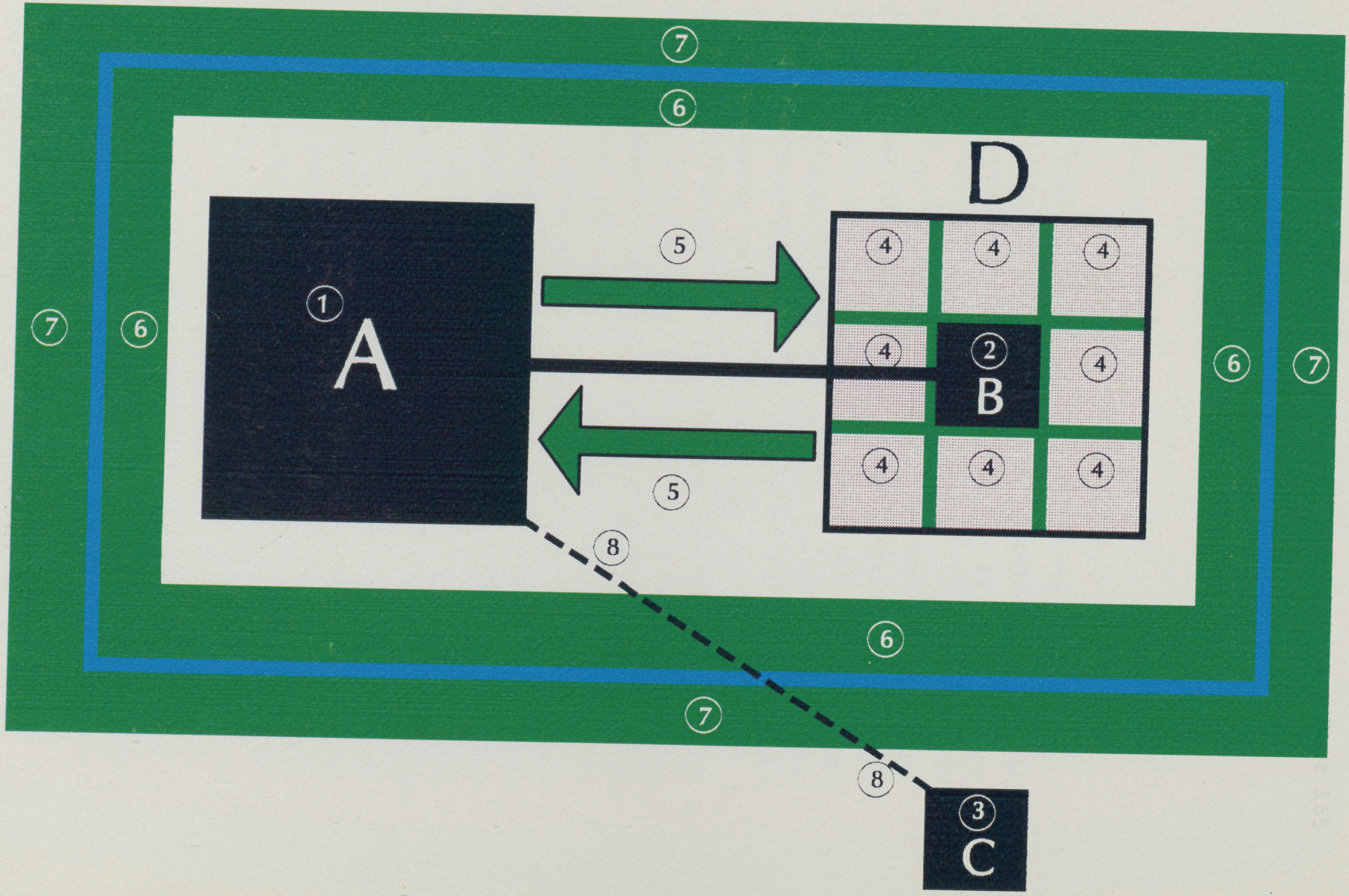
- Promoting collective bargaining (5).

- Demarcating the allocation context more securely (7).

Note: The power which is formed can be withdrawn in order to apply pressure towards accepting demands (ie: by means of industrial action).

The above inputs by the law all make it more difficult for A (capital) to make use of alternative labour (C) and therefore more dependent on B and D (labour) and therefore less powerful.

Figure I: PROCEDURAL INTERVENTION BY LAW TO ADJUST POWER BALANCE



CHAPTER THREE

CONTRACT AND THE REGULATION OF THE EMPLOYMENT RELATIONSHIP

1 INTRODUCTION

In order to address the way in which the law regulates the power balance in the institutionalization of labour disputes in South Africa, it is first necessary to analyse the nature of the employment relationship and in particular the desirability of contract as a means to regulate power relations. The way in which the employment relationship itself is viewed has important implications for the power balance between the parties in that it materially affects the creation and application of rules and therefore has an influence on the dependencies of the parties. For example, the law of contract regards contracting parties as equals, whilst in reality this legal fiction does not always take cognizance of the economic power discrepancies that may exist between parties. A consumer and a large service organization such as the railways simply do not enjoy the same amount of bargaining power when the price of a railway ticket is negotiated. Standard contracts such as this leave the consumer with only one choice, either to take the goods at the price offered, or to leave them.[1] If a dispute arises between these parties, the courts would traditionally adjudicate the matter from the perspective of equal contractual parties contracting willingly and freely. In reality, consensus in the sense contemplated by the law is seldom realized.

The sources of rights and duties regulating the employment relationship and the nature thereof are therefore very important. Unfortunately, no universal clarity exists

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1 Jacobson "The Standard Contracts Law of Israel" 1968 Journal of Business Law 325.

regarding the exact nature of the employment relationship. Kahn-Freund explains the problem:

> "The labour law of Great Britain shares with that of the other nations in our orbit of civilisation two essential jurisprudential features: it is based on the contractual foundation of the obligation to work and of the obligation to pay wages, and it is at the same time permeated by a tendency to formulate and to enforce an evergrowing number of imperative norms for the protection of the worker, norms which the parties to the contract cannot validly set aside to the detriment of the economically weaker party. This dual insistence on agreement as the legal basis of at least some of the essential rights and obligations and a mandatory regulation as the source of the content of the relationship has given rise to a jurisprudential dilemma which has so far not been clearly faced in the literature on the subject."[2]

Labour law rules are derived from many sources of law[3] with the result that various constructions regarding the nature of the employment relationship have seen the light. Some of these constructions are reviewed briefly with a view to clarifying the nature of the relationship in South Africa.

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2 Kahn-Freund "A Note on Status and Contract in British Labour Law" 1967 Modern Law Review 30: 635.

3 See inter alia Piron "Labour Law: A New Discipline in South Africa" 1977 CILSA 322 et seq especially the distinction between the common-law approach (eg United Kingdom, United States, etc) which does not encourage rigid demarcation of fields of law and the continental approach which does.

2 HISTORICAL BACKGROUND

2.1 Roman Times

A number of works exist on the historical background of the employment relationship in South Africa and elsewhere.[4] It is not necessary to repeat the discussions in these works here. This introduction is merely to show that the contract acted as a liberator of workers from the absolute subordination suffered by them and that it retained some of its role in the regulation of employment throughout history.

The Romans, largely similar to the position in other old civilization, depended primarily on slaves for the provision of labour. Slaves were the property of their owners to be dealt with at will. Apart from slave labour, labour was also performed by "free" workers who did so in a relationship akin to a contract for compensation of various kinds. They remained subordinate to and dependent on their employers however.[5]

Locatio conductio in Roman law included the hire of things (lease),[6] services (employment)[7] and work (eg

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4 See inter alia, Ehlers Die Arbeidsregtelike Verhouding tussen Werkgewer en Werknemer ch III 21-49; Fourie Die Dienskontrak in die Suid-Afrikaanse Reg the whole, but especially chs I-III 1-78; Piron Collective Bargaining in South Africa Labour Law ch 15-133, Van Jaarsveld & Coetzee Suid-Afrikaanse Arbeidsreg section 1 1-47; Ringrose The Law and Practice of Employment ch 2 3-14; also relevant to the South African history, see Kaser Roman Private Law par 42 182-7 and the authorities quoted by these writers. See also the very important work by Atiyah The Rise and Fall of Freedom of Contract. It concentrates on the development and demise of contract from 1770 to the present day in England. Aspects of this work will be referred to below. See also Jordaan The Employment Relationship : Contract or Membership (Jordaan Membership).

5 See, for example, the discussion by Ehlers 21 22 23 29 and Fourie 1 2 15 23 24.

6 locatio conductio rei.

7 locatio conductio operarum.

independent contractor)[8] in a comprehensive uniform contractual situation which did little to protect the economically and socially weaker party effectively. The uniformity of locatio conductio was upheld regardless of the variety and diversity of the relationships regulated by it. Outwardly the key words "locare" and "conducere" were responsible for this insistence on uniformity.

A Locator was a person who placed something out, who gave somebody a factual power to dispose of something and the conductor on the other hand took the object left with him or assumed the power to dispose of it.[9] In the hire of services the employee (locator) therefore placed his person and labour at the disposal of the employer (conductor) who could utilize the labour as he saw fit. The central irony, however, was the fact that since the locator could not be separated from his labour, the conductor assumed control over his person too. He therefore performed his labour in a situation of utter dependence, of complete subordination or near slavery.

Labour performed under contract was not popular, because members of the upper classes were loathe to contravene the good ancestral custom of acting gratuitously. Slave labour largely satisfied the demand for mass and skilled labour[10] with the result that the relationship in which labour was performed was predominantly one of status (rather than contract) in which the person of the slave itself was the object of the property rights of its owner. The locatio conductio operarum remains important however

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8 locatio conductio operis.

9 See in general Kaser 182-3.

10 Kaser 185; Ehlers 25.

since it is still regarded by the South African courts as the basis of the employment relationship.[11]

2.2 **Developments Since Roman Times**

What follows is a summary of the historical developments which influenced the nature and regulation of the employment relationship from early Roman times to the present day. These developments are briefly outlined for the purposes of gaining a bird's eye perspective on the suitability of contract as the basis of the employment relationship.

For many years the notion of the employment relationship as one of status rather than contract predominated. The colonus was for example a person who lived on state property subject to the authority of the landowner who inherited this kind of worker with the property in Byzantine times. The colonus was not the property of the landowner like a slave, but lived in a state of subordination that depended on the status of the landowner.[12]

Germanic law also initially regarded employment as a species of the law of persons rather than of contract although workers under Germanic law gradually started to enjoy more freedom.[13] Central to this concept was the idea of good faith or loyalty. Elements of the modern employment relationship became evident however:

> "Het nieuwe arbeidsethos en de opgaande economische beweging die met die 11de eeuw begint, hebben het moderne loondienscontract mogelijk gemaakt. Het

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11 See inter alia Ongevalle Kommissaris v AVBOB 1976 (4) SA 446 (A).

12 Ehlers 28.

13 Ehlers 29; Fourie 20-2.

> werken om dagloon was al by de Germanen bekend geweest; in de vroege middeleeuwen heeft dagloners-arbeid deur vrijen en onvrijen eveneens bestaan. Wat nu echter ontstand was en vorm die het mogelijk maakte, dat een vrije voor een bepaalde of onbepaalde tijd in dienst trad by een ander zonder iets van zijn vrijheid te verliezen. De onzelfstandige handearbeid heeft daarmee een geheel nieuwe dimensie gekregen .... Hoe dan ook, het feit zelf van het ontstaan van een vrij loondienstcontract mag als het meest originels verschijnsel in de ontwikkeling der middeleeuwsin arbeids-verhoudingen worden gewaardeerd."[14]

Although freedom was not compromised altogether, strong elements of subordination of the person of the worker still remained.

The rest of the Middle Ages saw a steady decline in dependence on slavery and during the 13th century slavery virtually disappeared in Western Europe, although the slave trade with other countries still continued for a couple of centuries.

The feudal system in England, characterized by an unfree status relationship between landowners and villani who had to see to the needs of the landowner from the proceeds of the land, also died out because landowners started to see the benefits of letting out land rather than depending on unwilling labour.[15]

Growing cities and the increased demand for labour in industry and commerce steadily caused more and more labour

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14 Van der Ven quoted by Fourie 23.

15 Ehlers 30.

to move from the land to the cities. The stage was set for the development of labour law from its strong patriarchal status basis to one founded in contract with the advent of the Industrial Revolution.[16]

The Industrial Revolution brought with it the establishment of large factories and a growing need for labour and it was only then that the development of labour law as a separate discipline really gained momentum.[17]

In the period of laissez-faire[18] during the 18th and 19th centuries, the contract of employment loomed large. Employers and employees were left to regulate their affairs without interference by the state. The legal assumption that parties contracted as equals made it possible for the economically stronger employers to exploit workers without additional protection being afforded by the state. Furthermore, the contract of employment could be terminated at will and employers bore no responsibility to see to the needs of workers beyond the payment of their wages. Workers were therefore in a subordinate position under the supervision and control of their masters. Little, if anything, remained of the so-called consensual basis of contract since workers had a choice only to accept work or not, without any power to negotiate better conditions of employment. By the 19th century most of the early protective legislation had disappeared.[19]

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16 Ehlers 15.

17 Ehlers 34.

18 Ehlers 34. Atiyah chs 8-16 refers to the period 1770-1870 as the "age of freedom of contract". During this period England saw "the emergence of a highly individualist society, and then the gradual creation of a collectivist society" (Atiyah 226).

19 Ehlers 35.

The next phase identified by Ehlers[20] was a period where the state actively started to regulate aspects of the employment relationship by means of minimum standards legislation and regulations. Matters such as hours of work, protection for women and children, safety and health and criminal prosecution for breaches of contract by employers received attention. During the laissez-faire period, the employment relationship was essentially bipartist, but the state now joined as a third party in a tripartist relationship.

Initially, labour unions which developed from the Friendly Societies were not permitted. The Combination Laws of the 14th century prohibited the formation of associations of workers for the purpose of negotiating better conditions of employment. The Combination Acts of 1799 and 1800 in England did essentially the same. Again, the subordinate position of workers was entrenched and the power of employers restored and protected.[21]

This was not the position for much longer.[22] In 1824 and 1825 England promulgated the Combination of Workmen Act which officially gave workers the freedom to negotiate conditions of employment on a collective basis. Many labour

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20 Ehlers 34-7.

21 Ehlers 38. See Atiyah 529: "After the outbreak of the Revolutionary Wars, however, the authorities began to take a different view of combinations, principally because they saw any association of workmen as a possible source of subversive or revolutionary ideas. At a time when new concentrations of population were appearing in great new cities, there was still no proper police force to control them or maintain some surveillance over them all combinations inspired fear and dread in the authorities. The result was the Combination Acts of 1799 and 1800 which made virtually all combinations, whether of employees or even employers, a crime."

22 Ehlers 40-1. See Atiyah 530: "Employers themselves knew that the Acts were largely ineffective in preventing combinations which often continued to flourish underground or in the guise of Friendly Societies. They also knew that labour relations were not helped by reliance on the law which was therefore invoked but rarely, and then only in times of great disturbance."

unions were formed and in 1867 workers received the franchise which led to the repeal of the remaining prohibitions against unions in 1875. The union movement had received full recognition and, under the influence of writers such as Marx, also sought international affiliation. The power of employers could now be challenged and workers were partly released from absolute subordination. Consensus, in the sense of agreement reached by equals, also became more feasible.

This was not the end of the road for the workers' struggle. The courts,[23] which were staffed mainly by members from the middle class, were loathe to enforce the freedoms afforded to the unions and instead developed common-law offences and remedies of their own, like criminal and later civil conspiracy, to protect the interests of employers. Again, worker power received a major setback.

Finally, the power of the courts was also curbed[24] by the state which promulgated legislation which did away with conspiracy as an offence in 1871 and 1875. The Trade Disputes Act of 1906 gave unions protection against claims in delict. The power balance between employers and employees

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23 Ehlers 41. See Atiyah 660: "From 1850 or thereabouts, the phenomenon of formalism took an increasing hold upon English legal thought. I have sketched above the principal characteristics of formalism as it affected English law; in particular, it invoked rejection of the law-making power of the judge, rejection of the relevance of policy issues to legal questions, belief that the law was a deductive science of principles, and the one `true' answer to legal questions could be found by a strictly logical process. It involved also a belief in the objective reality of legal concepts, so that, for example, lawyers came to see the answer to legal issues as depending on the `true' delineation of concepts such as offer, acceptance, consideration, estoppel, and a variety of others. The notion that legal concepts and categories were merely tools by which the lawyer could arrive at a range of justifiable decisions was not so much rejected, as simply not entertained by most English lawyers. And inextricably involved in this development was the gradual decline of the influence of external factors or bodies of thought on the law. It was indeed partly because lawyers could no longer find their answers in broad theories about society, or political economy, or moral principles, that they increasingly turned inwards to the law itself."

24 Ehlers 45-7.

was thus partly restored and new impetus was given to collective bargaining.

At the end of the 19th century, collective bargaining became firmly rooted as a means of determining conditions of employment between employers and employees.[25] Five parties were involved in the process: the employer, the employee and the state, and also employer organizations and unions.

Contract as a means of regulating the employer-employee relationship retained some prominence, but the absolute subordination and the inferior bargaining position of the individual, which had been obscured by the fiction of equality and freedom to contract inherent in the law of contract, gave way to a more realistic power balance between employer and employee in the determination of conditions of employment. In some countries contract remained the only legal foundation for the enforcement of rights and duties, but the content of contracts was determined by collective bargaining.

In conclusion, therefore, we see a see-saw historical development in the nature of the employment relationship from status to pure contract to a relationship dependent on various other sources such as regulatory legislation and collective bargaining. However, contract as a source of rights and duties never disappeared altogether.

3 CONTRACT AS A MECHANISM IN THE REGULATION OF THE EMPLOYMENT RELATIONSHIP

In the previous paragraph a brief historical perspective was gained on the overall development of the employment relationship. It is clear that contract played an

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25 Ehlers 47.

important role, firstly as a liberator of workers from the absolute domination suffered by them in the status relationship, and secondly, even when it became clear that the mechanisms of contract could not cope with the economic domination suffered by individual employees in the laissez-faire era, it still largely retained its function as the legal basis for most of the rights and duties created elsewhere, such as by means of collective bargaining. The modern employment relationship is increasingly characterized by rights and duties originating from a multiplicity of independent sources. It is therefore important to have a closer look at the suitability of contract as a means of regulating employment in order to establish its role vis-à-vis other sources of rights and duties operative in the employment relationship.

The question whether the employment relationship should be seen as a relationship sui generis also needs to be addressed briefly for the purposes of understanding the role of the law as a technique for the regulation of social power in employment relations. In this regard considerations of power and consensus in the establishment and continuation of the employment relationship are of paramount importance.[26] It is also worthwhile to remember that contract as a mechanism for the regulation of rights and duties manifests itself in both the individual as well as the collective context. This section deals primarily with contract in the former context. Furthermore, contract as a dispute settlement mechanism should not be confused with contract as the foundation of the employment relationship for the purposes of this discussion.

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26 One cannot avoid considerations of justice in a discussion of this nature. In this section (without defining justice) the concern is only with the obvious injustices contained in the classical contractual structuring of the relationship between employer and employee: the fiction that consensus as equals exists in a situation of unequal economic power. This aspect receives attention in pars 4-6 below.

Lastly, although contract may have lost some of its importance as the primary source of the substantive content of rights and duties pertaining to the individual employment relationship, one has to consider the question of the importance of the mechanics of contract as a vehicle for the operation of other rights and duties whether individual or collective. This question also receives some attention here.

3.1 Competition, Contract and the Role of the State

> "Competition is rivalry subdued into organization by rules of the game. Nature after centuries of creative effort produced no such scheme of arrangements as the competitive system. No great convention, called to consider how industrial activities might be put together, contrived such a constitution for the economic order. It grew up at a time when the medieval regime of prelate and baron, of fief and glebe, was passing; it was essentially the product of petty trade. Into its making went an element of choice, apparent in a few big decisions. The older way of authoritative control was rejected because of the mischief it had done; monopoly was unacceptable because of the threat it carried. But there was no conscious judgment to abandon status, to establish contract, to transform landed into commercial property or to replace custom with the market in the making of prices. For the most part such arrangements just grew up. They represent the accommodations of a myriad of men, in a million places high and low, to

their own little necessities; they are the survivals of a series of chance judgments."[27]

Historically the development of contract is largely an incident of commercial and industrial enterprises that necessitates a greater anticipation of the future than is necessary in a simpler or more primitive society.[28] The concept of freedom of contract became prominent in the social, economic and political philosophies of the 16th and 17th centuries[29] although clear traces are to be found in the Hebrew law of contract as far back as the days of Herod and in the Hellenic laws of contract in Greece during the rapid expansion of commerce that followed in the 5th century BC.[30]

Maine's observation that the progress of law is from status to contract[31] is therefore only true of periods of expanding trade. Throughout legal history these periods are

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27 Hamilton "Freedom of Competition" Encyclopedia of the Social Sciences vol IV: 142. Sir Henry Maine Ancient Law 170 305 called this a progress in law from status to contract in 1876. Pollock & Maitland A History of English Law 233, stated (in 1878) that in the early Middle Ages "the law of contract threatened to swallow up all public law.... The idea that men can fix their rights and duties by agreement is in its early days an unruly anarchical idea. If there is to be any law at all contract must be taught to know its place." This seems to say that Maine's generalization is not a universal and necessary law, but that it appears as if contract and status automatically varied in importance depending on the role of the state in the regulation of rights and duties. See also Isaacs's hypothesis that status-contract-to-status runs in cycles or in pendular swinging ("The Standardising of Contracts" 1917 Yale Law Journal 34).

28 Cohen "The Basis of Contract" 1932-33 Harvard Law Review XLVI: 553 555. See Atiyah 102: "In the eighteenth century a man's wealth was thought to consist largely of his `possessions', of physical property, principally land; in the modern world, wealth has been said to consist largely of promises - by companies to pay dividends on stocks and shares, by Government to pay interest on stock, by debtors to pay their debts, and so on. In and around the year 1770 this transition was in process of recurring. It was the process by which the law of property gave way in paramountcy to the law of contract."

29 Aronstam Consumer Protection, Freedom of Contract and the Law 1.

30 Cohen 556-7. See also in general par 2 above.

31 See n 26 above.

followed by increased regulation either by means of standardization or direct legislation. At no stage do communities completely relinquish the right to limit and regulate the effect of private agreements.[32]

In spite of indications of a status relationship the fact remains that the competitive system essentially consists of two pairs of institutions: private property and contract; profit making and freedom of trade.[33]

The emphasis placed on the protection and the method of regulation of these institutions by the state in any particular society are indicative of the way in which economic power is distributed in society, especially between capital and labour and also of the interests of the state itself.[34]

Laws are the result of economic, national, religious and ethical interests which confront one another in a legal community striving for acknowledgment.[35] This is true, but

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32 Cohen 558.

33 South Africa professes to have a capitalist economic system, and a policy of free enterprise and deregulation is currently advocated: see White Paper WPG 87 in general and specifically par 4.1.8.

34 Hamilton 142 states: "The usages of private property determine who is to hold and to control the various resources of society; the usages of contract, how persons, instruments and materials are to be brought together in the productive process. Together property and contract supply the mechanics of competition. The lure of profits draws individuals and corporations into industry and impels them to produce and market goods. The openness of an industry to all who care to take its chances prevents monopoly and limits money making to reasonable gains. The bait of profit is beacon and guide; the freedom of the trade is brake and governor. Together they direct industry, keep it orderly and adjust to a changing social order.[...] The right of contract, once thought of as a voluntary agreement between equals, is a changing thing; it has been remade by the rise of the corporation, the coming of business and the growth of large scale production."

35 A summary of Heck's paradigmatic formula taken from 1914 Archive fur die Civilastische Braxis.

of additional importance is the fact that the state itself[36] has interests which it wishes to protect, regardless of the other interests operative in society. To what extent the law is a result of the interests of the dominant classes and of the state itself to the detriment of those of other interest groups raises important questions of justice.

The nature of contract and the extent to which it is acknowledged as a source of rules in a particular industrial relations system is therefore an important power variable in the allocation[37] and protection of scarce resources. The prominence of contract can for example be an indication of the absence of state control (and therefore complete freedom) in the allocation process on a superficial level, but can be responsible for economic domination by one class over another, in that the law assumes equality of bargaining power where this does not exist in reality:

> "Society, when granting freedom of contract, does not guarantee that all members of the community will be able to make use of it to the same extent. On the contrary, the law, by protecting the unequal distribution of property, does nothing to prevent freedom of contract from becoming a one-sided privilege. Society, by proclaiming freedom of contract, guarantees that it will not interfere with the exercise of power by contract. Freedom of contract enables enterprises to legislate by contract and what is more important, to legislate in

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36 With regard to the interests of the state, Zippelius Das Wesen des Rechts writes that while law is conditioned by interests and power it is not merely a product of them. The holders of jurisdiction, especially parliaments, are confronted by desires which are manifestations of certain interests conflicting with other interests. Parliamentary acts and other legal regulations decide which interests may be satisfied and to what extent and which are protected and to what extent, and this is normally at the expense of other interests.

37 This is primarily a competitive process.

> a substantially authoritarian manner without using the appearance of authoritarian forms. Standard contracts in particular could thus become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals. This spectacle is all the more fascinating since not more than a hundred years ago contract ideology had been successfully used to break down the last vestiges of a patriarchal and benevolent feudal order in the field of master and servant.... Thus the return back from contract to status which we experience today was greatly facilitated by the fact that the belief in freedom of contract has remained one of the firmest axioms in the whole fabric of the social philosophy of our culture."[38]

Ironically, a blind adherence to the fictitious equality of contracting parties where competition in fact takes place in a situation of vast power inequalities, has made lawyers insensitive to the fact that contract itself may be a major contributor to the destruction of the institutional framework of a capitalistic society:

> "Freedom of contract means that the state has no monopoly in the creation of law. The consent of contracting parties creates law also. The law making process is decentralized. As a result, law is not an order imposed by the state from above upon its citizens; it is rather an order created from below."[39]

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38 Kessler "Contracts of Adhesion - Some Thoughts about Freedom to Contract" 1943 Columbia Law Review 629 640.

39 Kessler 641.

Whilst the absence of the state may be seen as desirable by the proponents of voluntarism in industrial relations in order to allow the law to grow from below, the irony is that the courts remain neutral in the name of freedom of contract which may have a devastating effect on the interests of the individual employee. The dogma which regards contract as a set of operative facts and nothing more helps to preserve the illusion that the law will protect the public against any abuse of freedom of contract. A very real danger exists that powerless individuals may be dictated to by, instead of reaching agreement with large employers. This may lead to unacceptable domination by monopolies and the demise of competition itself.

It is thus important to realize that freedom of contract has different implications for the parties to different kinds of contract, depending on the power of the participants. In this regard it is necessary to analyse the nature, mechanics and utility of contract in order to assess its desirability as a mechanism for the regulation of rules between employer and employee and, in the light of this, whether it is necessary for the state (and therefore the law) to intervene actively in order to restore the power balance in the allocation and protection of scarce resources between employer and employee. A further question that needs to be addressed for the purpose of tracing the role of the law in the institutionalization of conflict, is how the state has interfered and how it should interfere in order to promote maximum legitimacy and efficiency in the creation and enforcement of rules governing the allocation process. This is done in paragraph 6 below.

3.2 The Foundations, Mechanics and Utility of Contract

3.2.1 Freedom of Contract

The movement from status to contract has its roots not only in legal history but also in the general individualistic philosophy that manifested itself in modern political and economic theory, religion and metaphysics.[40]

Grotius considered the right to contract to be part of natural law:

> "10. Toezegging noemen wy een willighe daed eens mensches waer door hy een ander belooft, met meninghe dat den ander het zelve aennemen einde daer door op den belover eenig recht al mogen verkrijgen.
>
> 11. Toezegging is iet meer dan belofte: want de belofte maecht wel dat het onbehoorlick is zulks te laten als belooft is, maer geeft een ander gheen recht an zulks te mogen aenneemen.
>
> 12. Den grond hier van bestae in des mensches vrije macht over sijne daden: want gelijckerwys de macht die iemand heeft over sijn eighen goed, 't zy in vollen ofte gebrechlicken eigendom, zoo veel werckt dat hy door levering ofte toelating een ander mag eigenaer maecken, ghelick hier vooren is verklaert, alzoo oock vermag een mensch een deel, ofte veel eer een gevolg, sijns vrijheids aen een ander zulks aenneemende over te draghen, zoo dat die andere eenig recht daer over werd geboren, welck recht inschuld werd genoemt."[41]

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40 Cohen 558-68; see also in general Atiyah ch 10 256 et seq.

41 Inleidinge 3.1.10-12.

Implicit in the above legal statement is also the idealistic political view of contractualism that true justice lies in the will of the individual contracting freely without governmental restraint. Classic economic optimism has it that there is a pre-established harmony between the good of all and the pursuit by each of his own selfish economic gain. Since each individual knows best what he wants and since he is free to choose without restraint, justice follows naturally because nobody can be subjected to the power of another without his consent.[42] Hobbes describes this liberty as follows:

> "The right of nature, which writers commonly call the jus naturale, is the liberty each man has to use his own power, as he will himself, for the preservation of his own nature ... that is to say ... of doing any thing, which in his own judgment, and reason, he shall conceive to be the aptest means thereunto."[43]

From this general discussion of the nature of liberty, Hobbes derived the idea that liberty could be expressed by means of fundamental rights. These rights could be transferred to other people by means of contract and therefore freedom of contract itself was regarded as an unrestricted natural right.[44]

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42 Cohen 558. See also in general Aronstam 3-4 and his discussion of the views of John Locke, Thomas Hobbes and John Stuart Mill in this regard.

43 Hobbes Leviathan 145-6.

44 See inter alia the summary by Aronstam 3.

Other writers[45] such as Mill,[46] Smith[47] and Sidgewick[48] embraced similar ideas of unrestricted freedom of the individual leading to a natural justice for all. South African judges have also adopted similar ideas about freedom of contract,[49] for example:

> "It is a general principle of our law that parties shall not be fettered in their contractual freedom

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45 quoted by Aronstam 4-6.

46 He stated his utilitarian philosophy as follows in Three Essays 15: "That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign."

47 In Wealth of Nations II 180 he wrote: "All systems either of preference or of restraint therefore, being thus completely taken away, the obvious and simple system of natural liberty establishes itself of its own accord. Every man, as long as he does not violate the laws of justice, is left perfectly free to pursue his own interest his own way, and to bring both his industry and capital into competition with those of any other man, or order of men. The sovereign is completely discharged from a duty, in the attempting to perform which he must always be exposed to innumerable delusions, and for the proper performance of which no human wisdom or knowledge could ever be sufficient; the duty of superintending the industry of private people, and of directing it towards the employments most suitable in the interests of society."

48 He explained the way in which societies progressed in Elements of Politics 82: "Suppose contracts freely made and effectively sanctioned, and the most elaborate social organisation becomes possible, at least in a society of such human beings as the individualistic theory contemplates - gifted with mature reason and governed by enlightened self-interest."

49 See for example, Innes CJ in Wells v SA Aluminite Co 1927 AD 69; Kotze JP in Osry v Jugh Laubser & Co Ltd 1922 CPD 531; Potgieter J in Shifren & others v SA Sentrale Ko-op Graanmaatskappy Bpk 1964 (2) SA 343 (O) and Steyn CJ in SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren & andere 1964 (4) SA 760 (A).

unless their agreement is against public policy or prohibited by law."[50]

and:

"Dit sou 'n opvallende afwyking wees van die elementêre en grondliggende algemene beginsel dat kontrakte wat vryelik en in alle erns deur bevoegde partye aangegaan is, in die openbare belang afgedwing word."[51]

Although these statements by South African judges are not political in the sense meant by the writers, they are indicative of a reluctance to interfere in the contractual freedom of parties.[52]

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50 Potgieter J in Shifren & others v SA Sentrale Ko-op Graanmaatskappy Bpk 346H.

51 Steyn CJ in SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren & andere 767A.

52 The position in South Africa particularly with regard to contractual freedom in labour matters is discussed below (see par 3.3). See also Lubbe & Murray Farlam and Hathaway: Contract: Cases, Materials and Commentary 2: "The extent to which law and legal institutions in fact reflect social, economic and political conditions is always problematic. In contract law this problem manifests itself in two distinct ways. One relates to the way in which lawyers deal with the subject and its theoretical underpinnings, the other to those underpinnings themselves. The notions of freedom of the individual and equality strongly influence legal thinking about contracts. This does not mean that the law requires individuals to be free to contract on an equal footing before it will uphold contracts. In South Africa, at least, it rather means that equality and freedom of choice are taken for granted and that legal rules are developed on the assumption that these values are realized. For instance, it is extremely seldom a defence to breach of contract that the `guilty' party started from such a position of weakness that the contract hardly reflects his or her interests. On the other hand it is often agreed that a principle of contract law is sound because, in the abstract, it suggests an even-handed treatment of the parties. That the rule may lead to hardship in particular circumstances relating to the negotiating power of the parties is an issue that is not considered relevant. In other words, lawyers simply accept values such as freedom and equality as given and on such premises strive to develop a logical and consistent system. The second problem is whether these legal values indeed reflect social reality. Are the values reflected in text books and Supreme Court judgements consistent with the conditions, commercial practices and debates of the late twentieth century? One could also ask to what extent the law could be used to change existing social reality in order to make it more equitable. As an inescapable source of obligations in our society, a study of contract inevitably raises these issues."

Cohen correctly criticizes the pure doctrine of freedom of contract:

> "The philosophy of freedom or liberty illustrates one of the most pervasive and persistent vices of reasoning on practical affairs, to wit, the setting-up of premises that are too wide for our purpose and indefensible on their own account.
>
> In the fierce fight against the numerous irrational, tyrannical, and oppressive restraints men jump to the conclusion that the absence of all restraint is a good in itself and indeed the one absolute good in the political field. The error of this cult of freedom is of the same logical type as that of the tradition which it opposes. The latter argues that since our natural impulses are not free from bad consequences, therefore they are absolutely bad and must be made powerless by checks and balances or some other device. Both sets of arguments jump from the perception of what is evil under certain conditions to the affirmation of an untenable absolute. Let us consider the situation from this point of view.
>
> Since what we want generally seems to us good, freedom, as the removal of obstacles to achievement, is a necessary part or condition of this good. But mere freedom as absence of restraint, without positive power to achieve what we deem good, is empty and of no real value. The freedom to make a million dollars is not worth a cent to one who is out of work. Nor is the freedom to starve, or to work for wages less than the minimum of subsistence,

> one that any rational being can prize - whatever learned courts may say to the contrary."[53]

He continues by arguing that it is true on the other hand that when men are in the position of governors they cannot escape seeing the justice on the side of their own special interests when their interests conflict with those of the rest of the community. Thus governments almost always think it necessary to keep and to perpetuate their power.[54] He qualifies this:

> "But even so, the interest of the governors is not always contrary to those of the governed. Even a wolf, if we may modify a parable of Santayana's, can, to insure a steady supply of sheep, become a careful shepherd of his flock. The question to what extent the interests of the governors and the governed coincide and to what extent they differ is an empirical one."[55]

Essentially then, mere freedom to do does not necessarily entail the power to achieve. To what extent the power to achieve is afforded and supported by the law is a question of fact in any particular society. It is clear that absolute freedom to contract does not automatically mean the equitable distribution of scarce resources because of the power discrepancies that it conceals. Law as power has to regulate some kind of balance of power between interest groups in order to achieve real consensus in the distribution and protection of scarce resources. Real consensus will also

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53 Cohen 559-60.

54 Cohen 560.

55 Cohen 560-1.

never be present where the law[56] itself shows a bias of interests in the regulation of power between groups. Freedom of contract hides the bias in favour of employer interests.

3.2.2 **Why Contractual Thinking?**

The limitations of a general theory of freedom of contract are clear, but why does it still permeate legal thinking in the allocation and protection of scarce resources?

Pound[57] offers seven reasons for the course that American constitutional decisions have taken. Firstly, he attributes these developments to an individualistic conception of justice which exaggerates the importance of property and contract and which emphasizes private rights at the expense of public rights. This conception is hostile to legislation and regards a minimum of lawmaking to be the ideal.[58]

A second reason for these developments is "a condition of mechanical jurisprudence, a condition of juristic thought and judicial action in which deductions from conceptions has produced a cloud of rules that obscures the principles from which they were drawn, in which conceptions are developed logically at the expense of practical results

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56 Law is used in the sense of a mechanism in the hands of the state, ie those in control of the central rule making process (see also in general ch 1 and especially ch 2 par 2). According to Jordaan "The Law of Contract and the Individual Employment Relationship" in Labour Law (Jordaan Contract) 73-88 other sources of regulating the employment relationship have become so prominent that contract because of its limitations has no right of existence at all.

57 Pound "Liberty of Contracts" 1908-1909 Yale Law Journal 18: 457-8.

58 This is reminiscent of the voluntarist idea in industrial relations.

and on which the artificiality characteristic of legal reasoning is exaggerated".[59]

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59 Pound 457. What is meant by "mechanical jurisprudence" and "a cloud of rules that obscures the principles from which they were drawn" is illustrated by the following lengthy extract from Llewellyn "What Price Contract? - An Essay in Perspective" 1930-1931 Yale Law Journal 40: 704-5. It is quoted in full in order to show the stilted, artificial and mechanical style of contractual concepts and language: "Contract comes to a lawyer as a term laden with connotations of doctrine and theory. Unilaterals and bilaterals, detriment, pre-existing duty, accord executory or accord and satisfaction, peculiar rules on notes and bills and warranties in insurance and substantial performance in construction deals, objective standard and the meeting of the minds, simple rules or rules laden with exceptions, writings and seals and the statute of frauds and the rule of integration, specific performance, unjust enrichment, declaration of trust and conditional device, undisclosed principals, corporation charters, successive assignees, situs of debts, attachment, inheritance and taxation - as one ranges through the various technical phases two things happen. First, to get any coherence in the grasp of detail one is tempted to mark off a field called perhaps, `general contract theory'. And if one does this, he finds problems of gratuitous promises, of successive assignees, of beneficiaries, hiding silently out of sight in a `law' of trusts; problems of taxation, `liberty of contract,' inheritance, garnishment, dropping off into `constitutional law'; problems of anticipatory control of transactions dividing themselves queerly between this `general law of contract', the field of evidence, and general odds and ends, such as limitations when the problem is whether the statute is or is not to be contracted against; and those remedies which give any `law' of contract ninety-five percent of its meaning wandering afield into damages, quasi-contracts, equity and pleading. All of this, wholly without reference to the happy way in which those cases which do not happen to fit whatever type of `general theory' manages to get set up (cases on the formation of the depositor's agreement with his banker, for instance, or often on insurance, or on gratuitous undertakings cognizable in tort or recognized as agencies) drop quietly out of contemplation, unnoticed, unmissed, unmourned - and unaccounted for.

And second, even if the lawyer surmounts such obstacles as these to a true, full synthesis, he finds his mind riveted on law and legal obligation; he takes the court's decision for the fact of life; he assumes that what the court decides must in some obscure fashion represent what people do. Preoccupation with the niceties of doctrine almost compels such straight-jacketing of interest. Hence, if `a contract' is illegal and unenforceable, that is enough to know. If the first assignee prevails, why that is that. And the battle between objective, subjective, and objective-subjective theory rages, but rages only over those border-line cases which semi-occasionally trouble courts of law, and almost never trouble people.

There is no fault to be found with systematizing so much as we can of the rules on promises, or on assumpsit and its descendants, or on obligations arising out of transaction. Such systematization offers much chance of gain. Indeed, if we can keep a systematization from setting itself up as exclusively valid as soon as it is made, and if we can keep ourselves awake to the situations concerned, awake to people and their doings as well as to the particular legal compartments we have found it interesting (or merely possible) to systematize, we even stand a chance of avoiding that loss - via rigidification of rule and of imagination - which is part of the price men commonly pay for a new systematization. Neither is there fault to be found with a thorough canvassing of legal technicality over a less ambitious field, in its harder, more brittle, less

(continued...)

Thirdly, it is due to the survival of purely juristic notions of the state, economics and politics as opposed to the social conceptions prevalent in modern times.

In the fourth place the training of judges and lawyers in 18th century philosophy of law made them loathe to move away from the philosophical bonds of the past.

Natural law, in the fifth place, is still the theory of the American bill of rights and, in the sixth place, American labour legislation arrived at a time when the public was not yet prepared for it.

Lastly, and very importantly, "the sharp line between law and fact in our legal system which requires constitutionality, as a legal question, to be tried by artificial criteria of general application and prevents effective judicial investigation or consideration of the situations of fact behind or bearing upon the statutes".[60]

In general it can be said that contractual language permeates everyday life to such an extent that it has become second nature. The trouble is seldom taken to establish

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[59](...continued)

seductively systematized details; nor yet with those who prefer to stop when they have pursued such a canvass unto the uttermost case in the reports.

Yet I think that there is another area to be explored, and a grateful one; one from whose exploration - though it be but a first dash into the snow-fields - one returns with fresh eyes and fresh zest to the study of the heaped up cases and of the frail-seeming but sometimes steel-strong girders of doctrine. That area is the role of contract in the social order, the part that contract plays in the life of men. What price this curious legal institution - if legal institution it be? If not, what price this social institution, and what relation have its legal phases to its others, and to its meaning to society?"

From this extract the formalistic approach of lawyers in the sense mentioned by Atiyah (n 23 above) is evident. Legal concepts are concretized and elevated to realities themselves.

[60] Pound 458.

Planiol, Pollock, Salmond, Langdell[63] and JC de Wet[64] hold that the first essential of a contract is the agreement of wills, or the meeting of the minds of the parties. But:

> "Minds or wills are not in themselves existing things that we can look at and recognize. We are restricted in our earthly experience to the observation of the changes or actions of more or less animated bodies in time and space; and disembodied minds or wills are beyond the scope and reach of earthly law."[65]

It very often happens that the fictional will of the parties and reality do not correspond, with the result that rights and duties are imposed by the law rather than agreed to by the parties. A developed system of law must be able to distinguish between voluntary and involuntary acts in order to promote real consensus in the allocation and protection of scarce resources.

The injurious reliance theory holds that contractual liability arises (or should arise) only where someone makes a promise to someone else who relies on it to his detriment. Cohen[66] criticizes this theory because it integrates contract with the larger realm of obligations. Contractual obligation is not coextensive with injurious reliance because there are instances of both injury and reliance for which there is no contractual obligation and there are cases of such an obligation where there is no reliance or injury. Furthermore, in cases of breach the law remedies the situa-

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63 Cohen 575.

64 See in general De Wet & Van Wyk Kontraktereg en Handelsreg ch 2.

65 Cohen 575.

66 Cohen 578 579. See also the discussion in par 3.4 below.

whether this language effectively describes the facts it purports to communicate. The result is a serious discrepancy between rule and fact with important power implications for the parties utilizing contract in certain instances.

3.2.3 **Foundations of Contract**

This confusion of law and fact is not only present in the blind application of contractual principles, but more fundamentally in the very justification of contract law.

Cohen[61] discusses various justifications for the enforceability of contract. The first justification is that of the institutionists who holds that promises are sacred per se and that there is something inherently despicable about not keeping a promise. No legal system can however attempt to enforce all promises:

> "The actual world, which assuredly is among the possible ones, is not one in which all promises are kept, and there are many people - not necessarily diplomats - who prefer a world in which they and others occasionally depart from the truth and go back on some promise.... Certainly, some freedom to change one's mind is necessary for free intercourse between those who lack omniscience."[62]

The institutionists therefore do not succeed in explaining which promises should be enforced and which not.

The second justification is the will theory of contracts. People such as Savigny, Windscheid, Pothier,

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61 See in general Cohen 571-85.

62 Cohen 573. He states at 574: "The binding character of promises could not have been absolute to a people to whom Odysseus was a hero."

tion by reference to what the injured party would have gained had the promise been kept instead of what he in fact lost, because it was not kept. It concentrates on the hypothetical rather than the facts of the matter.

A further attempt at justification of contract is the equivalent theory.[67] It holds that promises which hold a quid pro quo should be enforced. Whilst this approach is popular and in line with the nature and purpose of contracts in everyday life, it fails to explain what things are equivalent. The law leaves it to the parties to determine what is fair. This may result in injustice because of power discrepancies between the contracting parties.

Another approach to the enforceability of contract stresses formalism:

> "Ceremonies are the channels that the stream of social life creates by its ceaseless flow through the sands of human circumstance. Psychologically, they are habits; socially, they are customary ways of doing things; and ethically, they have what Jellinek has called the normative power of the actual, that is, they control what we do by creating a standard of respectability or a pattern to which we feel bound to conform."[68]

Blind adherence to form and custom carries its own dangers with regard to factual change however:

> "We may justify them as sacred vessels through which we obtain the substance of life's goods. But the maintenance of old forms may also be an end in

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67 Cohen 580.

68 Cohen 582.

> itself to all those to whom change from the familiar is abhorrent."[69]

A last attempt at justification of the binding nature of contract is the distribution of risks theory. In terms of this approach a legal promise may be seen as a wager. One party assures another of a certain event which he may or may not control, and he pays in case of failure. Although this theory has not found much favour, it is important since:

> "All human transactions are directed to a future that is never free from elements of uncertainty. Every one of our ventures, therefore, involves the taking of a risk. When I board a train to go home I am betting my life that I will get to my destination. Now a contract or agreement may be viewed as an agreement for the distribution of anticipated gains or losses."[70]

A very important point is made by the adherents to this school of thought, that is, facts, especially future facts, are never capable of being known fully. Contract is therefore a handy mechanism in terms of which factual uncertainty may be partly regulated by parties willing to accept the risk:

> "From this point of view, we may look upon the law of contract as a number of rules according to which courts distribute gains and losses according to the equities of such cases; and the pretence that the result follows exclusively from the agreement of the two parties is fictional. Just as the process of interpreting a statute is really a process of

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69 Cohen 583.

70 Cohen 583.

> subsidiary legislation, so is the interpretation of a contract really a method of supplementing the original agreement by such provisions as are necessary to determine the point at issue."[71]

From the discussions thus far it is clear that the law of contract is not always able to regulate facts accurately. The reason for this may be the assumption of equality where discrepancies in power exist or it may be the fact that the traditional justifications for the enforceability of contracts themselves fail to address facts properly. Whatever the position may be in a particular situation, the important point is that facts are never capable of being known fully. While contract may be largely capable of eliminating the discrepancies between fact and fiction in a simple, static transaction, such as the sale of a house at an agreed price between two men, it becomes progressively inadequate to regulate intricate social relationships such as the continuous complex and dynamic relationship between an employer and its employees.

3.2.4 **Utility of Contract**

From the previous paragraphs it is clear that contract exhibits serious shortcomings as an equitable source of rights and duties in employment. The question should be asked, however, whether contract as a mechanism should be abolished altogether and whether it can be replaced by another more effective mechanism. The answer to the first question is a simple "no". The problem of uncertainty is a fact of life. At least contract is a flexible way of creating

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71 Cohen 584. Of the utmost importance to remember is that the application of law by the courts is really an ex post facto process, ie one that takes place after the event. By the time therefore when the enforcement of contracts are considered, care should be taken by the courts not to introduce the benefit of hindsight on established facts as the basis for a decision applicable to a time when these facts were not known. The courts should consider the risks, real or perceived, at the time of contracting.

and enforcing a method of distributive justice within the legal system by the parties themselves with a degree of certainty. Other sources of law such as court decisions, legislation and collective bargaining can and should be utilized to rectify the factual inadequacies of contracts in order to promote a more just distribution of scarce resources, but the major importance of legal contract is to provide a framework for well-nigh every type of group organization and every type of passing or permanent relationship between individuals and groups, up to and including states - a framework which is highly adjustable, a framework which seldom accurately indicates real working relations, but which affords a rough indication around which such relations vary, an occasional guide in cases of doubt, and a norm of ultimate appeal when the relations cease in fact to work.[72]

The importance of contract as a mechanism has varied through the ages, but contract has never disappeared altogether and is indispensable to a system of free enterprise capitalism. In order to discuss the role of

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72 Llewellyn 737. Llewellyn 751 concludes: "One turns from contemplation of the work of contract as from the experience of Greek tragedy. Life struggling against form, or through form to its will - `pity and terror' -. Law means so pitifully little to life. Life is so terrifyingly dependent on the law. Marginal cases, hospital cases, most of our cases well may be. Much doctrine, however sweetly spun, serves chiefly to grow grey with dust against the rafters. Overwhelming is the certainty that any synthesis which is to match with the meaning of the law in life must expand beyond the futile limits set by present legal theory to include great blocks of what we know as property, and equity, and remedies, to cover as well the most significant parts of business associations, and who knows what besides. Overwhelming is the realization of how far a law still built in the ideology of Adam Smith has been meshed into the new order of mass-production, mass-relationships. Overwhelming in no less measure is the conviction that broad forms of words are chaos, that only in close study of the facts salvation lies. Against these conclusions stand others. The ad hoc approach of case-law courts is sane, it cuts close to need, it lives, it grows. And the work of law and lawyers in the contract field, however little of the whole it constitutes, has vital meaning. It is both hinge and key of readjustment. And how, without it, shall the great gate swing open?"

Whether contract is regarded as a mere "figment of the legal mind" which cannot reflect employment realities accurately, or not, the point is that it is an indispensable figment without which employment law would lack the necessary mechanics to operate effectively (Jordaan Contract 88).

contract in the South African system of industrial relations which professes to adhere to the principles of voluntarism and free enterprise in a capitalist economy, especially as far as the lock-out is concerned, it is therefore necessary to take a brief look at the mechanical framework of contract.[73]

3.2.5 **Mechanics of Contract**

Discussions on the role of contract in industrial relations abound.[74] Whatever one's particular point of view may be, one has to be reminded, as Freedland[75] does, that it is possible to identify an area of importance for the law of the contract of employment. It combines an apparatus for the regulation of the individual employment relationship, although rudimentary and obsolescent, with a body of legal theory necessary for the proper operation of many other parts of the system of labour law. For example, contractual principles provide a basis for most legislation governing employment in the sense that the legislation is dependent on

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73 How intricate these mechanics can be in different situations is evident from Llewellyn's discussion quoted in n 59 above.

74 Kahn-Freund believed it was important as a legal framework for rights and duties created by systems of industrial relations (in Flanders & Clegg The System of Industrial Relations in Great Britain ch 2) but he was concerned about the disparity between the atomized view of reality imposed by contract and the complicated actual reality of dynamic collective labour relations. Rideout 1966 Current Legal Problems 19: 111 concludes that the contract of employment was unacceptable even as a legal framework because of its arbitrary bearing on the needs of the employment relationship. Fox Beyond Contract: Work, Power and Trust Relations 181-90 criticizes the structural framework of contract because of the notions of hierarchical duty inherent therein which have an unacceptable impact on the extent of the employee's duties to his employer. Different views on the nature of the employment relationship are discussed in par 4 below. See also Jordaan referred to in n 86 below.

75 Freedland The Contract of Employment 4.

the mechanics of contract for its proper interpretation and operation as well as its scope of application.[76]

"The law of the contract of employment thus deserves a systematic analysis not only as a process of adjudication in itself but also as a necessary element in various other aspects of labour law."[77]

Freedland[78] makes a distinction between the principles of the law of the contract of employment and the general principles of contract: He argues that the body of general principles of the law of contract can be divided into two broad types. Firstly, there is a type of truly general principle of law of contract, derived from the experience of no one particular species of contract. On the other hand, there is a type of principle which is offered as if it were truly general but which is in reality a generalization from judicial rulings in relation to certain specific kinds of contract (for example the employment contract). The principles of the truly general kind tend to be concentrated upon the formation of contracts. Hence the rules about formation have the function of defining the limits of the legal concept of contract.

In South Africa rules regarding the formation of contract have remained largely in tact as far as employment is concerned, but in certain other areas, such as specific performance, dismissal and termination of employment, the

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76 Our own Labour Relations Act 28 of 1956, Basic Conditions of Employment Act 3 of 1983 and Machinery and Occupational Safety Act 6 of 1983 are all dependent to a certain extent on contractual principles in order to determine their scope of application. Furthermore, as is evident from the definitions of "strike" and "lock-out" in s 1 of the Labour Relations Act, contractual principles are of paramount importance even in collective labour law.

77 Freedland 4. Unfortunately such a systematic analysis cannot be undertaken here, but the validity and place of some contractual principles will become evident as this discussion continues.

78 Freedland 5-6.

Supreme Court, the legislator, collective agreements and the industrial court have made dramatic inroads.[79]

The important point remains, that is, that the mechanics of contract still constitute the principal point of departure in the identification and operation of rights and duties in the employment relationship on an individual and on a collective level. It is a general rule of interpretation that the common law (and therefore common-law contractual principles) remains valid and is only departed from to the extent specifically contemplated in legislation, in agreements and by the courts.[80]

Contract not only constitutes a fundamental source of rights and duties in the employment relationship, but its important phases, such as offer and acceptance, breach and termination, represent the very moments upon which even the collective employment relationship depends for its proper dynamic and analysis.[81]

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79 These will become evident as far as is relevant in the discussions that follow. It is especially the unfair labour practice concept as applied by the industrial court that has been a major contributor to the erosion of certainty of contract (see par 6 below). For a discussion on how difficult it is to separate general principles of contract from principles of contract peculiar to the labour relationship and other principles peculiar to employment law, see Hepple & O'Higgins Employment Law par 119 59-60.

80 See Steyn Die uitleg van Wette ch 5 n 10.

81 For example, the letter of appointment which sometimes initiates the employment relationship in practice is an acceptance of the offer of employment in the employee's application for a job. Consider also the operation of offer and acceptance in re-employment, breach of contract in a collective refusal to work and termination which forms part of the definitions of strike and lock-out in s 1 of the Labour Relations Act 28 of 1956.

Some of these contractual moments or mechanics of contract[82] are the requirements for a valid contract (especially offer and acceptance),[83] the principles of the law of agency, breach of contract,[84] remedies for breach of contract[85] and termination of contract.

The exact role of contract cannot be quantified, but for purposes of the present discussion it is sufficient to remember that, despite serious attacks on the utility of contract in industrial relations, contract as a source of rights and duties on the individual level and as a vehicle for the analysis of the regulation of rights and duties and a necessary structural component of industrial relations on a collective level, has retained much of its importance in most common-law systems of law. Contract and its terminology, although they are sometimes alien to the facts of the situation they purport to regulate, still and probably always will form an integral part of labour law even if this is reduced by the operation of other sources of law to a purely

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82 For a full discussion on the general principles of contract and those peculiar to labour law in South Africa see, inter alia, De Wet & Van Wyk Die Suid-Afrikaanse Kontraktereg en Handelsreg; Van Jaarsveld & Coetzee Suid-Afrikaanse Arbeidsreg; Riekert Basic Employment Law; Ringrose The Law and Practice of Employment; Swanepoel Introduction to Labour Law; Norman-Scoble The Law of Master and Servant; Cheadle Wille and Millin's Mercantile Law of South Africa ch 4; Joubert General Principles of the Law of Contract; Kerr The Principles of the Law of Contract; Lubbe & Murray Farlam and Hathaway Contract : Cases, Materials and Commentary; Van Jaarsveld & Van Eck Kompendium van Suid-Afrikaanse Arbeidsreg.

83 According to De Wet & Van Wyk chs 2-4 they are consensus, capacity, formalities (although as a general rule no formalities are required for a contract of employment), possibility, certainty and that the contract must not be against the law, public policy or the basic mores of society.

84 Some of these are mora debitoris, mora creditoris, repudiation, poor performance and impossibility of performance (De Wet & Van Wyk ch 7).

85 Of these the exceptio non adimpleti contractus, specific performance, damages, rescission of contract and penal clauses are important (see De Wet & Van Wyk ch 8).

semantic and structural role.[86] A free enterprise economic system which purports to function without contractual mechanics is a contradiction in terms.

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86 Freedland 12-13 distinguishes between the sources of contractual terms and the methods whereby those terms are established as part of the contract. "The sources may be described thus:

(a) terms settled between employer and employee (which may include the adoption of a standard form of agreement such as a set of work rules);
(b) collective agreements;
(c) custom and practice;
(d) terms presumptively implied under rules of the common law;
(e) terms imposed by or under statute (e.g. terms embodying Wages Council Orders);
(f) statutory written particulars of terms of employment.

The methods whereby those sources are used to establish contractual obligations are as follows:

(a) direct agreement, e.g. by the signing of a complete written agreement;
(b) agreement by reference to other sources;
(c) agreement by agency;
(d) acceptance in practice - as where a working practice, never expressly agreed upon, is accorded contractual force;
(e) judicial rule-making - where a term is held to be implied by law;
(f) application of statute law - where statutory provision takes the form of implying a term into the contract;
(g) issuing and acceptance of statutory particulars of terms of employment."

In South Africa the system is similar but not identical to that described above. Many of the rights and duties created here by statute and collective agreement (eg those reached at an industrial council and promulgated) are of a public rather than a private law nature. Freedland's discussion shows the importance of contract as a valuable foundation for most of the rights and duties pertaining to the employment relationship. Rights created on a collective level or by statute even form part of the contract of employment in England.

See Elias "The Structure of the Employment Contract" 1982 Current Legal Problems 95, who comments on the resilience of contract which he ascribes to the fact that statutory rights have been built onto the common-law contractual framework. Whilst it is therefore less important as an independent source of rights and duties it remains central to the operation of these statutory provisions.

See Wedderburn, Lewis & Clark Labour Law and Industrial Relations: Building on Kahn-Freund 43-4 on the inaccuracies of contractual language. See also the valuable contribution by Jordaan Contract 88. He concludes: "At some stage in the history of its development, the contract of employment probably reflected reality with a reasonable measure of accuracy. It no longer does so and its continued survival can only be explained in terms of it being a `figment of the legal mind'." Jordaan's views is discussed in par 4.6 below. It is important to realize that even as a "figment of the legal mind" the concept of contract still remains indispensable in industrial relations.

3.2.6 **Conclusion**

Contract on its own is not suitable for regulating employment effectively and legitimately. Property, contract, profit making and freedom of trade are all indispensable components of the competitive system. The state has an active role to play in order to regulate power effectively. If the state totally abstains from interference, in line with voluntarist notions of regulation, the capitalist system may be threatened because the creation of vast power discrepancies between monopolies and individuals may lead to the disappearance of competition itself.

Blind, uncritical promotion of freedom of contract fails to recognize the power discrepancies inherent in contract. Where this philosophy still applies, as is largely the case in South Africa, the question that springs to mind is whether the state is biased because it promotes protection of values conducive to its own interests. Ultimately, the question is whether the interests of capital are not overly protected vis-à-vis those of labour in terms of the protection of contractual freedom and, if this is so, whether this could be potentially detrimental to the eventual health of the free enterprise system itself. If workers cannot compete effectively, they can never accumulate enough capital to become capitalists themselves. In this way, the economy can become stultified by the domination of monopolies and can curb the very work ethic responsible for its continued existence (namely self-interest) and the ability to promote it effectively.

The dangers involved in a blind adherence to freedom of contract are clear, but contractual thinking is part and parcel of capitalism for a number of reasons. Examples are individualistic conceptions of justice which exaggerate the importance of property and contract at the expense of public

rights, mechanical juristic thinking which concentrates on principles rather than their practical implications, juristic notions of the state, economics and politics as opposed to social conceptions more appropriate in modern times, juristic training which cannot shed the natural law bonds of the past, and lastly a preoccupation with artificial criteria of general application rather than an ability to deal with the facts of a particular case. Contractual thinking has confused law and fact, not only in the blinkered application of contractual principles, but fundamentally in the very justification of contract law. Contractual theories, such as that promoted by the institutionists who hold that promises are sacred per se, the subjective will theory, the equivalent theory, formalism and the distribution of risks theory, all fail to address the facts properly. It is a truism, however, that facts are never capable of being known fully especially future facts. Contract is therefore a useful mechanism which serves as a point of departure in terms of which risks are distributed at any particular stage of economic activity in a free enterprise environment. The courts usually supplement agreements between parties to the extent that it is necessary to determine the matter in issue. Although adjustments of agreements are sometimes necessary, the courts should not create agreements for the parties with the benefit of hindsight. This would make nonsense of the free enterprise ethic of competition and risk where choices have to be made in an environment which is uncertain per definition.

Whilst it is realized that contract has serious limitations as a source of rights and duties, it cannot be rejected altogether because it provides an indispensable framework for judicial thinking in a free enterprise environment. Other sources of law such as adjudication, legislation and collective bargaining can be utilized to rectify the inadequacies of contract as a means to distribute scarce resources, but can never replace it altogether.

Contractual mechanisms serve as the foundation upon which other sources of law, such as legislation, rely for their proper operation. They serve as a port of entry into the employment relationship and are also responsible for the identification and the content of some of the rights and duties operative within that relationship. Contract, if only in form and not necessarily substance, will always form part of the legal apparatus of a capitalist society, including the regulation of the employment relationship.

In the following section, a brief look is taken at the inadequacies of contract in the regulation of the modern employment relationship in order to show the need for adaptation and to investigate whether the way in which South African law has addressed the problem by means of the unfair labour practice concept has been effective and legitimate.

3.3 Contract, Labour Subordination and Demarcation

> "The right of a person to sell his labour upon such terms as he deems proper, is in its essence, the same as the right of the purchaser of labour to prescribe the conditions upon which he will accept such labour from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer for whatever reason, to dispense with the services of the employee.... In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract, which no government can legally justify in a free land."[87]

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87 Justice Harlan in Addair v United States 208 US 161 175.

This pure contractual approach relies on a number of invalid assumptions. The first assumption is that the labour transaction is a purely economic one similar to the static exchange of goods for money. A mere thought on the nature of labour proves this assumption to be false. Labour is something abstract which does not exist independent from the person who has to perform it. In order to perform his labour, the employee must involve his whole person on a continuous basis. It is therefore not only the labour itself which forms the subject-matter of the transaction, but the total human being with his social, spiritual, economic, physical and other needs on an ongoing basis.[88]

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88 Haines "English Labour Law and the Separation from Contract" 1980 Journal of Legal History 1: 272 states: "The trouble is purely legal reasoning is not applicable to emotional social relationships." According to Justice Peter Pain "Contract and Contact: The Trade Unionist and the Lawyer" 1981 Industrial Law Journal (UK) 10: 137 141: "Unlike the criminal law, the law of contract has little ethical content.... it has developed piecemeal on the basis of what is practical rather that what is just." He continues (143-4): "The law of contract has about it a rigidity which does not adapt easily to permanent human relationships. It defines the contractual position in fixed terms. This deals adequately with the contract that provides for a single transaction....

The contract of employment does not bear some comparison with the contract of marriage. In many cases it is intended to be almost as permanent. It involves daily contact over a long period. If it is to be successful it involves a satisfactory human relationship which is more important than strict legal rights.

With the daily contract there evolves a constantly changing tissue of custom, which it is difficult to express in contractual terms. ...

I do not see how co-operation is possible until the law of contracts of employment is adjusted to the reality produced by daily contact at work."

Carlyle Past and Present 126, quoted by Wiehahn Enkele Aspekte van Arbeidsreg as Publiekregtelike Figuur, states: "Even in the meanest sort of labour, the whole soul of man is composed into a kind of real harmony the instant he sets himself to work. Wiehahn 2 continues to explain the nature of labour as follows: "Arbeid het dus slegs arbeidsregtelike betekenis daar waar die mens as regsubjek ook die arbeidsubjek is. Die mens styg in juridiese sin bo diere, masjiene en ander bronne van arbeid uit deurdat hy met sy menslike rede en waardigheid teenoor die arbeidobjek staan. Die mens as regssubjek is dus die oorsprongpunt van die erkenning deur die reg van sy arbeid as 'n proses wat verandering in die arbeidsobjek meebring.... Volgens die arbeidsfisologie en-psigologie is die mens liggaamlik en geestelik as 'n eenheid by sy arbeid betrokke.... Sy arbeidsvermoë kan dus nie van hom geskei word nie - dit is deel van sy persoonlikheid."

Freedland[89] explains:

"In the case of the contract of employment, the exchange is of service against remuneration; but there is more to the contract than is simple exchange, because the employee undertakes an obligation to make himself available to render service, while the employer undertakes to enable the employee to earn his remuneration. Each of these promises, however, is conditional upon the readiness and willingness of the other to perform his counter-promise. Hence the contract has a two-tiered structure. At the first level there is an exchange of work and remuneration. At the second level there is an exchange of mutual obligations for future performance. The second level - the promises to employ and be employed - provides the arrangement with its stability and with its continuity as a contract. The promises to employ and to be employed may be of short duration; or may be terminable at short notice; but they still form an integral and most important part of the structure of the contract."

Patrick Elias[90] adds a third tier to those of Freedland:

"To these it may be useful to add a third tier which, to a greater or lesser extent, is a feature of all employment contracts, namely the employee's obligation to serve the employer honestly and faithfully and not to deliberately damage the employer's interests. This duty, which reflects the

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89 Freedland 20.

90 Elias "The Structure of the Employment Contract" 1982 Current Legal Problems 95 97.

continuing dependent nature of the employment relationship, will impose restrictions on the employee's freedom of action."[91]

It is clear that human labour cannot simply be regarded as a commodity and that the pure contractual approach fails to address the issue.

The second assumption that is wrong in Justice Harlan's quotation above is the assumption of equality between employer and employee. Much has been said about the social and economic inequality of employer and employee.[92]

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91 See also Collins Industrial Law Journal (UK) 15: 1 3 who states: "The simple characterisation of employment as a contract fails to grasp the nature of the social relations involved.... Plainly, the ordinary relations of authority found in employment cannot be reduced to a simple contractual formulation." He also criticizes contract for its failure to quantify labour for the purposes of putting a price to it and to measure performance, but especially for its failure to recognize the bureaucratic dimensions of the employment relation. See also Hepple "Restructuring Employment Rights" 1986 Industrial Law Journal (UK) 15: 69 171 for similar views on the various tiers of the contract of employment.

92 Collins 1 states: "But in the labour market, this consensual source of authority has been criticised on the ground of the inequality of the bargaining power of the parties. An employer commands superior resources, such as capital, information, and access to legal advice, which both reduce the opportunity costs of not hiring someone and permit an insistence upon control over the terms of the contract. In contrast, the ordinary employee lacks the time and resources to pick and choose between offers of employment and to haggle over the terms. This inequality of bargaining power leads to the creation of forms of oppressive subordination under the disguise of freely chosen agreements." Kahn-Freund in Davies & Freedland Kahn Freund's Labour and the Law 35 declares eg: "The common law, however, ignores any disequilibrium of power which results from normal social relations, as distinct from abnormal personal conditions (infancy, mental disorder). It ignores the realities of social constraint and of economic power: it did so even at a time when the employer was and the worker was not in a position to invoke the aid of the criminal law, to say nothing of the threat of the workhouse; the worker's obligation to obey the lawful commands given by management and the employer's obligation to remunerate the worker are contractual obligations freely incurred among equals." See also Riekert Basic Employment Law 20-1 and Jordaan Contract 77-8. For general discussions on the inequality of bargaining power in certain kinds of contract, compare inter alia Kessler "Contracts of Adhesion - Some Thoughts About Freedom of Contract" 1943 Columbia Law Review 629 especially 640-3; Grunfeld "Reform in the Law of Contract" 1961 Modern Law Review 62; Silberberg "The Economics of Standard Contracts" 1967-68 Rhodesian Law Journal (7-8): 89; Jacobson "The Standard Contracts Law of Israel" 1968 Journal of Business Law 325.

Clarke[93] argues that "the conceptualization of the contract of employment as an exchange relation embodied in mutual obligations, itself rooted in the Roman Law tradition of jurisprudence, was a legal expression of the socio-political ideology of the industrial bourgeoisie, which was based on the principle of the formal equality and freedom of all persons under law. On this analysis the idea of the `free' contract of employment, a fundamental tenet of the technical-positivistic approach, is in fact a highly partisan interpretation derivative of liberal-capitalist ideology."

A further form of inequality between employer and employee is evident on the hierarchical level. This is of necessity so since no organization can be effectively administered without a power to command and a duty to obey. At the same time this element of subordination is regarded as the hallmark of the contract of employment[94] and has formed the basis for various tests designed to distinguish the employment relationship from other legal relationships.[95] Collins[96] explains:

> "The source of this residual managerial power springs from the form of the relations of production in advanced industrialised societies. An employee normally joins a bureaucratic organisation. He is allocated a particular role, which is defined by the rules of the institution. These bureaucratic rules create a hierarchy of ranks rising from the manual

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93 Clarke in Wedderburn, Lewis & Clarke Towards a Sociology of Labour Law: An Analysis of the German Writings of Otto Kahn-Freund in Labour Law and Industrial Relations: Building on Kahn-Freund.

94 See the statement by Kahn-Freund quoted in ch 2 n 3 above. See also in general Brassey "The Nature of Employment" 1990 Industrial Law Journal (SA) 11: 889-936 (Brassey Nature).

95 The position in South Africa is discussed in par 3.4.1 below.

96 Collins 1-2.

> worker on the shop floor to the highest echelons of management. Having been assigned his role, the employee then finds himself in a relation of subordination with those above him in the system of ranks. This bureaucratic aspect of subordination arises from the organisational structure rather than from any initial inequality of bargaining power in the market, for it persists even when the employee, either individually or collectively, enjoys strong bargaining leverage."

He essentially draws a distinction between "market power" and "bureaucratic power" and continues to argue that his bureaucratic conception of subordination in the employment relationship allows for the introduction of administrative law principles, which are better capable of identifying the employment relationship than contract is capable of doing.[97]

The third problem with Justice Harlan's statement is not so much a wrong assumption, but the complete absence of security of employment inherent in the pure contractual approach to the employment relationship. A long line of South African cases treats employment contracts similar to other contracts and even worse when dealing with specific performance.[98]

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97 See in general Collins 1-14. See also Davis "Voluntarism and South African Labour Law - Are the Queensbury Rules an Anachronism?" in Labour Law 68-71 (Davis Voluntarism).

98 See Brassey "Specific Performance - A New Stage for Labour's Lost Love" 1981 Industrial Law Journal SA 2: 57. See also ch 2 n 223 above and the following cases: Schierhout v Minister of Justice 1926 AD 99; Stoop v Lichtenburg Town Council 1952 (2) SA 72 (T); Myers v Abramson 1952 (3) SA 212 (C); Rooiberg Minerals Development Co Ltd v Du Toit 1953 (2) SA 505 (T); Gründling v Beyers & others 1967 (2) SA 131 (W); Stewart Wrightson (Pty) Ltd v Thorpe 1977 (2) SA 943 (A); NUTW & others v Stag Packings (Pty) Ltd & another (1982) 3 ILJ 285 (T); Zenzile & others v Administrator of the Transvaal & others (1989) 10 ILJ 34 (W); Coin Security (Cape) (Pty) Ltd v Vukani Guards & Allied Workers Union & others (1989) 10 ILJ 239 (C).

From the above discussion it is clear that contract conceals a number of inadequacies. It treats labour simply as a commodity regardless of the needs of the person performing it. Furthermore, it hides the inequalities of power between employer and employee on an economic, social and hierarchical level[99] and is therefore alien to fact. Lastly, it renders the individual employee completely powerless by the way in which it negates security of employment in its demarcation of the parameters of the employment relationship.

3.4 **A Modern Paradigm of Contract?**

Common-law lawyers have for many years operated within a particular conceptual framework governing the law of obligations. Within this framework the fundamental distinction has been that between obligations which are voluntarily assumed (contract) and obligations which are imposed by law (for instance delict). Little attention has been given to "the place of equitable obligations in the great divide between voluntarily assumed and legally imposed obligations".[100]

With contract, the function of the law was merely to give effect to the private autonomy of contracting parties to make their own legal arrangements. This led to all kinds of abuse, as seen in previous paragraphs.

Atiyah argues that in spite of curtailment of this contractual abuse by both the courts and the legislator, and the attack on freedom of contract in general, the conceptual

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99 On this level it experiences grave difficulties as a means to distinguish the employment relationship from other relationships in order to establish applicable rights and duties (see the discussion in par 3.3.1 above).

100 Atiyah "Contracts, Promises and the Law of Obligations" 1978 Law Quarterly Review 94: 193 (Atiyah Contracts).

apparatus which still dominates legal thinking on contract is that of the nineteenth century. He argues further, that this conceptual apparatus is not based on "any objective truths, it does not derive from eternal verities". The result is "that our basic conceptual apparatus, the fundamental characterizations and divisions which we impose on the phenomena with which we deal, do not reflect the values of our times, but those of the last century".[101]

This nineteenth century paradigm model of contract sees a typical contract as a bilateral executory agreement, consisting of an exchange of promises which is carried through by the process of offer and acceptance with the intention of creating a binding deal. Once the offer is accepted, the contract comes into existence before anything is actually done by the parties. The parties are now obliged to perform or be liable for damages in case of default.[102] "The whole model is suffused with the idea that the fundamental purpose of contract law is to give effect, within limits of course, to the intentions of the parties."[103]

This law consists of "power-conferring rules" which the parties may use. Those who wish to create legal obligations only have to comply with the simple set of rules and the result will be recognized by the law.[104]

Atiyah lists some of the underlying presuppositions of this model which are rarely made explicit. Firstly, this model assumes that contract law is about what parties intend

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101 Atiyah Contracts 194.

102 Atiyah Contracts 194-5.

103 Atiyah Contracts 195.

104 Atiyah Contracts 195.

rather than what they do (unlike the law of delict for example).[105]

Secondly, the contract is regarded as "a thing which has some kind of objective existence prior to any performance or any act of the parties". This reification is so powerful that a promise can be treated as broken ("anticipatory repudiation") before performance is due. Reification has the effect that contractual relationships are seen to be defined within limited parameters with the result that concepts such as fairness, justice and reasonableness have little space to operate.[106]

Thirdly, the function of the courts in this paradigm is important. The judicial process has two important functions:

> "The first is, by the threat of penalties or the promise of rewards, to encourage the citizenry to comply with socially desired standards of behaviour. And the second is to provide machinery for the settlement of disputes by peaceful and fair means."[107]

The classical model of contract with its emphasis on intentional conduct and future planning regards the first function as of primary importance. Other parts of the law of obligations are more concerned with the dispute settlement functions of the courts than with their "deterrent or

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105 Atiyah Contracts 196.

106 Atiyah Contracts 197.

107 Atiyah Contracts 197.

hortatory functions".[108] The emphasis seems to be on hindsight rather than the facts of the matter.

Fourthly, the classical model of contract presupposed one model, that it is possible and useful still to think in terms of general principles of contract. It was based on an economic model, that of the free market under the influence of the classical economists and the philosophical radicals.[109]

It is perhaps an exaggeration to say that nineteenth century thinkers wanted to reduce all relationships to economic terms. Atiyah concludes:

> "But it is true that many of them saw much in the classical contract model which they felt was both admirable and applicable far beyond the commercial sphere. They thought it desirable that men should learn to order their lives according to some definite plan, that they should be encouraged to aim for particular goals, that they should co-operate with others in attempting to seek those goals, that those who let down their fellows should be made to pay the cost of doing so; they thought it desirable that men should be free to develop their skills and ambitions, and they accepted the natural corollary that some would rise and some would sink. It was partly for these reasons (though there were certainly others too) that the classical model of

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108 Atiyah Contracts 198.

109 Aityah Contracts 198-9.

> Contract was so unified, and no doubt, it was partly its unity which gave it so much power."[110]

This age of principles had to give way to the age of pragmatism, the twentieth century:

> "Flexibility, as opposed to rigidity, compromise as opposed to single-mindedness, and pragmatism as opposed to principle, have become the virtues of the modern world."[111]

Atiyah proceeds to evaluate whether the classical paradigm of contract still holds true in the modern world by asking questions, such as:

> "Is it reconcilable with the value systems of the modern world, and in particular, of modern England? Is it even reconcilable with the developments in positive law which have taken place within this conceptual framework? Is it true that contractual obligations normally rise from agreements or exchanges of promises? How far is it true to suggest that contracts are institutionally made with a view to future performance? To what extent is it correct to regard contractual liability as depending on voluntary assumed obligations? To what extent is it possible to adhere to the very concept of a single basic model of Contract?"[112]

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110 Atiyah Contracts 199. A concept of contract which could dismiss all differences of time and place of circumstances and people had no need for moral distinctions between sale and hire-purchase, mortgages and leases, commercial and consumer contracts and of course lease and employment.

111 Atiyah The Rise and Fall of Freedom of Contract 649 (Atiyah).

112 Atiyah Contract 200.

He starts with the last question and concludes that general principles only remain general by default because they are "superseded by detailed ad hoc rules lacking any principle".[113]

He then asks to what extent it is true that contractual liabilities arise from agreement or promises or depend on the voluntary assumption of obligation and argues that where liability arises out of conduct (for example consumer transactions) rather than from the voluntary assumption of obligation, the conduct itself is usually of a voluntary character. Secondly, he argues that where obligations can be said to be primarily conflict based or reliance based, explicit promises may have a valuable evidentiary role to play.[114] He concludes:

> "Treating explicit promises as prima facie evidence, and as strong prima facie evidence of the fairness of a transaction ... is an indispensable tool of efficient administration in a free market society. For any other rule would leave it open to a dissatisfied party to any and every transaction to appeal to a judge to upset an agreed price and fix a new one. But the extent of the indefeasibility of a promise, the extent to which it is to be treated as a conclusive admission of the fairness and reasonableness of the terms of exchange, is a much less simple proposition."[115]

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113 Atiyah Contract 201.

114 Atiyah Contract 201-7.

115 Atiyah Contract 209: "A society which believes in allowing the skilful and knowledgeable to reap the rewards of their skill and knowledge is likely to have a higher regard for the sanctity of promises than a society which wishes to protect the weak and foolish from the skilful and knowledgeable."

The classical model of contract based on the will theory and the executory transaction does not fit a large part of the law and life,[116] but why does it still permeate legal thinking to the extent that it does? Atiyah arrives at the following conclusion:

> "Virtually all discussion of the source of contractual and promissory obligation, in law and in morality, has failed to draw the all important distinction between promises and contracts which rest purely in intention, and promises and contracts which depend partly on action."[117]

A belief that a bare promise creates a moral obligation and should therefore create a legal obligation is wrong. What is more important is to inquire about the reason why the promise was given or the effect that the promise has had.[118]

Atiyah finally contends that too sharp a line has been drawn between contract and delict[119] and that although a new law of obligations cannot be drawn from the principles of benefit and reliance, "a more adequate and more unifying conceptual structure for the law of obligations can be built around the inter-relationships between concepts of reciprocal

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116 Atiyah Contract 193-209.

117 Atiyah Contract 219.

118 Atiyah Contract 220.

119 Atiyah Contract 221. He argues for example that a person who injures another while voluntarily driving his car on the road, may be found to submit himself to the requirements of the law with as much or as little truth as the seller of goods.

benefits, acts of reasonable reliance, and voluntary human conduct".[120]

In labour law, the distinction between promise and action is a valuable one. Because of the dynamic, continuous multifaceted nature of the employment relationship (involving the person of the individual as well as his union), a more actionorientated approach is called for than forcing the relationship into the reified, static and outdated strait-jacket of classical contract theory which does not reflect the values of our time.

Jevans began the move in England to what is now known as "ad hockery", the deliberate turning away from general solutions, general ideas based on abstract principles. It was he who insisted on looking at every case on its own merits to see if there was (for example) adequate justification for interfering with market forces.

No doubt this was partly a reaction to the past misuse of so many economic principles. Economists by 1870 were growing tired of the way in which politicians or newspaper writers, with no real understanding of the issues, appealed to laissez-faire or freedom of contract as though they settled all policy questions.[121]

The employment agreement, more than other spheres of contract was not and is not a contractual relationship in classical terms, yet it has been contained under this

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120 Atiyah Contract 223. Elsewhere he refers to these concepts, namely "recompense for benefit", "protection of reasonable reliance" and the "voluntary creation and extinction of rights and liabilities" as the "three basic pillars of the law of obligations" (Atiyah 779).

121 Atiyah 650. Whether the South African solution of a widely defined unfair labour practice concept dependent on adjudication for the development of guidelines was the correct answer to the inadequacies of contract (and whether the act based approach by reference to particular circumstances was sound) is discussed in par 6 below.

unbalanced structure of imperfect reasoning.[122] Other sources of law have had such a dramatic influence on the regulation of the relationship between employer and employee that the question may be asked, what is the contract of employment today?

Haines argues:

> "Can it be claimed that this concept of public policy which is in the thinking of the court does not form part of all aspects of employment including the agreement itself? If that is so, then the contract of employment will sound more in public policy than in pure contract. This suggests that the employment contract is much broader than a relationship between two parties alone; it is a tripartite agreement with society as well."[123]

He concludes that a contract exists legally, but this contract combines the elements of agreement to work and an offer of work by members of a community in the context of the fabric of society today. It is a "social contract" which recognizes the fact of social dependence more than the classical atomistic contractual model was able to do.[124]

This reasoning is sound, but the difficult question to answer is what is public policy?

> "Poolman has sought to counter these difficulties by suggesting that fairness is really `objective

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122 Haines "English Labour Law and the Separation from Contract" 1980 Journal of Legal History 262 263.

123 Haines 294. See also in general Jordaan Contract 73 et seq.

124 Haines 295. See also discussion in ch 1 on the tripartite industrial relations system, and especially ch 2 par 2 above. See also in general Jordaan Contract or Membership? (Jordaan Membership).

> reasonableness', alternatively the `boni mores', alternatively the behaviour of the `reasonable person'. This reliance on all the heavy artillery of the law of delict unfortunately amounts to no more than begging the question via the invocation of more legal fictions. The base criteria remain as fictitious as the `accepted or prevailing moral values'."[125]

Eventually it appears that however inadequate the classical paradigm of contract may be as a means of regulating the employment relationship, the idea or mechanism of contract cannot be eradicated completely in a free enterprise environment. To shift the emphasis completely to an action based approach where disputes are settled by the courts in the particular circumstances of each case by reference to something as vague as public policy, is to carry "ad hockery" to such an extreme that the law as a set of guiding principles to regulate order in society becomes a mockery of what it is supposed to be. The end result is nothing less than retrospective legislation with hindsight by a stranger to the relationship. An act based approach may promote justice through the benefit of hindsight, but it fails to realize and respect the rules involved when decisions are made in the uncertainties prevalent in the present. A free enterprise economic system is based on the creation of rules in a situation of uncertainty. Self-interest and competition are its driving forces and should be promoted.

Injustices can be eliminated by rectifying the power discrepancies between employer and employee to acceptable levels through participation of all concerned and promotion of self-government in industry by means of negotiation (as

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125 Cockrell "Fair is Foul and Foul is Fair: The Unfair Labour Practice in South African Law" 1986 Responsa Meridiana 5: 83 86.

an immediate not an ex post facto process) where facts can be found or agreed to by the parties themselves. It would then not really matter whether the outcome of the negotiation process is couched in contractual terminology or not. In the following section (paragraph 3.5) the employment relationship is distinguished from other contractual relationships in order to enhance an understanding of its true nature. Thereafter, in paragraph 4 alternative constructions for the employment relationship are analysed before the South African legislature's response to the inadequacies of contract is discussed in paragraph 6.

3.5 The Employment Relationship Distinguished

3.5.1 Introduction

The employment contract originates from the species locatio conductio in Roman law, more specifically the locatio conductio operarum, the hiring and letting of services.

De Wet & Van Wyk define the contract of employment as follows:

> "'n Dienskontrak is 'n ooreenkoms waardeur die een (die werknemer) sy arbeidskragte of werkvermoë ter beskikking van 'n ander (die werkgewer) stel, teen vergoeding, op so 'n wyse dat die werkgewer gesag voer en toesig hou oor die werknemer."[126]

The contract must be concluded orally or in writing, voluntarily and for a definite period; the remuneration must

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126 De Wet & Van Wyk 338-9. See also Kaser 183; Norman-Scoble 1 and the discussion in par 2 above.

be specified or specifiable (and does not necessarily have to be payable in money).[127]

3.5.2 The Employment Contract and Other Legal Relationships

It is essential to distinguish the employment relationship from other legal phenomena in order to establish which rights and duties apply to a specific relationship and how they are defined. The Labour Relations Act 28 of 1956 and other labour legislation for example only apply to the employment relationship.[128] This topic is vast, and is only addressed superficially in order to show the importance of identifying a contract of employment and to highlight the element of subordination which of necessity forms part of employment. This will promote a better understanding of the nature of employment so as to gain a better perspective on its proper regulation by the law.

3.5.2.1 The Employment Contract and Representatives ("Agents")

The cardinal difference between an employee and an agent lies in the fact that an agent has power to create a legal relationship between his principal and a third party, while an employee merely tries to fulfil his duties in terms of the employment contract. The agent is usually more able to use his discretion and time as he sees fit, while employees are relatively restricted by their employment conditions. An agent also enjoys greater privileges in terms

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127 De Wet & Van Wyk 339; Norman-Scoble 2; Ringrose 27; Van Jaarsveld & Coetzee 61-3 and the authority quoted therein. Remuneration is probably not an essential. (For full references see n 82 above.)

128 Cheadle 343-4; Brassey Nature 889 et seq.

of compensation[129] because he usually works for a commission (although nothing prevents an employee from working for a commission either).

3.5.2.2 **The Employment Contract and the Contract of Purchase and Sale**

Norman-Scoble[130] argues that where one party supplies the material and another party supplies the services, this is clearly an employment contract. Problems can arise if the latter party also supplies part of the material. Then it can possibly be regarded as purchase. The intention of the parties in each particular instance will be decisive, and confusion between a contract of service and a contract of purchase and sale should not give problems in practice.

3.5.2.3 **The Employment Contract (locatio conductio operarum) and Lease (locatio conductio rei)**

The fundamental difference here lies in the fact that in a lease, the object of the contract is a physical thing, while a contract of employment is concerned with an incorporeal thing, that is, personal services. Problems arise, however, when one party is both employer and lessee, or where part of the compensation in terms of the contract is the right to occupy certain land or buildings. In appropriate cases, a specific contract can be both an employment relationship and a lease at the same time. Once again the courts have to establish the intention of the parties on the basis of the circumstances of the particular case.[131]

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129 Ringrose 27; Norman-Scoble 5; Van Jaarsveld & Coetzee 65 and the authority quoted therein.

130 Norman-Scoble 3-4; Van Jaarsveld & Coetzee 68, and the authorities quoted therein.

131 Norman-Scoble 3-4; Van Jaarsveld & Coetzee 68, and the authorities quoted therein.

3.5.2.4 **The Employment Contract and Directorship**

Generally a director (who holds office like a curator, executor and trustee) can also be considered to be an employee if he holds the position in an executor capacity. This is not the case where the position is merely held in an official capacity. In each case, the de facto position must be thoroughly examined. Van Heerden J and Friedman J state in Oak Industries (SA) (Pty) Ltd v John NO & another (1987) 8 ILJ 756 (N) 759B-C:

> "In considering whether or not the second respondent falls within the definition of `employee', it seems to me to matter not whether at the same time he is a holder of an office in the company duly appointed to that office in terms of the articles. What is important is the de facto relationship between the person concerned and the company and if in any given case the de facto situation reveals that that person is quite apart from his office as managing director a person falling within the definition of employee then quite clearly the Act applies to him."[132]

3.5.2.5 **The Employment Contract and Partnerships**

The partnership contract reveals three essential characteristics, namely a contribution to a communal fund with the aim of making a profit. An employer can however also share in the profits while a partner's contribution can consist of labour. A partnership has the following distinguishing features (although they are not absolute):

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132 See also Bleazard & others v Argus Printing & Publishing Co & others (1983) 4 ILJ 60 (IC) for the fact that no cut off points exist in the company hierarchy; see also Ringrose 29.

(a) A partner is not under the authority of his fellow partners but is their equal. Junior partners are exceptions.

(b) A partner can bind a partnership unless permission to do so is restricted, while an employee only binds his employer contractually where the ability to do so is expressly given or when this can be clearly deduced by implication (such as the usual authority of a branch manager, etc).

(c) A partner is liable for losses (unless excluded).

(d) A partner is co-owner and co-claimant of the partnership assets.

(e) A partner usually does not receive a salary but shares in profits (although a salary can be received as part of an initial share in profits).

(f) A partner must contribute to the partnership in the form of money, property or services (whilst employees provide services).

(g) A partnership contract is usually terminated by a longer period of notice (although this is not necessarily always the case).

It may happen that parties try to get around the law by disguising an employment contract as a partnership by building into the contract all the characteristics of a partnership. Here a careful investigation of the intention

of the parties is undertaken by the courts in order to establish the true relationship.[133]

3.5.2.6 **The Employment Contract and the Mandate**

De Wet & Van Wyk state:

"Trouens enige opdrag om dienste te verrig, aangeneem deur die persoon aan wie die opdrag gerig is, skep 'n lasgewingsverhouding, tensy dit van so 'n aard is dat dit onder 'n ander soort ooreenkoms tuisgebring kan word."[134]

Van Jaarsveld & Coetzee[135] lists the following differences between an employee and a mandatary. They are mere indiciae:

(a) The mandatary does not deliver his services under management, supervision or control.

(b) The intention of the parties differs in terms of the nature of the legal constructions.

(c) The employee is a member of the employer's business organization, while this is not so for the mandatary.

(d) The mandatary is usually not supplied with a vehicle, equipment or tools.

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133 Norman-Scoble 8-9; Ringrose 29; Van Jaarsveld & Coetzee 67-8, and the authorities quoted therein. See also s 71 of the Labour Relations Act 28 of 1956.

134 De Wet & Van Wyk 341.

135 Van Jaarsveld & Coetzee 65.

(e) An employee provides his services on a permanent basis while a mandatary acts on a more ad hoc basis.

(f) A mandatary is paid on a global or commission basis while the employee receives his wages or salary periodically.

(g) Certain activities are associated with the person of the employee and not with the mandatary and vice versa.

Examples of mandataries are lawyers, doctors, agents and auditors.

3.5.2.7 **The Employment Contract and the Independent Contractor (locatio conductio operis)**

An employment contract is result orientated in contrast with a service contract which is process orientated. The employee places his capacity to work at the disposal of his employer whereas an independent contractor usually delivers the result of his labour.

Furthermore, the independent contractor works on his own, without the management and supervision of the other party. He is bound by his contract and not by the orders of his co-contractor. Usually independent contractors are only paid once as opposed to periodically, for example, weekly or monthly.[136]

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136 Ringrose 28-30, Swanepoel 2-3; Van Jaarsveld & Coetzee 66; Norman-Scoble 6; Cheadle 343; Riekert 8; and the authorities quoted therein. (For full references see n 82 above.) See also Brassey Nature.

3.5.3 **Tests to Distinguish the Employment Contract**

Much has been written about the essential characteristics of the employment contract and how it should be distinguished from other contracts.[137] Most of these viewpoints concentrate to a greater or lesser degree on the subordinate nature of the employment relationship and therewith the control and supervision which distinguish the employment contract from other legal relationships.

Kahn-Freund explains for example:

> "But the relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the `contract of employment'."[138]

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137 Compare among others Van Jaarsveld & Coetzee 58 et seq; Riekert 8 et seq; Ringrose 27 et seq. See also Brassey Nature; Kahn-Freund "Servants and Independent Contractors" 1957 Modern Law Review 14: 504-9 (Kahn-Freund Servants); Le Roux "Identifying the Contract of Service" 1979 Modern Business Law 1: 50-2; Brown "The Test for Service" 1969 Journal of Business Law 177-86; Pauw "Aspects of the Contract of Service" 1979 Modern Business Law 138-41; Mureinik "The Contract of Service: An Easy Test for Hard Cases" 1980 Industrial Relations Journal (SA) 246-66.

138 Davies & Freedland 18. Other authors, eg Napier "Judicial Attitudes Towards the Employment Relationship - Some Recent Developments" 1977 Industrial Law Journal (UK) 6: 1; Roos "Labour Law in South Africa, 1976 - 1986: The Birth of a Legal Discipline" 1987 Acta Juridica 94; Wiehahn Enkele Aspekte van Arbeidsreg as Publiekregtelike Figuur; Fourie Die Dienskontrak in die Suid-Afrikaanse Arbeidsreg etc feel that the employment relationship is no longer a contractual relationship but has become a relationship of status under the influence of legislation, collective agreements and especially the unfair labour practice concept. See also Jordaan Contract 73 et seq who favours the concept of industrial citizenship and Jordaan Membership.

Subordination is sometimes regarded as of less importance. This debate is not elaborated on here as these opinions have not yet come before the courts.[139]

What is discussed briefly though are the different tests applied in order to distinguish the employment contract and the attitude of our courts on the matter. From this it appears that subordination is still considered to be a very important indication of the existence of an employment contract. As stated by Kahn-Freund, subordination is an indispensable feature of employment. Employees will always be in a less powerful position than employers on both an economical and hierarchical level in a free enterprise environment.

3.5.3.1 **The Control Test**

The control test originates from English law and is defined as follows by De Villiers CJ in Colonial Mutual Life Assurance Society Ltd v McDonald 1931 AD 412 433 in terms of the difference between locatio conductio operis and the employment contract:

> "The crucial difference between these two cases lies in the fact that where a master engages a servant to work for him the master is entitled under the contract to supervise and control the work of the servant. He is entitled at any time to order the servant to desist, and if the master is sufficiently serious may even dismiss him for disobedience."

He states further that the employment contract cannot exist where there is no right of supervision and control, "in other words unless the master not only has the right to

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139 Except perhaps traces thereof in the recent SACWU & others v Sentrachem Ltd (1988) 9 ILJ 410 (IC).

prescribe to the workman what work has to be done, but also the manner in which that work has to be done".

This test no longer correctly indicates the different manifestations of the modern employment contract since many employees nowadays command more skills than their employers: "There is a stark difference between a blacksmith's hand and an airline pilot."[140]

The fact that the control test is no longer applied absolutely by the courts is clear from the following statement by Roos JA in R v Feun 1954 (1) SA 59 (T) 61:

> "Complete control in every respect is in my view not essential to the master and servant relationship, and some degree of freedom from control is not incompatible with the relationship.... Whether the control exercised is such as to lead to the inference that the engaged person is a servant is therefore a question of degree."

The problems arising from control have led the courts to try to identify the employment contract with reference to a right of control rather than the actual existence thereof.[141]

The control test in all its forms is not always a conclusive criterion by which the existence of the employment contract can be established in all cases.

3.5.3.2 **The Organization Test**

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140 Cheadle 344; see also among others Le Roux 50 and Pauw 138.

141 See Rodriguez v Alves 1978 (4) SA 834 (A) 841C-D; Mersey Dock and Harbour Board v Coggins and Griffith (Liverpool) Ltd (1946) 2 All ER 345. According to Cheadle 344 there is an inherent problem in this approach in that the existence of control is accepted precisely when it is absent.

Lord Denning was the first to formulate this test:

> "One feature which seems to run through the instances is that under a contract of service a man is employed as part of the business and his work done is an integral part of the business; whereas under a contract for services his work, although done for the business is not integrated into it but is only accessory to it."[142]

This test, which does not deviate much from the control test, is however vague and inexact especially owing to the unclear nature of words like "integration" and "organization". It is even possible that a person may be an employee without belonging to an organization. This test is however not without value.[143]

3.5.3.3 **The "Mixed" Test**

In an attempt to move away from the old control test, the Appellate Division developed a "dominant impression" or "mixed test". This test probably establishes the basis on which the courts have always judged problems of this nature.[144] Rabie JA puts it thus in Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB 1976 (4) SA 446 (A) 457A:

> "Dit was ook gemene saak dat waar 'n verhouding elemente van sowel 'n diensverhouding as van 'n ander soort verhouding het, 'n mens moet probeer vasstel welke soort verhouding die sterkste uit al

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142 Stevenson Jordan & Harrison v MacDonald & Evans (1952) 1 TLR 101 (CA) at 111. See also Kahn-Freund Servants 504-9.

143 Compare Le Roux 51; Mureinik 251 et seq.

144 Cheadle 344.

> die feite spreek, of, soos dit in die uitspraak van die hof a quo gestel word, wat die `dominante indruk' is wat die kontrak op 'n mens maak. Ek meen dat hierdie siening van die saak noodwendig juis moet wees, want as 'n verhouding nie oorwegend die van heer en dienaar is nie, sou 'n mens dit beswaarlik met reg so kon noem."

In Smit v Workmen's Compensation Commissioner 1979 (1) SA 51 (A) 62F-G Joubert JA states that the right of supervision and control is still an important indication of the existence of the employment contract but not the only one and continues:

> "Notwithstanding its importance the fact remains that the presence of such a right of supervision and control is not the sole indicium but merely one of the indicia, albeit an important one, and that there may also be other important indicia to be considered depending upon the provisions of the contract as a whole."

Factors which must be taken into account when determining whether or not an employment contract exists are among others the following:

(a) Does the worker supply his own equipment and tools?

(b) Is he personally bound to deliver the required services or can he appoint a substitute?

(c) Does the worker pay tax himself or is it deducted from his salary?

(d) Is any of the worker's own capital subject to risk?

(e) Is the work result or process orientated?

This test has also not escaped criticism - mainly because it is not sufficient.[145] Mureinik concludes:

"A service contract, it is suggested, is simply an agreement in which one party (the servant) agrees to work for another (the master) and in which the servant occupies a subordinate position."[146]

Cheadle follows a wider approach:

"But prior to any balancing of the indicia, the essentialia of the contract of employment have to have been established, namely: that it is a lease of personal service, which is to be performed under the control or supervision of the employer, for remuneration. Identifying the contract should be a two-stage enquiry: the first stage must be to establish the existence of the essentialia and only thereafter should there be the balancing of the `indicia' to identify the nature of the contract. It

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145 According to Le Roux 54 it amounts to a balance of the factors present. (See also the English authority quoted; Le Roux 51; Pauw 139-40, Mureinik 263.) It simply boils down to the control test.

146 Mureinik 263. Brassey Nature 889 et seq especially 935, emphasizes the fact that an employee places his capacity to work at the disposal of the employer whereas an independent contractor delivers the finished product. He argues that control is an important indicium of the existence of a contract of employment but not the only test. The fact remains that employment does not exist if there is no indication of subordination, because of the economic and hierarchical power discrepancies that of necessity exist (see Collins n 96 above). If this capacity, labour, is to be "sold" to anyone who is to utilize it, the latter will have to assume some kind of control or authority over the person whose capacity to work is "bought". The labour is bought as a potential (or capacity) and has to be utilized as the "buyer" sees fit. (The terms "buyer" and "seller" of labour are used in ch 1 par 1.1.3 above.)

> is important to reaffirm the essential core of the employment contract because it does provide a coherent body of rules, developed by the courts, to regulate this pervasive form of employment. The obligation to serve carries with it the concurrent obligations to be ready and willing to work to offer personal service and to perform the services in a competent fashion. It gives legal form to that essential feature of employment in the capitalist enterprise: the owner's prerogative to determine how and in what manner the enterprise is going to be run."[147]

The essence of the mixed test remains the element of subordination peculiar to the contract of employment. To that may be added the nature of the work as an important indicium.

3.5.3.4 **Legislation**

It is naturally necessary in appropriate circumstances to refer to the definitions of the employer and the employee in applicable legislation. Here are a few:

The Labour Relations Act 28 of 1956 defines "employee" and "employer" as follows:

> "`employee' means any person who is employed by or working for any employer and receiving or entitled to receive any remuneration, and subject to subsection (3), any other person whomsoever who in any manner assists in carrying on or conducting of

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147 Cheadle 345. (Note also the industrial court in Tuck v SABC (1985) 6 ILJ 570 (IC) 578-84 which favours the control test.)

> the business of an employer; and `employed' and `employment' have corresponding meanings";[148]
>
> "`employer' means any person whomsoever who employs or provides work for any person and remunerates or expressly or tacitly undertakes to remunerate him or who subject to subsection (3) permits any person whomsoever in any manner to assist him in the carrying on or conducting of his business; and `employ' and `employment' have corresponding meanings".[149]

The Basic Conditions of Employment Act 3 of 1983 and the Wage Act 5 of 1957 contain similar definitions. The definition of "employee" in the Machinery and Occupational Safety Act 6 of 1983 also includes someone who works "under the instruction or supervision of an employer":

> "`employee' means, subject to the provisions of subsection (3), any person who is employed by or working for an employer and receiving or entitled to receive any remuneration or who works under the direction or supervision of an employer, or any other person who in any manner assists in the carrying on or the conducting of the business of an employer".[150]

It is clear that these definitions are much wider than the common-law description.[151] Some legislation excludes certain categories of employees, for example the

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148 s 1.

149 s 1.

150 s 1.

151 See par 1 above.

farming industry, domestic servants and certain civil service employees.[152]

3.5.3.5 **Conclusion**

It is clear that no final test to distinguish the employment contract exists and that subordination still plays the decisive role. It lies at the heart of the employment relationship in a free enterprise environment. This is the case firstly because the owners of the means of production will and must enjoy more economic power in order to be in a position to plan and direct the way in which those means of production should be employed.

Secondly, subordination is also evident from the hierarchical nature cf employment. An employee can make his labour available to be utilized at the discretion of his employer only if he submits to a hierarchy of power. This is not only the case with large organizations, but also with single employers employing one employee. One party, the employer, must have the final say as to the manner in which the labourer can be gainfully employed.

Thirdly, it is in the nature of labour as the potential of a particular person and inseparable from that person that it cannot be utilized on a continuous basis unless the total person is subjected to the direction of the employer who plans its utilization as part of a process. The employee must of necessity serve the interests of the employer honestly and faithfully in a situation of continuing dependency which in turn imposes restrictions on the employee's freedom of action.

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152 See s 2 of Act 28 of 1956 for example.

Employment does not only involve a static exchange of labour for remuneration, it also promises to employ and to be employed. It therefore involves the assumption of unforeseeable risks that the future may hold. The employee does not risk capital; he agrees to provide his labour at an agreed price continuously subject to the risk that the employer runs in a particular market and to risks which may affect his ability to work. The very opportunity of and terms of employment are therefore subjected to the risk of the market and, because of the power discrepancy, to the will of the employer.

Factors which ultimately affect the opportunity to be employed and the terms of such employment are therefore objective factors such as vis maior and subjective factors such as the interests and the power to realize these interests of the parties to the employment relationship.

Since the individual employee is of necessity in a subordinate position and consequently less powerful, contract[153] with its assumption of equal bargaining power cannot regulate the facts accurately. Where contract is therefore exclusively utilized to regulate employment it is ineffective and illegitimate on two levels. Firstly, it fails to describe factual power discrepancies and secondly it promotes the interest of the more powerful party (the employer) to the detriment of the employee for this very reason.

The law as a technique for the regulation of social power should therefore utilize additional sources of regulation in order to adjust the power discrepancy to acceptable levels without disrupting the very fabric of the free enterprise economic system.

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153 See also S v Lyons Brooke Bond (Pvt) Ltd 1981 (4) SA 445 (ZA).

The law can do this by protecting security of employment and promoting the formation, use and implementation of collective power beyond what contract is capable of. This does not mean that contract falls by the wayside. On the contrary, as long as employers and employees operate in a free enterprise environment some assumption of future risk is inevitable and promises will have to be upheld. The role of the law is to adjust the power discrepancies in such a way that the parties are more or less on an equal footing when the risk is assumed and to provide for the continuous adjustment of interests (in a procedurally correct way) by the parties themselves. The law should not try to adjust power discrepancies ex post facto by means of ad hoc interference in the particular circumstances of each case. This will make nonsense of legal certainty which is of the utmost importance for any free enterprise system to function effectively and legitimately.

In this paragraph it has been shown that the essential feature of employment is the element of subordination which exists on various levels. Various indicia such as whether the work is process or result orientated, whether the person doing the work risks any capital, uses his own equipment, belongs to the organization, etc, can be useful in establishing whether that element of subordination is present or not.

It is not only relevant to say that contract hides the power discrepancy, but to ask whether contract with its assumption of equality is suitable to regulate a relationship between parties who are per definition not equals.

In the next section a look is taken at various other constructions for the employment relationship and whether contract still has a role to play.

4 SOME OTHER APPROACHES TO THE STRUCTURE OF THE EMPLOYMENT RELATIONSHIP

The previous section deals at length with contract as a mechanism for the regulation of employment and how employment should be distinguished from other relationships. It shows contract's strengths and weaknesses in sufficient measure so as not to necessitate further discussion in this section. Various other suggestions and approaches to the regulation of employment will now be reviewed briefly in order to determine whether alternative constructions to contract can regulate employment more effectively and whether contract can be eliminated completely.

4.1 Private or Public Law?

Since the relationship between employer and employee is essentially one of power which the contract of employment fails to address properly, people have started to look at the principles of public law and especially administrative law to address its regulation effectively.[154]

Wiehahn in his inaugural lecture[155] argues that labour law should be seen as a branch of public law (more specifically administrative law) because of the many statutes responsible for its regulation, and that the state can

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154 See the discussion in par 3 above. See also in general Collins 1-14 and specifically 2: "This elementary observation that an employee's subordination derives from both inequality of bargaining power and the exercise of bureaucratic power sheds some light, I believe, on certain inconsistencies and defects in contemporary labour law." Napier 1-2 makes a similar observation: "Since the employment relationship is essentially concerned with regulation of power between employer and employee, it would not be inconsistent to find the courts insisting that an employer should be subject to the same constraints they impose on other power wielding bodies." See also Davis Voluntarism 68-71 who argues that "the limited procedural protection afforded by administrative-law principles cannot be ignored or underestimated. They require that employers' power be justified by more than an appeal to the common law and the mechanism of the so-called free market".

155 Enkele Aspekte van Arbeidsreg as Publiekregtelike Figuur.

consequently be seen as a third party to every labour relationship.[156]

He continues[157] and lists the following differences between labour law as part of public law and the private law contract of employment:

(a) Labour law has a collective character as opposed to the individualistic nature of the contract of employment.

(b) Labour law, unlike contract, takes into account the interests of the community.

(c) Labour law serves a social function in that it regulates aspects of unemployment, accidents, illness and insurance.

(d) In labour law compensation is based on a iustum pretium and not on a quid pro quo.

(e) Whereas contract operates on the basis of communicative justice, labour law promotes distributive justice.

(f) Labour law creates criminal sanctions for breaches of obligations, this is not the case in contract.

(g) Labour law allows self-help in the form of strikes and lock-outs, whereas such actions

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156 Wiehahn 18 23. This is not entirely correct since it does not take cognizance of the creation of rules between the parties themselves independent of the state.

157 Wiehahn 21-2.

> are deemed breaches of contract in private law.

Although these differences are helpful in order to gain a better perspective on the true nature of labour law they do not prove conclusively that labour law should be perceived exclusively as public law (or more specifically administrative law). Firstly, public law does not take account of rights and duties created on both an individual and a collective level by the parties themselves without any state interference.

Secondly, although it may be true that labour law draws upon the principles of administrative law, it cannot be viewed as part of administrative law:[158]

> "Administrative law is that branch of public law which regulates the legal relations of public authorities, whether with private individuals and organisations, or with other public authorities."[159]

The parties to the employment relationship in the private sector are seldom public authorities and labour law is not concerned with state administration only.[160]

Thirdly, it is also possible to regulate "community interests" and social responsibilities like illness and insurance by contract.

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158 See Piron "Labour Law: A New Discipline in South Africa" 1977 CILSA 322 who argues that labour law does not fit entirely into either private or public law (323) but that in fact it draws upon many fields of law (325) and that it should rather be viewed as an autonomous field of law (325). See also his criticism of Wiehahn's definition of labour law (326).

159 Baxter Administrative Law. Wiechers Administratiefreg 2 gives the following definition: Administrative law "is daardie deel van die publiekreg wat die organisasie, bevoegdhede en optredes van die staatsadministrasie reël".

160 Piron 325.

However, administrative law principles have been applied in employment cases to good effect.[161] This is a worthwhile development:

> "The simple characterisation of employment as a contract fails to grasp the nature of the social relations involved. In the first place, the ordinary nexus between manager and employee cannot be described as a contractual relation, for they have never actually made a contract together. Instead, they have both agreed with a third party, usually a company or a government agency, to join the same organisation at different points of entry in the hierarchy of ranks. Moreover, another person, usually someone at the top of the organisation, determines the initial terms of their relation. Plainly, the ordinary relations of authority found in employment cannot be reduced to a simple contrac-tual formulation. Again, unlike a contractual or market relation, a manager's natural remedy for an employee's deviation from the bureaucratic rules[162] consists not of economic compensation to himself or his employers but of punitive sanctions, such as a reprimand or demotion or even expulsion from the organisation. Similarly, an employee normally receives a wage which does not depend directly on the amount he produces, so that unlike a normal contractual relation he does not suffer economic loss for defective or tardy performance. All these anomalies thrown up by the

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161 Napier 17. Our industrial court has gained much guidance from administrative law principles especially in the field of procedural fairness by reference to the rules of natural justice. See also Stokes "Public Law Remedies for Dismissal" 1985 Industrial Law Journal (UK) 14: 117. See also Cockrell 83 97.

162 The rules referred to here are those contained in disciplinary codes and procedures for example.

> traditional contractual analysis are produced, I suggest, by the failure to recognise that the employment relation combines both market and bureaucratic dimensions. This suggestion points to a resolution of a number of doctrinal inconsistencies."[163]

Collins describes the system of job specifications and rule books characteristic of employment as a "miniature legal system" which the employee enters by means of a market transaction. Once in this system the employee is subject to the exercise of discretionary power. Contract provides the point of entry while the rule book or code constitutes a set of bureaucratic rules which must be operated fairly.[164]

Collins discusses the problem in English law of incorporating collective conditions of employment as part of the contract of employment[165] and suggests that collective agreements should be seen as altering the code,[166] the application of which is regarded as the exercise of private bureaucratic power.

In South African labour law, promulgated industrial council agreements are backed up by criminal sanction and are therefore part of public law. In this area, Collins's argument could therefore find fruitful application without any real problems.

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163 Collins 3.

164 Collins 4-5.

165 Collins 6-7.

166 Similar to the American system in certain instances.

Collins further argues that since the employment relationship is frequently modified after its formation,[167] his view allows for more flexibility.

Collins contends that separating the code from the contract of employment would make it easier to identify the employment relationship.[168]

Finally, he says that the law of unfair dismissal should be regarded as an attempt to introduce a review of the exercise of private bureaucratic power, for example, procedural rights under the principles of natural justice become a condition precedent to the valid exercise of power.[169]

The task of the law in short should be seen as the regulation of private bureaucratic power.[170]

The concept of private bureaucratic power is certainly of much value, but "the rigid distinction between public and private law has inhibited the development of a more radical perspective within labour law which requires the

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167 Collins 8: "There exists a stark `contrast between the lawyer's static model of the formation of terms and the evolutionary character of actual practice'." Although it may seem like a unitary approach to industrial relations, Collins argues that the insistence that power should be exercised reasonably brings about that it is not.

168 He proposes something akin to the organization test (Collins 10).

169 Collins 11-13.

170 Collins 13. This view is in line with the definition of labour law as a technique for the regulation of social power (see ch 2 par 2 above).

Napier 17 strongly supports the utilization of administrative law principles in the power relationship between employer and employee: "In fact, the encroachment of administrative law principles into the contract of employment, although this has so far only occurred on a very modest scale, may be one of the most significant changes in judicial approach. For while it would be quite wrong to suppose that this necessarily leads to radical reform, it is the case that until the employment relationship is widely understood in terms of its power dimensions, judicial innovation is unlikely to amount to more than a tinkering with its details."

power of employers to be justified by more than appeals to agreements to market transactions. Once managerial power is likened to governmental power, old questions concerning the absence of democracy and respect for and liberties in the work place begin to press upon us with renewed intensity".[171]

A very important question arises: How crucial is the distinction between private and public law in any event?[172] Harlow warns, somewhat cynically, against attaching too much value to the distinction in English law because -

> "it may lead us to adopt an outmoded distinction at the very moment when our continental neighbours are questioning its validity and usefulness.
>
> I believe myself that the `public/private' classification is part of another, more insular tradition. It is nothing more than an attempt by the judiciary to conceal political issues behind a formalist facade and to shield from public criticism some highly executive minded decisions. Nevil Johnson has rightly called our legal theory `very thin gruel indeed'. The `public/private' distinction is not thick enough for gruel. To continue his culinary metaphor, our judges can be linked to crafty restaurateurs, seeking to pass off unpalatable common law leftovers as delicacies from the classic French cuisine. But Brown Windsor soup is not easily disguised as Creme Vichyssoise."[173]

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171 Collins 14.

172 This question cannot be discussed in any detail here.

173 Harlow "`Public' and `Private' Law: Definition without Distinction" 1980 Modern Law Review 43 (3): 241 265.

It is commonly accepted that the distinction between private and public law has no prior essential value and that it may differ from legal system to legal system. It need not exist at all.[174] In other words the existence of rights and duties and their nature are not dependent on the distinction between public and private law.

> "Dit is wetenskaplik die kar voor die perde span om te vra of die verhouding tussen die indiwidu (`onderdaan') en Staat (`owerheid') 'n publiekregtelike of privaatregtelike is, en om dan aan die hand van dié uitslag die regte en verpligtinge te probeer kategoriseer of nog erger, hoegenaamd te probeer vasstel."[175]

A number of writers has already speculated about adopting the concept of subjective right ("subjektiewe reg") as the foundation for both private and public law.[176] There seems to be no serious objection to this.

For the purposes of viewing labour law as an autonomous branch of the law, objections (if any) that the distinction between public and private law is ignored, do not seem material. Under the widely defined unfair labour

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174 Van Wyk Privaatreg, Publiekreg en Subjektiewe Regte, taken from his doctoral thesis Persoonlike Status in die Suid-Afrikaanse Publiekreg 18.

175 Van Wyk 9.

176 Consider in general the contributions by Van Wyk; Venter Die Publiekregtelike Verhouding especially ch 5); Joubert "Die Realiteit van die Subjektiewe Reg en die Betekenis van 'n Realistiese Begrip daarvan vir die Privaatreg" 1958 THRHR 21: 12; Rautenbach "Judisiële Staatsoptrede in die VSA - Judisiële Onthouding in SA" 1971 THRHR 34: 45; Neethling "Enkele Gedagtes oor die Juridiese Aard en Inhoud van Menseregte en Fundamentele Vryhede" 1971 THRHR 34: 240. See also Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk 1977(4) SA 376 (T), where Mostert J adopts the doctrine as the basis for his decision.

practice the industrial court has already (perhaps not always consciously) ignored this distinction.[177]

It may be worthwhile to consider the regulation of both individual and collective labour law by statute using as point of departure the fact that law as a set of rules is a mechanism for the regulation of social power in a tripartite industrial relations system.[178] Labour law can then have its own simplified rules and concepts and will for example be able to move away from the intricacies of contract and an unsophisticated widely defined unfair labour practice concept. The law will be able to institutionalize conflict with more certainty and fairness in close approximation of the facts peculiar to the employment relationship.

4.2 **Ownership of Jobs**

Myers[179] investigated job security in the United States, Britain, France and Mexico in order to establish whether there is an inherent instability in the traditional contractual relationship between employer and employee which causes it to yield over time to something different and, if so, whether there are common characteristics in the new forms of relationship. He summarizes his conclusions as follows:

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177 Compare, for example, the introduction of the rules of natural justice; see par 6.3.5.1. See Roos "Labour Law in South Africa, 1976-1986, The Birth of a Legal Discipline" 1987 Acta Juridica 94 98.

178 Hepple "Restructuring Employment Rights" 1986 Industrial Law Journal (UK) 15: 69 74: "We need a new concept which can match the underlying purposes of labour legislation. The contract of service should be replaced by a broad definition of an `employment relationship' between the worker and the undertaking by which he is employed. That relationship would of course, be based upon voluntary agreement between the worker and the undertaking to work in return for pay. The insistence on agreement makes it appropriate to describe this as a `contract' rather than a `status', but it would be a `contract' of a new kind, one that encompassed both the intermittent exchange of work for remuneration, and the single continuous contract." See also Wedderburn "Labour Law: From Here to Autonomy" 1987 Industrial Law Journal (UK) 16: 1 6.

179 Myers Ownership of Jobs: A Comparative Study 1.

> "The evidence of these four countries tends to support the conclusion that the classical liberal contractual approach to the employment relation in a complex industrial society is simply not a viable one. Workers do in fact tend to regard themselves as having some kind of right of possession in a job, and to devise institutions which wrest control over incumbency from the hands of the employer and which express objectively a vesting of property like rights in the worker."[180]

Central to the notion of ownership is the idea of job security. An employee for as long as he wishes to work may not be dismissed unless he can be shown to be incompetent or to have behaved sufficiently badly. This is the position regardless of the will of the employer. The employer still has control over access to the job however.[181]

Lord Denning MR in Nagle v Feilden (1966) 2 QB 633 (CA) states that "a man's right to work at his trade or profession is just as important to him as, perhaps more important than, his rights of property. Just as the courts will intervene to protect his rights of property, they will also intervene to protect his right to work".

It is clear that the word ownership is used descriptively and not as a term of art. It denotes the increasing tendency of job demarcation and the employer's steady loss of absolute control over it. The term is handy

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180 Myers 112.

181 Myers 6-7.

from a semantic point of view but cannot be seen as synonymous with property rights in general.[182]

4.3 Contract or Status?

"The cornerstone of the edifice of labour law",[183] should be buried. "Only by an open admission of a status of employment can the law hope to keep pace with the practicality of the industrial scene. Status alone is the real guarantee of the workers' rights and there is no reason why, having built on the wrong foundation 150 years ago, the law should not now reappraise its attitude."[184]

The dominating influence of collective bargaining and statute and the unsuitability of contract to regulate the content of the employment relationship in areas such as unfair dismissals, redundancy and maternity have caused a number of writers to declare that Sir Henry Maine's dictum "from status to contract" should be inverted to describe the modern movement from "contract to status".[185]

Although the term status perhaps appears more accurate than contract as a description of the employment

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182 See also Cassim "The Changing Contours of Labour Law" 1984 CILSA XVLII: 340 342. The idea of ownership of a job also comes to the fore in discussions on the right to work in Brassey "The Contractual Right to Work" 1982 Industrial Law Journal (SA) 3: 247. See also Hepple "A Right to Work" 1981 Industrial Law Journal (UK) 10: 65.

183 A phrase used for the contract of employment by Kahn-Freund "Legal Framework" in Flanders & Clegg System of Industrial Relations in Great Britain 45.

184 Rideout "The Contract of Employment" 1966 Current Legal Problems 19: 111 127.

185 See in general Roos 95; Cockrell 97; Elias "The Structure of the Employment Contract" 1982 Current Legal Problems 95; Fourie "Status en Kontrak in die Suid Afrikaanse Arbeidsreg" 1979 THRHR 79-85 and "Is Ondergeskiktheid 'n Kenmerk van die Moderne Arbeidsverhouding?" 1978 TSAR 3: 224-36; De Kock 1979 THRHR 353; Davis "Refusing to Step Beyond the Confines of Contract" 1985 Industrial Law Journal (SA) 6: 425 434; Kahn-Freund "A Note on Status and Contract in British Labour Law" 1967 Modern Law Review 635-44 (Kahn-Freund Status); Haines; Raday and Jordaan Membership.

relationship, it remains a misnomer and of very little analytical value.

By status Maine meant "the sum total of the powers and disabilities, the rights and obligations, which society confers or imposes upon individuals irrespective of their own volition. Hence, however much of the incidents and the consequences of marriage may be regulated by law, marriage does not figure in Maine's catalogue of examples of `status in modern society, whilst infancy and lunacy do'".

Status therefore means a legal position imposed on certain people either in accordance with the accident of birth or from a desire to protect those people because they do not possess the faculty of forming a judgment in their own interest.[186] This is hardly the case with an employee, with the result that the term status cannot be used to describe the employment relationship accurately. From an analytical point of view it is bound to create confusion in the sense that it denotes an involuntary state whereas the employment relationship is highly voluntary and dynamic, especially in a unionized environment on the collective level.[187]

Kahn-Freund[188] finds an explanation for the use of status in the gap in the conceptual equipment [189] of English law:

> "The distinction between jus cogens and jus dispositivum, between `imperative' and `optional' norms of the law of contract, is familiar to every

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186 Kahn-Freund Status 636.

187 See also Cockrell 97.

188 Kahn-Freund Status 637.

189 See also the comments regarding the mechanics and utility of contract in par 3.2 above and especially n 86.

> practising lawyer in any Continental legal system.... The distinction is not commonly used in English legal practice, although it is beginning to become more and more familiar to academic writers. The reason appears to be that the positive regulation of the substance of contractual relations has only within fairly recent times become one of the recognised functions of the legislature. The law of contract was developed by the courts, and the principal conceptual instruments which they handled were the intention of the parties (which to a large extent fulfilled and still fulfils the function of the jus dispositivum on the Continent) and public policy, which in a few extreme cases, may destroy contract, but which cannot mould it. Thus the idea of the positive regulation by law of the content of contractual relations is, as English legal history goes, fairly new."

He further explains by way of statutory examples how in the areas of protection and minimum wages the law has imposed certain obligations and concludes that "the idea of contract moulded by jus cogens has not yet penetrated into what may be called the general legal atmosphere which lawyers breathe. Hence the tendency to think of anything that is imperative or compulsory as imposed in the way status is imposed".[190]

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190 Kahn-Freynd Status 642. Jordaan's premise (Contract 85-6) for his notion of "industrial citizenship" is couched in the same status language: "The starting point of a new analysis is the premise that employers and employees find themselves in a relationship infused with rights and obligations that are created not through their own volition but by virtue of their association with, or membership of a particular industrial community. Because of their statutory nature, these rights and obligations do not originate in fictitious assent but have their roots in societal values or, if you will, 'public policy'. They are imposed upon people who contribute to a given relationship and who have certain expectations of it merely because of the fact of their association."

The movement should rather be seen as one from private to public law (or a combination of both) than from contract to status.[191]

4.4 The Multiple Sources Approach

> "The traditional distinction between the law of Master and Servant and the burgeoning law regulating the individual and collective aspects of the employment relationship is no longer tenable. The employment relationship is so shot through by statute and collective bargaining agreements that it has become an inextricable complex of rights and obligations with its sources in contract, common law, trade custom and practice, legislation and collective bargaining. Employment law is that branch of the law that has as its central intersection the relationship of employer and employee."[192]

What is termed here as the multiple sources approach to the structure of the employment relationship is nothing more than a realization in practice that the contract of employment is not the only source of rights and obligations in the employment relationship, but that a number of sources is at play and that it is a matter of correct legal interpretation what the legal position with regard to a particular set of facts may be.[193] This is the most realistic approach and the one commonly followed in practice.

Although part of legislation, the unfair labour practice, because of its wide ambit can also be seen as a

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191 See the comments in par 4.1 above. See also Cockrell 97 and Roos 96.

192 Cheadle 340.

193 See also inter alia Roos 95; Piron 325 and Van Jaarsveld & Coetzee in general.

potential source of rights and obligations depending on the circumstances of each case (and some would argue, the officer presiding). Reference has also been made to international guidelines in giving effect to the unfair labour practice jurisdiction.[194]

It is important to note that Cheadle finds that the traditional distinction between individual and collective labour relations, the former governed by contract and the latter by statute and collective bargaining, is no longer tenable.[195] This is correct since rights affecting the individual can also be created by collective bargaining, custom and legislation (especially the unfair labour practice). The concepts of individual and collective only bear relation, perhaps, to the method of creation of rights and duties (that is, whether individual or collective bargaining) or the number of people involved in a particular legal act, but they have no bearing on statutory rights. The falling away of this distinction augers well for an autonomous approach to labour law based on a power conception of law and the removal of categorization (such as individual and collective, private and public).

It is furthermore essential to acknowledge that there are only a fixed number of recognized sources of law,[196] contract and collective bargaining (with their foundation in consensus), common law (based on the principle of stare decisis), custom (grown out of accepted practice) and

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194 See Thompson De Kock's Industrial Laws of South Africa 520 J. See also the discussion in par 6 below.

195 Unlike Van Jaarsveld & Coetzee 43-4 for example. Hepple 82 also states: "It is obvious from this critique of the complexity of existing labour legislation that ... legislation should abandon the link between contractual and statutory rights."

196 See Hahlo & Kahn The South African Legal System and its Background 140 and in general chs 5-9 and Hosten, Edwards, Nathan & Bosman Introduction to South African Law and Legal Theory 4.

legislation (with its mandatory origin in central rule making by the state). A further source, which is not so clear from Cheadle's exposition, is the authoritative decisions handed down by judges of the Supreme Court. He probably means the development by the courts of the common law on a case by case basis. No other sources of law are recognized. This is important for there is a tendency in the industrial court to treat what it terms the "employment relationship"[197] as an independent source of rights and duties. This amounts to conceptual jurisprudence which should not be allowed to take root in a system of industrial relations which is already over-complicated.

The multiple sources approach corresponds most closely to legal reality. It is clear that contract still has major role to play as one of the sources of rights and duties in the employment relationship. In a free enterprise system this must be the case since a mechanism is needed to regulate economic risks on an ex ante basis by the parties themselves whether individually or collectively. Until a relationship sui generis is created by statute contract will fulfil this role.

4.5 An Employment Relationship as Opposed to Contract

Up to now the term employment relationship has been used purely descriptively to indicate the complex of rights and duties pertaining to the relationship between employer and employee regardless of whether these rights and duties originate from local or central rule making or both. This is an acceptable use for the term.

Wedderburn also sees it as acceptable in this way:

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197 See discussion in par 4.5 below and also ch 5 par 3.2.2 below.

> "`We need a new concept which can match the underlying purposes of labour legislation. The contract of service should be replaced by a broad definition of an "employment relationship" between the worker and the undertaking by which he is employed'. This is a call for autonomy, for freedom from civil law categories. It now receives a wide and favourable response."[198]

It is fundamental, however, that such a term should be created by legislation and be properly defined. It would be utter folly for a court or tribunal to elevate descriptive terminology to terms of art, and worse to proceed to deduct rights and obligations from it as if it were an independent source of rights and duties without defining its parameters - as is apparent from the following abstract:

> "The Act also makes a distinction between the contract and the employment relationship. For instance in the definition of `strike' in s 1 of the Act reference is made to any body or number or persons who are or have been employed by the same employer or by different employers, and to the refusal or failure by them to accept re-employment, in addition to other acts or omissions; s 35(4)(a) requires the minister to be satisfied that a dispute exists in regard to any matter concerning the relationship between employer and employee; s 43(1)(a) concerns the termination of employment of an employee or employees as well as the proposal of an employer to terminate such employment. Counsel's argument therefore was that the court is concerned to evaluate the termination of the employment relationship, not the termination of contract, and

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198 Wedderburn 6.

when the court reinstates it does so not because the termination or the contract was wrong but because the termination of the employment relationship was wrong. In this particular case the contract ended with the dismissal on 8 July; the employment relationship endured to 15 July. The question is why the employer terminated the employment relationship - not whether objectively speaking there were reasons for terminating the relationship, but why the employer did so. This distinguishes the position in labour law from what it would be under the law of contract in terms of the common law where breaches by the employee of his obligations of which the employer only became aware after he had terminated the contract of employment can be relied upon by him."[199]

However keen the industrial court may be to develop labour law in South Africa and however wide the ambit of its

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199 Dr John in SACWU & others v Sentrachem Ltd (1988) 9 ILJ 410 (IC). See also Brand "Lock-outs and Mass Dismissal" 1991 Employment Law 8 (2): 31. Brand 32 states: "It is the fixation with contract that creates the problem. If the relationship is seen as decisive, the problem goes away. The relationship-based approach acknowledges that the employment relationship continues despite the termination of the contract if it was terminated in the expectation that it would subsequently be renewed." This statement relies on the benefit of hindsight and has no universal analytical value. See also Rycroft & Jordaan A Guide to South African Labour Law 148-9 who accept the distinction between contract and relationship without any explanation. They compare the notion of a relationship with Freedland's second tier in his discussion of the structure of the contract of employment, that is "an exchange of mutual obligations for future performance" (see par 3.3 especially n 89) but fail to explain why it should be seen as a relationship instead of a continuity of contract as Freedland does. For a similar approach compare Mtshamba & others v Boland Houtnywerhede (1986) 7 ILJ 563 (IC), Jacob v Prebuilt Products (Pty) Ltd (1988) 9 ILJ 1100 (IC) and Jordaan "Selective Re-employment Revisited" 1991 Industrial Law Journal (SA) 12: 1192-202 (Jordaan Selective Re-Employment). He argues (1192-93) that "the notion of an employment relationship which transcends the parties' contractual arrangement was arguably the most important conceptual advance which the industrial court has managed to make in the decade of its existence". However desirable the notion of an employment relationship may be, it is not to be found in existing South African law. Attempts to create it other than through statute only create uncertainty and chaos. Compare the discussion in ch 5 par 4.7 below for an approach which is more in line with existing South African law. See inter alia Borg-Warner SA (Pty) Ltd v NAAWU (now known as NUMSA) (1991) 12 ILJ 549 (LAC) and Ngubane & others v NTE (1991) 12 ILJ 138 (IC).

unfair labour practice jurisdiction may be, it still has to respect firmly established legal principles especially when it interprets certain legal provisions. One such principle is that words used in legislation should be given their ordinary grammatical meaning unless the words are clearly defined differently or a different meaning clearly appears from the context.

The term "employment relationship" is not defined in the Labour Relations Act. Where it is used therefore it should be given its ordinary descriptive, grammatical meaning, which according to Chambers Dictionary is "a state or mode of being related". "Relate" means inter alia "to bring into connection or relation; to have reference or relation; to connect".

"Employment relationship" is therefore not a term of art, a legal concept with an independent clearly defined legal meaning, but is merely a descriptive term which may include the relationship between employer and employee as demarcated by contract or go beyond it (purely descriptively).

Where the Act seems to suggest a relationship beyond contract, such as in the definitions of "strike" and "lock-out", it does not envisage something specific. There is, for example, no duty to offer re-employment as one of the legs of the lock-out provided for in the Act. In other words re-employment is only included in these definitions in realization of the fact that it may be offered again after termination.

Furthermore, selective re-employment is not one of the possible victimizatory acts for the purpose of section 66 of the Act. If the legislature intended a relationship beyond contract it certainly would have included selective

re-employment as one of the acts for the purposes of the offence of victimization.

What in fact happens is that the power realities between the parties continue beyond contract and that the law takes cognizance of this. In other words, the law takes notice of the fact that the dependencies of the parties may continue beyond contract even though the contract is terminated. The concepts and language underlying the Act are still those of contract. The law does not create something foreign or new such as an employment relationship to govern the position and it certainly does not create a new source of law. In other words, contractual mechanisms or concepts such as offer and acceptance should still be utilized to make legal sense of realities such as market forces, availability of labour, logistical problems, training costs and general economic, social and other power considerations which have an impact irrespective of the law (and beyond the initial contract).

The South African legislature realized that contract alone cannot address the facts of collective power play adequately and introduced the concept of fairness by means of the unfair labour practice concept in order to regulate the power play on a more acceptable basis.

When selective re-employment has to be addressed, it is not necessary to distinguish between contract and relationship (as a term of art) in order to get to grips with the power realities. The contractual substructure of the Act remains. The best way (in terms of the existing formulation of the Act) in which to view the mechanics of selective re-employment is therefore firstly that the dismissal should be fair and secondly that if an offer is made to ex-employees that offer should also be fair in the sense that it does not discriminate against people on the basis of trade union

activities for instance. Selective re-employment should therefore not be considered within the parameters of a nebulous new "employment relationship", but on the basis of termination of contract and a new offer to contract both of which have to be fair. The offer for the new contract has to meet objective criteria. The legislature does not take it further nor is it necessary to introduce meaningless new concepts which only create confusion. In other words, selective re-employment involves the lawful and fair termination of an existing contractual relationship and the start by means of an offer (which is fair) of a new one - not the termination of a contract and subsequently of a relationship. The problem is simply, when does the so-called relationship come to an end? For example, if the employer terminates services and decides not to re-employ are both the contract and the relationship terminated? And what if he discovers after a period that he needs additional employees, is the relationship resurrected?

Fairness on the other hand, in line with accepted labour standards all over the world, requires the employer to give preference to ex-employees and to select from their numbers in accordance with acceptable objective criteria. Re-employment depending on when it occurs (and if it can still be termed that) is viewed as part and parcel of the collective power game.

This discussion warrants a lot more attention in South African law because of the dangers involved in creating a concept and then elevating it to an independent source of rights and duties. This could result in major uncertainty and a further removal of the law from the facts it has to regulate.

If a concept like the "employment relationship" is needed, it should be created and defined by statute. It is

submitted that the regulation of such a concept should take cognizance of the following:

(a) The employment relationship is one of power. Therefore, the concept of private bureaucratic power and administrative law rules with regard to the reasonable exercise of power could be introduced.

(b) Such a concept should be clearly demarcated with regard to its termination. The law of dismissal and termination should therefore be regulated by statute as well.

(c) Access to this relationship should be voluntary by means of a market transaction. Here contract can still fulfil a valuable role.

(d) The parties should be able to vary terms and conditions by negotiation either individually or collectively. The formation, use and implementation of collective power should therefore be promoted by the law in order to ensure an equitable distribution of scarce resources.

(e) The distinction between private and public law can largely be ignored for the purposes of regulating the employment relationship. Removal of criminal sanction from employment law should be seriously considered.

(f) The regulation of the employment relationship should be sufficiently clear so as to render

disputes of rights amenable to effective adjudication.

(g) It should be realized that common-law and contractual principles are still operative to the extent that they have not been changed by statute. Changes to the common law should therefore be clear and precise in order to avoid conceptual jurisprudence by speculation and by borrowing from foreign legal systems.

5 CONCLUSION

Historically the role of contract in the regulation of employment varied in importance, but contract never disappeared altogether as a source of rights and duties.

In spite of serious shortcomings, such as its failure to address facts properly, its assumptions of power equality where discrepancies exist on an economic and hierarchial level and its failure to provide adequate security of employment, contract still remains indispensable in a free enterprise environment even on an individual level, because it is necessary that employers and employees should be able to regulate future events ex ante.

Attempts at developing a new paradigm of contract with the emphasis on acts instead of promises are laudable and helpful but concepts such as "public policy" create more problems than they solve.

If a closer look is taken at the nature of employment and various other constructions relating to the regulation of employment it appears that the multiple sources approach is still the most realistic as the law stands at present.

Ideally, employment should be regulated by statute as a relationship sui generis. Contract must maintain its role as a port of entry into the employment relationship and as the basis for some rights and duties. Once the relationship is concluded, the law should recognize that it is a power relationship per definition and ensure that employer power is exercised reasonably with the assistance of administrative law rules such as the rules of natural justice.

The law should adjust the power balance between employer and employee by promoting power formation through freedom of association and collective bargaining supported by the right to supplement power when necessary. The power balance should also be adjusted by providing greater security of employment to employees. The law should do this by creating clear procedural rules by means of legislation. These rules should be of a sufficiently binary nature to be effectively justiciable as procedural disputes of rights whenever they are breached. Problems of polycentricity with vaguely defined rules should be avoided as far as possible in order to promote legal certainty and proper planning in a free enterprise environment.

In the next paragraph, a closer look is taken at the way in which the South African legislator addressed the inadequacies of contract by the introduction of the act based unfair labour practice concept.

6 THE UNFAIR LABOUR PRACTICE CONCEPT

6.1 Introduction

The Wiehahn Commission[200] envisaged the introduction of an unfair labour practice concept along the following lines:

> "In most countries the true grounds of decision in the field of industrial relations on the question of what constitutes fairness in a particular case include considerations of socio-economic and socio-political policy. It is vain to suppose that solutions will always be attained by the logic and general propositions of law: decisions on the grounds of equity or fairness might therefore be regarded as a correction of law where the law is defective owing to its universality, or where it is silent owing to its conservatism. As it is so appropriately stated; equity or fairness in the judicial process fashions a trust with flexible adaptation to the call of the occasion. In South Africa it has on many occasions been pointed out by the Supreme Court that a system of equity does not exist separately from the system of law. Equity in South Africa has always been regarded as an important ingredient of its common law, the Roman Dutch law. The interpretation of fairness or equity will therefore also be developed along the principles of Roman Dutch law."

The intention of the Wiehahn Commission expressed in

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200 Report par 4.127.18.

this quotation is in line with South African legal tradition.[201] The legislative effect of and the way in which the industrial court developed the concept of the unfair labour practice is, however, more difficult to understand in terms of and to reconcile with Roman-Dutch legal tradition. The concept has on the contrary served to a large extent as an independent basis for the introduction of legal principles or guidelines from all over the world as lawyers went on an international shopping spree in search of material that would secure favourable outcomes in the cases they argued in terms of the widely defined unfair labour practice concept. The industrial court was not reluctant to buy the material peddled in its stitching together a jurisprudential quilt of guidelines which did not always blend with the rest of the Roman-Dutch furniture of our legal system, but provided some warmth to those invited to the inhospitable bed of the new labour dispensation. Often, however, it provided cold comfort to traditionalists accustomed to the Roman-Dutch hearth. Others who were willing to stray from tradition entertained the idea that they "might function as a sort of industrial wayside pulpit, uttering wise laws that the tribunals could murmur to themselves as they went about their daily task".

> "Once you allow the possibility of intrusion by guidelines into the field of case law there is a tendency for `spot the guideline' to become a game for all to play. In no time at all guidelines spring up everywhere as advocates, professors, journalists and the convenors of seminars each for

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201 In other words that equity is part and parcel of common law and not a separate system of law. See in general: Henning "Reg, Billikheid en in Verband Daarmee Regterlike Regsvorming" 1986 THRHR 49 243; De Vos "Vrye Regsvinding?" 1967 THRHR 30: 362; Van Zyl "Justice and Equity in Cicero" 1987 THRHR 50: 154 (Van Zyl Cicero); Van Zyl "The Significance of the Concepts `Justice' and `Equity' in Law and Legal Thought" 1988 SALJ 105: 272 (Van Zyl Equity); Van Zyl "Aspekte van Billikheid in die Reg en Regspleging" 1986 De Jure 19: 110 (Van Zyl Billikheid); Waite "Lawyers and Laymen as Judges in Industry" 1986 Industrial Law Journal (UK) 15: 32; Hahlo & Kahn.

their different purposes join in the game".[202] (1 (end note))

In this section a brief look is taken at the nature of the unfair labour practice concept and how it has served as a legal tool for the regulation of industrial power over the last decade. Unfortunately a comprehensive discussion of the concept and the guidelines that have emerged cannot be undertaken in a work of this nature. It is not necessary since, as will be seen in chapter 5, the unfair labour practice jurisdiction does not apply to legal industrial action.

As in chapter 2 it is argued that the proper way for the law to interfere in the institutionalization of industrial conflict is firstly the procedural promotion of collective bargaining. Conflict can only be institutionalized properly if the facts are fully known (in other words, if the discrepancy between fact and rule is eliminated as far as possible). Negotiation as an immediate process is best suited to find or to agree on the facts where possible. Parties should therefore be encouraged to exhaust the possibilities of negotiation before recourse is taken to the implementation of own power or legal power in the interest of industrial peace.

Secondly, the law may interfere procedurally to demarcate the bargaining context and promote security of employment. Again the emphasis is on the accumulation of relevant facts before a decision may be taken to get rid of present and to look for alternative labour.

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202 Quotations by Waite 32 34 35. Compare for example publications like Employment Law; Labour Law Briefs and Levy Unfair Dismissal; Beaumont Unfair Labour Practice; South African Labour Law Reports; Contemporary Labour Law; Current Labour Law; Labour Law News and Court Reports; Labour Law Compendium. For other material on the unfair labour practice and related topics see end note 1.

It is further submitted that a widely defined unfair labour practice concept is both ineffective and unacceptable as a basis for institutionalization because of the polycentricity of the issues submitted to adjudication. The concept should either be abolished altogether and replaced by other legal mechanism such as bargaining, legislation and regulations in terms of legislation (provided access to central rule making is open to all in society) or be formulated specifically and clearly in order to make it more conducive to adjudication. If this is not done as a broadly defined legal basis for juridification of industrial relations, the door is wide open for the introduction of legal bias and complete subjectivity in the development of ad hoc rules by outsiders to the relationship.

6.2 **Fairness[203] and Roman-Dutch Tradition**

Henning[204] summarizes the role and place of equity in the South African legal tradition as follows:

> "Dit skyn of die gedagte aan 'n billikheidsreg gebore is uit die oortuiging dat dit onmoontlik is om die regslewe volledig te reglementeer. Veral geregtigheid vir die besondere geval kan sou nie verwesenlik word nie. Ontwikkelingsgeskiedkundig gesien, het die billikheid hom bewys as die figuur par excellence om leemtes aan te vul. Reeds Plato en Aristoteles het die positiewe reg as onvolkome beskou en in die billikheid 'n middel gesien om die positiewe reg te verbeter waar dit in besondere gevalle tot onregverdige gevolge sou lei. Die

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203 "Fair" means "just, unbiased, equitable, in accordance with the rules" (The Concise Oxford Dictionary of Current English). Fairness and equity therefore have the same meaning (Afrikaans "billikheid").

204 Henning 247-9. This lengthy quote summarizes the position well. See also Hahlo & Kahn 133-8; Van Zyl Equity 279 and De Vos for similar views.

praktiese aanleg van die Romeine het die billikheid - aequitas - benut om die ius strictum by nuwe verhoudinge en by die eise van die geval aan te pas. Die billikheid word beskryf as die `voortreflikste regsverbeterende middel' in die Romeinse reg. Waar die ius aequum en die ius strictum eers twee onderskeie regskringe gevorm het, het geleidelik 'n versmelting plaasgevind en is die onderskeid uitgewis. Ook die Kanonieke reg het die inwerking van die billikheidsgedagte geken. In Engeland het die `equity'-begrip 'n eienaardige verloop. Aanvanklik het die billikheidsreg buite die howe om, veranker in die koning, ontwikkel. Iemand wat verontreg gevoel het oor die howe se hantering van sy saak, kon die koning nader wat beklee was met `a reserve of justice'. Die oogmerk van die billikheidsreg was geregtigheid vir die besondere geval. Later is afsonderlike howe vir die handhawing van `equity'-reg daargestel, totdat in 1875 het die Judicature Acts 'n nuwe bedeling gekom het. Ons reg ken nie 'n afsonderlike billikheidsreg, 'n `system of equity, as distinct from a system of law' nie, maar probeer om onder dekking van byvoorbeeld uit die billikheid voortvloeiende stelreëls in te gryp waar starre reg vir die betrokke geval onbillike resultate meebring.

'n Mens sou verwag het dat, vanweë sy uitgebreide aanwending, daar oor die betekenis van die billikheidsbegrip eenstemmigheid sal bestaan. Tog dra die begrip geen ondubbelsinnige betekenis nie. Dit is 'n geval, verklaar Rümelin, van soveel hoofde, soveel sinne, en hy staaf sy stelling met voorbeelde. Waaroor eensgesindheid heers, is dat die billikheid 'n funksionele begrip is, die aanwending waarvan op die starre reg 'n soepele,

> gelykmakende, harmoniese inwerking het en wat geregtigheid vir die geval nastreef. Scholten meen dat die geregtigheid 'n algemene karakter het en dat die billikheid 'n in concreto, op 'n bepaalde verhouding gerigte, werking het. Die aanwending van die billikheidsreg veronderstel 'n individualiseringsopdrag: dit veronderstel 'n poging om geregtigheid vir die geval te verwesenlik. Die inherente eiesoortigheid van elke besondere geval veroorsaak dat behoorlike inagneming hiervan en die toepassing van die billikheidsreg hierop, daartoe lei dat 'n nougesette nakoming van logika en streng reg hier onvanpas sal wees. Ons howe het tereg al dikwels die aandag daarop gevestig dat by diskresionêre regsaanwending `the particular circumstances of each and every individual case coming up for decision' van deurslaggewende belang is en dat die regsaanwender nie belas is met kategoriese voorskrifte oor hoe hy te werk moet gaan nie."

It is impossible to regulate life exactly and therefore the law is not an exact science. In each factual situation there will therefore always be discrepancies between the general legal rule and its application in the particular circumstances of that case.[205] Equity is designed to address this discrepancy and to ensure that justice be done as far as possible in each individual case where the rigid application of a particular rule will have harsh consequences.

Equity is a functional concept in that it allows for concentration on facts rather than fiction (in the sense of a conventionally accepted falsehood) when a dispute is

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205 See also par 3.2.6 above.

referred to adjudication. Equity in Roman-Dutch law presupposes the existence of a principle to be applied in a particular situation and furthermore, from a purely positivist point of view (in the sense that the rule is taken as the point of departure), that such a principle be of a sufficient binary nature to allow for effective adjudication (with marginal equitable adjustment where necessary).[206]

Ironically however, the position is not as simple as that for the point of departure ubi ius ibi remedium confuses the issue because legal rules (rights) do not exist for the regulation of all factual situations and even if they were to exist, they may not be sufficiently specific to address a particular situation with absolute certainty (or they may be felt to be wrong). An illustration of the problem is evident from the following extract from a speech made by the late judge, Dr LC Steyn:[207]

> "By die wetenskaplike gaan dit allereers om regsbeginsels en die logiese of billike

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206 Open-ended polycentric adjudication as a separate system of justice peculiar to English law is foreign to the Roman-Dutch legal tradition. See the discussion on adjudication and dispute negotiation in ch 2 pars 4.1.1 and 4.1.2 respectively for the meaning of the terms "polycentric" and "binary". Hahlo & Kahn 133 state: "The view was taken by the Greek philosophers that the strictness of the law should be tempered by a supplementary equitable interpretation, in Aristotle's words, `a correction of law where it is defective owing to its universality'. Where hardship results from the generality of a legal rule, equity should step in and decide what in the spirit of the law would have been laid down had regard been had to the particular case." In this way, two systems of law emerged in England, applying different rules to the same facts. Relief unavailable in common law might be found in the Court of Chancery (Hahlo & Kahn 135).

207 De Vos 363. Corbett followed a similar approach in developing the doctrine of legitimate expectations in Administrator, Transvaal & others v Traub & others 1989 (4) SA 731 (A) 761E: "There are many cases where one can visualize in this sphere - and for reasons which I shall later elaborate I think that the present is one of them - where an adherence to the formula of `liberty, property and existing rights' would fail to provide a legal remedy, when the facts cry out for one; and would result in a decision which appeared to have been arrived at by a procedure which was clearly unfair being immune from review."

> gevolgtrekkings wat daaruit gemaak moet word. By 'n hof gaan dit natuurlik ook daarom, maar met hierdie verskil dat 'n hof meesal ook met 'n konkrete situasie te doen het, waarin hy reg moet doen tussen twistende partye, met die gevolg dat die naakte werklikheid hom soms stel voor 'n keuse tussen summum ius en summa iniuria, en dat sy poging om ad hoc 'n gevolg te vermy waarteen sy billikheidsgevoel in opstand kom, vir die wetenskaplike na 'n sorgwekkende regsdwaling lyk. Dan word daar gesê: `Hard cases make bad law'. Miskien kan 'n mens net sowel sê: `Hard cases disclose bad law'. Die druk van billikheidseise in so 'n situasie kan tot foutiewe rasionalisasie lei en tot 'n afwyking van beginsel en logika. Maar ons moet nie uit die oog verloor nie dat so 'n afwyking, hoewel dit met rede slegte reg genoem kan word, kan ontwikkel tot beter reg, ten spyte daarvan dat dit 'n onlogiese afwyking is. Die reg is per slot van rekening nie sonder uitsondering die produk van suiwere logika nie. Soos die mens self en sy bedrywighede, het hy ook irrasionele bestanddele."

Which comes first, the court or the rule? This rhetorical question addresses the essence of the problem, namely that no set of perfect immutable rules exists against which justice here and now can be measured with absolute certainty and, on the other hand, courts must serve the ends of justice whatever that may be or perceived to be by the presiding officer in a particular case.[208] The further irony is that not everybody will agree on what is fair and what not, nor will they reach universal agreement on what the

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208 De Vos 365: "Wat is hierdie billikheidsgevoel waarvoor regsreëls moet swig, nou eintlik? Is dit nie maar net 'n ander woord vir die natuurreg nie? En het die natuurreg, wat aan almal kenbaar sou wees en dus ook seker sou wees, dan nie reeds in die 17de en 18de eeue geblyk 'n hersinskim te wees nie?"

boni mores dictate in any particular situation, nor will all accept the fact that we live in an imperfect world in the first place.[209]

Henning's[210] argument as far as Roman-Dutch law is concerned is descriptively sound in -

> "(a) dat ons howe regsvormingsorgane is; (b) dat regterlike regshervorming in hoofsaak gelei word deur die norme van die billikheidsreg; en (c) dat reg en billikheid nie antiteties teenoor mekaar staan nie, maar onskeibaar is".

Yet, it did not bring an end to the debate about the place and function of judges and equity in South African law.[211] I do not intend to continue this debate here. From

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209 "Het is oplaats toch maar een dobelspel". De Vos 366 in response to the statement by Judge Steyn. This may be said even against the background of De Vos's qualification (363-4): "Waar mens moet aanvaar dat geen regstelsel vooraf voorsiening kan maak vir elke geval wat sig kan voordoen nie en nie reëls vir al die minutiae kan bevat nie, moet daar minstens 'n `logical plenitude' wees, 'n raamwerk van vaste beginsels vanuit welke stelling mens dan die gapings deur 'n proses van regslogika kan oorbrug. Die howe se rol in so 'n bestel is om, in beginsel, nie as wetgewer op te tree wie, maar die reg toe te pas en te interpreteer." No "logical plenitude" existed when the Wiehahn Commission planned the creation of an unfair labour practice jurisdiction within the Roman-Dutch tradition. See the quotation in par 6.1 above.

210 Henning 242.

211 Compare for example Van Zyl Billikheid 127 and other authorities referred to; Baxter "Fairness and Natural Justice in English and South African Law" 1979 SALJ 96: 607-39; Dugard "The Judicial Process, Positivism and Civil Liberty" 1971 SALJ 88: 181-200; Forsyth & Schiller "The Judicial Process, Positivism and Civil Liberty - II" 1981 SALJ 98: 218-30; Dugard "Some Realism About the Judicial Process and Positivism - A Reply" 1981 SALJ 372-87; Cameron "Legal Chauvinism, Executive-Mindedness and Justice L.C. Steyn's Impact on South African Law" 1982 SALJ 99: 38-75; Van Blerk "The Irony of Labels" 1982 SALJ 99: 380-93; Wacks "Judges and Injustice" 1984 SALJ 101: 266-85; Dugard "Should Judges Resign? - A Reply to Professor Wacks" 1984 SALJ 101: 286-94; Wacks "Judging Judges: A Brief Rejoinder to Professor Dugard" 1984 SALJ 101: 295-300; Davis "Positivism and the Judicial Function" 1985 SALJ 102: 103-19; Dyzenhaus "Judges, Equity and Truth" 1985 SALJ 103: 295-309; Van der Vyver "Law and Morality" in Fiat Justitia. Essays in Memory of Oliver Deneys Schreiner 305-69; Zimmerman "Judges Shall be Independent and Subject only to the Law" 1985 (continued...)

the point of view of effective and legitimate institutionalization of conflict, realism is called for. Therefore, facts should be the point of departure and the aim for the law should be to regulate factual situations to the satisfaction of as many people as possible.

Facts are what is real or what is perceived to be real by participants in the institutionalization process.[212] They should therefore be allowed to deal with facts themselves and create their own rules and not be unnecessarily subjected to perceptions and judgments of outsiders.[213] The outcome of the institutionalization process should be a function of power as it exists in fact or is perceived to exist in fact. The law should only interfere procedurally in order to regulate the power play in the interest of industrial peace. Peace will only be achieved if most people are relatively happy in an open institutionalization system which allows for the free flow of power[214] in the allocation of scarce resources.[215]

Adjudication should only be utilized in binary situations and should not be accorded an institutionalization

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211(...continued)
THRHR 48: 291-304; Margo "Reflections on Some Aspects of the Judicial Function" in Fiat Justitia. Essays in Memory of Oliver Deneys Schreiner 350-69; Kerr "Judges and Academic Lawyers on the Relative Values of Justice and Certainty Should the Two Conflict, and on the Hierarchy of Authority" 1985 SALJ 102: 403-6.

212 It is essential to realize that reality as perceived to be is as important if not sometimes more important that objective facts when it comes to the effective and satisfactory institutionalization of conflict.

213 An immediate process such as negotiation allows for satisfactory fact finding or agreement on facts where these cannot be proven objectively. See the discussion in ch 2 par 4.1.2 above.

214 See the discussion in ch 1 and specifically the conclusion in par 1.2.4 above. With "open" is inter alia meant a system where everybody can participate in both central and local rule making.

215 that is, the creation of rules; see ch 2 par 3 above.

function in situations of polycentricity or else the danger of legal bias becomes real. Adjudication should not be allowed to usurp the role of the legislator. Where change is called for, the rules should be formulated clearly by the legislator and only thereafter can effective and legitimate use be made of adjudication.

It is submitted that a power conception of law best explains the use of fairness in the South African industrial relations system, for the emphasis with a power conception is on facts (the circumstances of each case) or empirical research rather than legal assumptions. This is true, especially in view of the broad definition of the unfair labour practice concept here. Whether, however, it is desirable and effective to make use of ad hoc adjudication to juridify industrial relations on the basis of a broadly defined legal power is a different question. It is submitted that it is not.

To define law as power is to recognize that it is biased.[216] To concentrate on facts rather than assumptions by allowing the parties through negotiation to deal with facts themselves is more legitimate and effective than to submit to the whims and fancies of an outsider. In this way possible bias by outsiders can be curbed. Unfortunately, the widely defined unfair labour practice concept leaves the door wide open for an adjudicator to "legislate" in situations of complete polycentricity.

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216 See ch 2 par 2 above and particularly Black (quoted in n 17): "And if we are to have a strategically detached approach, our concept must be value neutral." This is not to accept bias, but to try to rectify it. It is not to prefer "the risks of error by ignorance to the risks of error from bias" (Nonet quoted in ch 2 n 17). It is to concentrate first and foremost on facts and once those are known to decide on direction. See also the discussion in par 4.1 above as well as the conclusion in par 6.4 below.

In what follows, the nature of the unfair labour practice concept, its function and impact are considered briefly against the above background.

6.3 The Unfair Labour Practice in South Africa

The first definition of unfair labour practice introduced by the Industrial Conciliation Act 94 of 1979 simply read:

> "Unfair labour practice means any labour practice which in the opinion of the industrial court is an unfair labour practice."

The wide ambit of this definition entailed that the industrial court was entrusted with a legislative function because it could define unfair labour practices and then proceed as a court of law to determine them.[217]

The Industrial Conciliation Amendment Act 95 of 1980 changed this open-ended definition of the unfair labour practice to one purportedly less wide:

> "`Unfair labour practice' means -
>
> (a) any labour practice or any change in any labour practice, other than a strike or lock-out, which has or may have the effect that -
>
> (i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities, work security and physical, economic, moral or social welfare is or may be prejudiced or jeopardized thereby;

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217 Thompson 620; Reichman & Mureinik 22.

(ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;

(iii) labour unrest is or may be created or promoted thereby;

(iv) the relationship between employer and employee is or may be detrimentally affected thereby; or

(b) any other labour practice or any change in any labour practice which has or may have an affect which is similar or related to any effect mentioned in paragraph (a)."

About eight years of guideline development followed whereafter the legislator changed the definition yet again, this time to incorporate a codification or summary of guidelines developed up to that time as specific unfair labour practices and to allow for the further development of guidelines by leaving the definition sufficiently wide for further development by the industrial court. The definition contained in the Labour Relations Amendment Act 83 of 1988 was worded as follows:

"`[U]nfair labour practice' means any act or omission which in an unfair manner infringes or impairs the labour relations between an employer and employee, and shall include the following:

(a) The dismissal, by reason of any disciplinary action against one or more employees, without a valid and fair reason and not in compliance with a fair procedure: Provided that the following shall not be regarded as an unfair labour practice, namely:

(i) The dismissal of an employee during the first six months of his employment with a particular employer or during such shorter

period as may have been agreed upon: Provided that such dismissal does not take place without compliance with a fair procedure;

(ii) the dismissal of an employee where an employer fails to hold a hearing or a disciplinary enquiry and the industrial court thereafter decides that it could not reasonably have been expected of an employer to hold such a hearing or enquiry;

(iii) the dismissal of an employee where an employer fails to hold a hearing or a disciplinary enquiry and the industrial court thereafter decides that such employee was granted a fair opportunity to state his case and a hearing or enquiry would in the opinion of the court not have had a different effect on the dismissal;

(iv) any dismissal which takes place after substantial compliance with the terms and conditions of an agreement relevant to the dismissal; or

(v) the selective re-employment of dismissed employees providing such re-employment takes place in accordance with fair criteria and not on the ground of an employee's trade union activities;

(b) The termination of the employment of an employee on grounds other than disciplinary action, unless -

(i) such termination of employment takes place during the first six months of such employee's employment with a particular employer or during such period as may have been agreed upon; and in accordance with any

applicable agreement, wage regulating measure or contract of service; or

(ii) (aa) prior notice of such termination of employment in accordance with any applicable agreement, wage regulating measure or contract of service, has been given either to the employee, or if such employee is represented by a trade union or body which is recognized by the employer as representing the employees or any group of them, to such trade union, body or group; and

(bb) prior consultation in regard to such termination of employment took place with either such employee or where the employee is represented by a trade union or body recognized by the employer as representing the employees or any group of them with such trade union, body or group; and

(cc) such termination of employment takes place in compliance with the terms of an agreement or contract of service, regulating the termination of employment of the employee whose employment is terminated; and

(dd) such termination of employment takes place in a case where the number of employees in the employment of an employer is to be reduced, according to reasonable criteria with regard to the selection of such employees, including, but not limited to, the ability, capacity, productivity and conduct of those employees and the operational requirements and needs of the

undertaking, industry, trade or occupation of the employer;

(c) the unfair unilateral suspension of an employee or employees;

(d) the unfair unilateral amendment of the terms of employment of an employee or employees, except to give effect to any relevant law or wage regulating measure;

(e) the use of unconstitutional, misleading or unfair methods of recruiting members by any trade union, employers' organization, federation, member, office-bearer or official of any trade union, employers' organization or federation: Provided that the refusal of a trade union in accordance with the provisions of such trade union's constitution to admit an employee as a member, shall not constitute an unfair labour practice;

(f) the refusal or failure by any trade union, employers' organization, federation, member, office-bearer or official of any trade union, employers' organization or federation to comply with any provision of this Act;

(g) any act whereby an employee or employer is intimidated to agree or not to agree to any action which affects the relationship between an employer and employee;

(h) the incitement to, support of, participation in or furtherance of any boycott of any product or service by any trade union, federation, office-bearer or official of such trade union or federation;

(i) the unfair discrimination by any employer against any employee solely on the grounds of race, sex or creed: Provided that any action in compliance with any law or wage regulating

measure shall not be regarded as an unfair labour practice;

(j) subject to the provisions of this Act, the direct or indirect interference with the right of employees to associate or not to associate, by any other employee, any trade union, employer, employers' organization, federation or members, office-bearers or officials of that trade union, employer, employers' organization or federation, including, but not limited to, the prevention of an employer by a trade union, a trade union federation, office-bearers or members of those bodies to liaise or negotiate with employees employed by that employer who are not represented by such trade union or federation;

(k) the failure or refusal by an employer, employee, trade union or employers' organization, to comply with an agreement;

(l) any strike, lock-out or stoppage of work, if the employer is not directly involved in the dispute which gives rise to the strike, lock-out or stoppage of work.

(m) any strike, lock-out or stoppage of work in respect of a dispute between an employer and employee which dispute is the same or virtually the same as a dispute between such employer and employee which gave rise to a strike, lock-out or stoppage of work during the previous 12 months;

(n) any strike, lock-out or stoppage of work in contravention of section 65;

(o) any other labour practice or change in any labour practice which has or may have the effect that -

> substantively and procedurally fair if it is to withstand a legal challenge. The unfair dismissal jurisdiction that arose virtually overnight was of course of great significance for all employees in that it signalled the end of arbitrary action by employers. But the "draconian powers" as the Appellate Division has described them in Consolidated Frame Cotton Corporation v President of the Industrial Court and Others 1986(3) SA 786 (A) at 799 afforded to the industrial court were of greater importance still to previously vulnerable shop stewards. Even the most astute victimization techniques could be confounded by the simple but all-embracing principles of unfair dismissal and the court was seldom reluctant to reinstate where good course had not been established. {.....} The cumulative impact of such cases entailed that unions were now able to penetrate and organize a series of establishments which had previously defied such attempts."

The above extract shows how the law by means of the broadly defined unfair labour practice concept dramatically strengthened the bargaining context by introducing international standards with regard to security of employment overnight.[225] Security of employment also strengthened the hands of unions in their attempts to organize workers.

In this way large chunks of jurisprudence was introduced into our law over the last decade. The way in which foreign legal principles were introduced was not always a sophisticated exercise and very often amounted to nothing more than the rationalization of a gut feel (or propaganda plain and simple) by reference to whatever (appropriate legal principle) could be found elsewhere in the world.

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225 See discussion in chapter 2 paragraph 5.3.2.

> `unfair labour practice' which definition was substituted by section 1(a) of the Labour Relations Amendment Act, 1991."

From the non-binary character of the definitions alone, it is clear that the wide ambit of the unfair labour practice "rule" (in any of its manifestations) was eminently unsuitable as a basis for adjudication. The result may well have been and often was as De Vos[218] describes it:

> "Maar wat van die onbillikheid teenoor die ander party wat volgens die bestaande reg moes slaag? Hy het tot die litigasie toegetree op deskundige en korrekte advies dat hy 'n goeie saak het. Die beslissing word teen hom gevel uit hoofde van 'n wetgewingsdaad met terug-werkende krag en hy word met koste gepenaliseer. Is dit billikheid? Is dit nie eerder summa iniuria nie?

A good example of the surprise element is recounted in the following summary by Harper:[219]

> "In United African Motor and Allied Workers' Union and Others v Fodens (South Africa) (Pty) Limited 1983 (4) ILJ, 212, the union sought an order declaring 37 unfair labour practices. The court emphasised that the various unfair labour practices as alleged should not be considered in isolation, and that they should be seen in the particular circumstances which surrounded the situation in which they occurred. The court considered that all the practices listed seemed to have or may have the effect of detrimentally affecting the relationship

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218 De Vos 365.

219 Opinion 1985.

between employer and employee, and to that extent declared them to be unfair. They are listed below -

1. The Company's policy decision that it would not negotiate with a representative, registered Union.
2. The failure by the Company to have an employee representative body in the manner required by the majority of employees.
3. The interference by the Company and particularly its managing director, Cook, with the lawful activities of the Union and its members and furthermore, the interference by the Company and particularly Cook with the right of employees to decide to which Union they wished to belong.
4. The use by Company officials and managerial employees of the word `boy' in the salary and other documents of the Company.
5. The making of disparaging remarks by Cook and other employees of the Company on behalf of the Company in relation to the ability of the Union to represent and assist employees.
6. The Company's failure to respond within a reasonable time to the lawful request of employees that they should be represented by the Union.
7. The failure of the Company to furnish within a reasonable period an unconditional and permanent undertaking that employees would not be victimised.
8. The failure of the Company to communicate in good faith with the Union.
9. The failure of Cook on behalf of the Company in understanding basic industrial relations principles and concepts and the consequent

effect thereof on his dealings with the Union.

10. The sarcastic reference by Cook on behalf of the Company to the Union as the `Pretoria Union'.

11. The derogatory references by Cook and other managerial employees and supervisors on behalf of the Company and made in respect of the Union in relation to the question of pensions.

12. The reference of Cook on behalf of the Company that the Union was not entitled to operate and represent employees without a certificate of registration.

13. Cook's derogatory statement on behalf of the Company concerning what the Union was able to offer the Company's employees.

14. Cook's refusal on behalf of the Company to discuss the draft recognition agreement with the Union's representatives until he had been presented with a certificate of registration.

15. The attempt by Cook on behalf of the Company to embarrass the general secretary of the Union and thereby the Union in the presence of employees of the Company.

16. The non-existence of a disciplinary code and procedure for the Company's employees.

17. The non-existence of a grievance procedure for the Company's employees.

18. The use of sarcastic references by the Company's supervisor Albert acting on behalf of the Company in an attempt to dissuade employees for remaining members of the Union.

19. The reference to the Union and employees by officials, employees and supervisors of the

Company by invoking four letter words with particular reference to private female parts.

20. The reference by officials, employees and supervisors of the Company to the relatives of employees in the context of four letter words.

21. Cook's request on behalf of the Company that employees join the Union of his choice.

22. Cook's attempt on behalf of the Company to persuade employees that their conditions of employment would be affected if they did not join his Union. Cook's attempt on behalf of the Company to appoint 4 persons to visit his Union (meaning the Industrial Council).

23. The decision of the Company to dismiss the employees who were responsible for thwarting Cook's attempts to persuade employees to join the Union of his choice.

24. The attempt of the officials, managerial employees and supervisors of the Company generally to persuade employees that the Union was neither a suitable vehicle nor a proper body to represent them.

25. The use by officials, managerial employees and supervisors of the Company of the word `kaffir'.

26. The dismissal of 3 employees.

27. The allegation of Cook that 2 of the employees were retrenched.

28. The reasons for the basis upon which they were dismissed.

29. The failure of the Company to give reasonable notice to the employees that they would be retrenched.

30. The failure of the Company to advise the employees of the reason for their dismissal.

31. The failure of the Company to pay any retrenchment compensation whatsoever to the employees in the light of the length of their service with the Company.

32. The retrenchment of the employees when overtime was being worked prior to and subsequent to their dismissal and casual employees being employed.

33. The statement on Cook on behalf of the Company to the effect that he was not interested in the certificate of registration of the Union when he had previously said that he would not talk to the Union unless it presented him with his certificate of registration and thereby implied that he would talk to the Union when such certificate of registration was presented.

34. The failure of the Company to accept that the Union was entitled to discuss dismissals and retrenchments with it and to obtain the reasons therefore and to query whether the basis of dismissal and retrenchment was fair.

35. The failure of the Company to acknowledge that it knew which of its employees were members of the Union.

36. The dismissal of fixed term contract employees who had not acted in material breach of the contracts of employment and who had not therefore acted in such a manner as to justify summary dismissal.

37. The deduction of contributions from the wages of employees by the Company for the Unemployment Insurance Fund in respect of employees who were not citizens of South Africa and the failure by the Company to

refund such contributions to the relevant employees."

The 37 unfair labour practices listed above may well have been unacceptable conduct on the part of the employer, but in 1985 there was no "logical plentitude" or a "raamwerk van vaste beginsels vanuit welke stelling mens dan die gapings deur 'n proses van regslogika [kan] oorbrug"[220] at least not in South Africa with its Roman-Dutch heritage.

The enlightenment had to come from elsewhere - from all over the world, from everybody. The result was that a system of equity akin to the English system developed parallel to and often in conflict with the jurisdiction of the Supreme Court.

There are "no rights in equity",[221] and it had been made clear right from the start that the industrial court did not create legal precedents, but merely laid down guidelines and determined each unfair labour practice dispute in accordance with the particular circumstances surrounding it.[222]

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220 De Vos 364. See also n 222 first quotation below.

221 Langdell quoted by Fuller Adjudication (ch 2 par 4.1.1 n 82 above). See also n 196 above.

222 In an early article on the role of the industrial court, Ehlers DB, then deputy president of the industrial court, later president said ("Dispute Settling and Unfair Labour Practices: The Role of the Industrial Court vis-à-vis the Industrial Council" 1982 Industrial Law Journal (SA) 3: 11):

1 "That definition could possibly be described as putting the cart before the horses for it presupposes that the complainant - or whatever one would elect to call him for lack of a better name - had to consider carefully whether the industrial court would be of the opinion that what the complainant alleges to be an `unfair labour practice' is in fact an `unfair labour practice'. The complainant was expected to prejudge his problem to that extent with all the conceivable difficulties related to such a decision"(12).

2 "As this is a new concept in the South African law, and more particularly in our labour law, no precedents in the form of previous judgements by our courts are available from which it is possible to derive juridical guidelines and principles in relation thereto. Probably as a result of this situation some of our jurists have been tempted to draw an analogy between this new concept with what is understood by related notions in such overseas countries as Britain and the United States.

(continued...)

Yet questions of "law and fairness" may now be taken on appeal to the Labour Appeal Court (which supposedly is a court of law proper) and reference is often made to the common law for guidance by the industrial court.[223]

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[222](...continued)

It has however to be borne in mind that in Britain legislation exists dealing with the concept of `unfair dismissals' which is then statutorily defined. That definition can probably be said to accentuate the dismissal aspect. In the United States the `unfair labour practice' appears to be normally mostly related to the collective relationship in the sense that it is particularly aimed at the actions of employees and unions. Therefore research of the labour law of those countries, however helpful it might be to achieve a better understanding of those legal concepts, is not really of particular practical value in order to obtain a clearer and better meaning of the expression `unfair labour practice'." (13).

3 "From the aforegoing, it can be deduced that because `unfairness' has a very wide meaning, it is just about impracticable if not impossible to compile a list of the unfairnesses that are conceivable. The question whether an unfairness exists can only be decided by considering all the circumstances surrounding a particular alleged `unfair labour practice'. It is also evident that in so deciding one has to be guided by the exact wording of the definition and has to take into account any grounds for justification that may exist in respect of the 'unfair labour practice' complained of" (13 14).

4 "In doing so, the court seems to be expected to consider all the circumstances which might have justified the introduction of the alleged `unfair labour practice', such as common law or statutory grounds for justification. For instance, a dismissal which may otherwise constitute an `unfair labour practice' may be justified on inter alia such grounds as blatant disregard of safety instructions of regulations, the employer's legitimate orders, being under the influence of intoxicating liquor or drugs while on duty, to mention but a few" (19).

5 "It may not be (practicable) to endeavour to compile a list of the possible determinations that can be made in respect of `unfair labour practice' and the court would in each case have to be guided by the particular circumstances surrounding the specific `unfair labour practice'. In doing so the court would have to have regard to equity as it sees it in the light of all such circumstances" (20).

These quotations are given in full in order to show the frustration of the court at the time. Yet commentators got agitated about the guidelines they spotted, or that should have been spotted or not have been spotted by the industrial court - all in vacuo. See for example the discussion of the BTR Sarmcol Case in 1987 Employment Law 4 (1): 17.

223 See ss 17(21A) and 17A of the Labour Relations Act 28 of 1956 and Ehlers 19 (n 222 fourth quotation above). But there are visionaries who seem to suggest that the common law had become too "arbitrary" for the "new" labour dispensation, "hence the unfair labour practice jurisdiction" (Brassey, Cameron, Cheadle & Olivier The New Labour Law 2-9). It seems as if they had forgotten that a fundamental freedom such as freedom of association has its roots in the common law and that this freedom is the cornerstone of power formation and effective collective bargaining. The damage that exists has been done by the legislator and the courts over the years. That does not mean that "die kind en die badwater" must be done away with in one fell swoop in favour of the clean sheet of the

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The concept of unfair labour practice in South Africa and the way in which content was given to it over the years cannot be explained by reference to the Roman-Dutch or English tradition. It is in fact a concoction of lawfulness (comprising both certainty and equity) as understood in Roman-Dutch law and equity as a separate system of justice as understood in English law. Appeals (to the Labour Appeal Court and Appellate Division) are possible in law (presumably lawfulness as understood in Roman-Dutch law) and fairness which, presumably, is something in addition to the equity component already contained in the concept of lawfulness. What this could possibly be is not clear. In addition, all matters of law can be taken to the Supreme Court and Appellate Division with the result that these bodies have a double jurisdiction (if it is possible to distinguish the jurisdiction in principle). The end result is theoretical chaos. A good example emerges if the two Appellate Division cases dealing with overtime are compared. In SA Breweries Ltd v Food & Allied Workers Union & others (1989) 10 ILJ 844 (A) the same result could have been achieved as in NUMSA & others v Macsteel (Pty) Ltd (1992) 12 ILJ 826 (A) if the Appellate Division had unfair labour practice jurisdiction in the SA Breweries case and the case was based on it. Now it has both common-law and unfair labour practice jurisdiction and a choice in principle exists.

The emphasis has happily been on facts and the "particular circumstances" of each case throughout. In purely descriptive terms, the unfair labour practice is nothing other than a broadly defined legal base or power which both employers and employees can invoke in order to

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223(...continued)
widely defined unfair labour practice concept upon which everybody could leave their mark in the conception of a new child. This is even more "common" than the common law. See also discussion by Davis "The Juridification of Industrial Relations in South Africa - or Mike Tyson v Johannes Voet?" 1991 Industrial Law Journal (SA) 12: 1181 (Davis Juridification).

have their interests (and rights) determined by the law. Thompson[224] describes the process of developing "rights":

> "In the seminal case of Metal and Allied Workers Union and Others v Stobar Reinforcing (Pty) Ltd 1983 (4) ILJ 84 (IC), which involved a mass dismissal, the union's legal representative argued that the International Labour Organization's standards regarding termination of employment could and should be received into our labour law, courtesy of the generous unfair labour practice provisions. The argument was accepted and since then the court has consistently held that a decision to terminate employment has to be both substantively and procedurally fair if it is to withstand a legal challenge. The unfair dismissal jurisdiction that arose virtually overnight was of course of great significance for all employees in that it signalled the end of arbitrary action by employers. But the `draconian powers' (as the Appellate Division has described them in Consolidated Frame Cotton Corporation v President of the Industrial Court &

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224 Thompson Using the Law 341. See also Clarke "The Juridification of Industrial Relations: A Review Article" 1989 Industrial Law Journal (UK) 69 for a discussion on the process of "lawification" (n 2). On the need for certainty in our law see Le Roux "The Use of Economic Power during Industrial Action: Some Thoughts on National Union of Mine Workers v East Rand Gold and Uranium Co. Ltd, (1991) 12 ILJ 1221 A" 1992 South African Mercantile Law Journal 4: 116. He states at 124: "If the courts are to embark on a relatively interventionist approach of regulating collective bargaining and the use of economic power, one often-made point bears repeating. They will be intervening in an area where the conflicting interests of labour and capital are particularly evident. A particular decision could affect the bargaining power of the parties drastically. It will be a difficult task to balance these interests. The task will be made more difficult by the need for legal certainty in our law in this regard. The Appellate Division's decision was given more than four years after the commission of the unfair labour practice. During this period employers and employees developed practices and procedures based on the decisions of, first, the industrial court, and then the Labour Appeal Court. They now have a third decision to which they have to adapt, a decision which, as shown here, raises several additional questions. In the absence of legislation reflecting a consensus concerning the legal principles in this area of our law, the need for these questions to be answered by the courts in an authoritative and expeditious manner, with a minimum of inconsistency, is self-evident."

> others 1986 (3) SA 786 (A) at 799) afforded to the industrial court were of greater importance still to previously vulnerable shop stewards. Even the most astute victimization techniques could be confounded by the simple but all-embracing principles of unfair dismissal, and the court was seldom reluctant to reinstate where good cause had not been established.... The cumulative impact of such cases entailed that unions were now able to penetrate and organize a series of establishments which had previously defied such attempts."

The above extract shows how the law by means of the broadly defined unfair labour practice concept dramatically strengthened the bargaining context by introducing international standards with regard to security of employment overnight.[225] Security of employment also strengthened the hands of unions in their attempts to organize workers.

In this way large chunks of jurisprudence have been introduced into our law over the last decade. The way in which foreign legal principles were introduced was not always a sophisticated exercise and very often amounted to nothing more than the rationalization of a gut feeling (or propaganda plain and simple) by reference to whatever (appropriate legal principle) could be found elsewhere in the world. The widely defined unfair labour practice offered a potent platform for all kinds of legal oratory. Like Aids, the word "unfair" spread from crummy union offices to fancy boardrooms, from underground to the open spaces of the "platteland" and everybody wondered "*Am I unfair?*" Employers suddenly became scared of screwing employees arbitrarily as collectivities roamed the empty plains.

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225 See the discussion in ch 2 par 5.3.2 above.

A small troop of sectarians managed to pitch tent amidst this wasteland of uncertainty. Their material was rudimentary and varied - hand made from English, American, German and other snippets they could find - but soon the first (sometimes discordant) sounds in praise of Justitia could be heard floating over the barren South African industrial relations scenario. A discipline was re-born and born again ... and again ....

6.4 **Institutionalization Process**

Whatever the legal nature of the unfair labour practice concept and wherever it fits into our legal system, fact remains, it has had a dramatic impact on the institutionalization of labour conflict in South Africa.

In this paragraph an attempt is made to summarize broadly as far as is relevant for this thesis the guidelines over the last ten years or so in order to gain an idea of the impact the concept has had on the power balance between employer and employee. Literally thousands of cases have been referred to the court. It is therefore an impossible task to discuss all of them let alone quantify the impact they have had on the power balance. Even empirical research should be hard if not impossible to undertake in this regard. In spite of this, a very good indication of the most important cases and their relevance can be gained from Cameron's index.[226] Furthermore, significant progress has already been made by academic and other writers towards solidifying a body of jurisprudence from the cases decided by the industrial court, Labour Appeal Court and Supreme Court.[227]

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226 Cameron Industrial Law Journal (SA) Ten-year Index 1980-1989. See also Industrial Law Journal (SA) 1990 Index and 1991 Index.

227 See the references quoted in end note 1 and in the footnotes to follow.

In a general work of this nature, no attempt will be made to reinvent the wheel. The following is a descriptive summary of developments in the areas of collective bargaining and security of employment. In other words, an idea will be gained of the procedural promotion of collective bargaining and the strengthening of the allocation context in terms of the unfair labour practice concept by the law.

6.4.1 **Freedom of Association**

The freedom of association concept in South Africa is an open-ended one in the sense that employers and employees are free to associate or not to associate with a collective body of their choice.[228] Whilst this is essentially democratic in that each individual is given a choice as to where he wants to place his allegiance (if at all), an all-comer system like this gives rise to many problems in practice concerning the closed-shop issue and other collective bargaining topics such as bargaining units, the duty to bargain, sole bargaining rights (majoritarianism), joint bargaining, simultaneous bargaining, good faith bargaining, the protection of minorities, dealing with non-unionized employees and inter-union rivalry. The court still has a long way to go to provide absolute clarity on these and other issues. In the meantime a fierce debate is raging.[229] (2 (end note))

It is submitted that an open-ended concept allowing for complete freedom to associate or not to associate with a particular body, or to associate with another, better allows for the protection of minorities and is therefore more acceptable from a moral point of view despite the practical

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228 See s 78 of the Labour Relations Act 28 of 1956. See however also s 24(1)(x). Compare also the discussion in ch 2 par 5.3.1 above.

229 The closed shop is a highly politicized issue with dramatic practical considerations. See end note 2 for material on the closed shop.

problems associated with it. The nature of freedom of association and its regulation are however a task for the legislator in the new political dispensation.

6.4.2 **Collective Bargaining**[230] ([3 (end note)])

In addition to the statutory regulation of collective bargaining the industrial court has laid down numerous guidelines (often contradictory) relating to topics such as recognition agreements, bargaining units and agents, the duty to bargain, good faith bargaining, disclosure of information, etc. These guidelines cannot be discussed fully here. In what follows some principles which have been established to promote collective bargaining as the preferred institutionalization mechanism are discussed.

Traditionally collective bargaining has been regarded as a voluntary process. Voluntary in the sense that the law (and the courts) interfere as little as possible in the way in which the parties institutionalize the conflict inherent in their relationship. Voluntarism however has never existed anywhere in an absolute form. There has and always will be some interference by the law in the collective bargaining system. Interference is a matter of degree, depending on the circumstances in any industrial relations system.[231] In the South African system with its widely defined unfair labour practice concept the door is left wide open for interference by the industrial court where the particular circumstances in the opinion of the presiding official warrant such

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230 For some material on topical issues regarding collective bargaining, see inter alia end note 3.

231 See the discussion in ch 1 par 1.2.2 above. For cases on the subject of voluntarism, see inter alia TWIU v Maroc Carpet & Textile Mills (Pty) Ltd (1989) 10 ILJ 526 (IC); FAWU v Spekenham Supreme (2) (1988) 9 ILJ 628 (IC); UAMAWU v S Thomson (Pty) Ltd t/a Thomson Sheet Metal Workers (1988) 9 ILJ 266 (IC); BAWU & others v Edward Hotel (1989) 10 ILJ 357 (IC); Nasionale Suiwelkoöperasie Bpk v FAWU (1989) 10 ILJ 712 (IC); BAWU (SA) v PEK Manufacturing Co (Pty) Ltd (1990) 11 ILJ 1095 (IC).

interference.[232] This power has given rise to inconsistency and much debate about the role of the court in the bargaining process.[233] It is not necessary to discuss this debate in full, since the unfair labour practice jurisdiction is not applicable to the implementation of legal industrial action as will be shown in chapter 5. (This process is more voluntary, especially after the latest amendments to the Labour Relations Act 28 of 1956 on 1 May 1991.) In general it is submitted that the court should never interfere in the substance of the bargaining process in the sense that it determines the outcome of the allocation process. Indications of such interference have however unfortunately become evident. Furthermore, the court may interfere procedurally in order to promote the bargaining process, but this it has to be done consistently in order to allow for orderly bargaining. Again, the industrial court has not been consistent in its approach.[234] It is submitted that

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232 Compare the quotation from the Spekenham (2) case n 236 below.

233 For informative discussions see in general Thompson Legal Intervention 1-14; Thompson Hydra 808-13; Rycroft Good Faith 202-20; Davis Voluntarism and Davis Juridification.

234 "Legal intervention in the field of industrial relations is appropriate to remedy two species of mischief. Firstly, granted that collective bargaining constitutes the legislative cornerstone for the promotion of labour peace, conduct which is subversive of that process should invite judicial reproach. The unfair labour practice definition, wide as it is, makes specific reference to practices which may create labour unrest. Notwithstanding court dicta to the contrary, it is argued below that the status quo remedy is also integral to a defence of collective bargaining. Given the clear indications of legislative intent, it must really be axiomatic that the original sin is obduracy on the issue of negotiating."

"The second mischief requiring redress relates to activities that undermine the employment justice that employees may demand in their individual capacities. These are activities which in the words of the statute, jeopardize the employment opportunities, work security or physical, economic, moral or social welfare of employees."

Both quotations are from Thompson Legal Intervention 8-9. Thompson Legal Intervention 1-2 summarizes the point: "The argument presented here is that our law can and should impose an obligation to negotiate, but that a failure to distinguish process from product has produced a limping jurisprudence." An example of the wrong kind of consideration is the following: "In this regard Mr Michaelson contended that the company is a well-established and highly profitable concern bearing in mind that it is common cause that it could well

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proper legislation is a better mechanism for regulation. In this way a collective bargaining philosophy can be clearly identified and a consistent approach formulated on the basis of that philosophy.

Voluntarism is not a term of art in the sense that it has a fixed, defined, legal meaning. It is a descriptive term with a relative content like the word "democracy". Its meaning varies according to who uses it in which circumstances.[235] It therefore makes little sense to focus a debate and worse even to determine outcomes in disputes on the existence or not of voluntarism in a particular industrial relations system: [236]

> "I do not believe that voluntarism has any further right of existence in a system which is principally intended to combat industrial unrest. The arguments of counsel and the very instructive judgment of

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234(...continued)
have afforded to pay the increases demanded" (NUM v Marievale Consolidated Mines Ltd (1986) 7 ILJ 123 (IC) 127G). The industrial court has also on numerous occasions ordered employers to pay severance pay in cases of retrenchment.

235 "Voluntarism" means "the principle of relying on voluntary action rather than compulsion" and "voluntary" means "done, acting or able to act of one's own free will, not constrained or compulsory, intentional" (The Concise Oxford Dictionary).

236 Quotation by Fabricius AM in FAWU v Spekenham Supreme (2) (1988) 9 ILJ 628 (IC) 636J-367. This lengthy quotation is provided because it is indicative of the court's approach on a number of issues.

In spite of the introduction of the unfair labour practice jurisdiction in 1979 it is still true that the "Act encourages collective bargaining" as stated by Centlivres JA in Amalgamated Engineering Union v Minister of Labour 1949 (4) SA 908 (A) 912. Yet, it is also true that it "was the very inefficacy of [the earlier] voluntary procedures which the new dispensation sought to remedy .... The fact that a dispute reaches the industrial court is precisely because voluntary negotiation before the industrial council or conciliation board has failed" (Trident Steel (Pty) Ltd v John NO others (1987) 8 ILJ 27 (W) at 35). See also Thompson De Kock's Industrial Laws of South Africa 620 Q. The point is simply that the existence of voluntarism is a matter of degree in any industrial relations system. Intervention by the law is justified in certain circumstances (eg procedurally in the promotion of collective bargaining). It will be argued in ch 5 below that the regulation of the lock-out in South Africa (ie the implementation of management power) once bargaining has been exhausted, is largely voluntary.

Ackerman J in Trident Steel (Pty) Ltd v John NO & others (1987) 8 ILJ 27 (W) enforces this view.

In my view, and having regard to the fact that fairness is now the overriding consideration in labour relations in South Africa, it is time for the court to find firmly and unequivocally that in general terms it is unfair for an employer not to negotiate bona fide with a representative trade union. The substratum for this decision has already been laid in decisions of this court such as Bleazard & others v Argus Printing and Publishing Co Ltd & others (1983) 4 ILJ 60 (IC) at 77H; United African Workers and Allied Workers Union & others v Fodens (SA) (Pty) Ltd (1983) 4 ILJ 212 (IC) at 226D and Natal Die Casting supra. The duty to bargain in good faith reinforces the obligation of an employer to recognize the bargaining agent and fosters rational, informed discussion, thereby minimizing the potential for unnecessary industrial conflict. See Rycroft `The Duty to Bargain in Good Faith' (1988) 9 ILJ 202 at 203.

It is quite true, as the author states at 205, that the complex and damaging character of collective bargaining makes it difficult to define `good faith bargaining'.

Rather, conduct not conducive to such bargaining has been characterized. See Natal Die Casting supra at 542B-E.

By bargaining collectively with organized labour, management seeks to give effect to its legitimate expectation that the planning of production, distribution, etc should not be frustrated through

interruptions of work. By bargaining collectively with management, organized labour seeks to give effect to its legitimate expectations that wages and other conditions of work should be such as to guarantee a stable and adequate form of existence and as to be compatible with the physical integrity and moral dignity of the individual, and also that job should be reasonably secure. See Kahn-Freund at 69.

The fact that management refused the employees official trade union advice and assistance during wage negotiations is in my view unfair to both employee and trade union. The main object of labour law and labour legislation is to counteract the inequality of bargaining power which is inherent in the employer-employee relationship. It is also unwise for management having regard to its justifiable interests to deal with its employees on this basis. Public, or consumer interest, also demands that there will be an uninterrupted flow of goods and services at stable prices. In this respect too it is the duty of this court as part of its function to settle, limit or avoid industrial unrest, to encourage and if necessary enforce proper collective bargaining."

To say that voluntarism has no right of existence in a free enterprise, capitalist system is to contradict oneself, for the ability to contract freely forms one of the very cornerstones of the free enterprise system.[237] As far as the strict industrial relations system is concerned (that is the inner system or the relationship between employer and

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237 Compare the discussion in par 3.2 above.

employee whether individual or collective),[238] Fabricius also grossly overstates his case. Contracts of employment, recognition agreements, industrial council and conciliation board agreements are for example all entered into on a largely voluntary basis. Except for a few restrictions, strikes and lock-outs may be implemented freely in order to compel agreement[239] and on the whole, the design and purpose of the Labour Relations Act 28 of 1956 is to promote self-government in industry by means of collective bargaining at industrial councils and elsewhere.[240]

Furthermore, to say that the South African industrial relations system is "principally intended to combat industrial unrest" is to ignore its fundamentally pluralist nature and the fact that conflict and the implementation of power in its institutionalization is recognized.[241]

"Fairness in now the overriding consideration in labour relations in South Africa." This attitude of the court has led it to interfere unnecessarily in the collective bargaining process in cases such as HRWU v Karos Hotels

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238 For the distinction between "inner" and "outer" systems see ch 1 par 1.2.2 and especially ns 72 73 above.

239 Compare the discussion on the regulation of the lock-out in ch 5 below.

240 See the discussion ch 4 par 3 below.

241 See the discussions ch 1 par 1 and ch 2 par 5.3.1 below and chs 4 and 5 above in general. Note also the statement by Davis in ch 2 par 2 n 16: "Labour law undoubtedly acts to preserve industrial peace, but its function is clearly not to promote industrial peace. The reason for this is, as has been argued above, that the law acts to confine and contain those manifestations of conflict which are endemic to the entire system of industrial relations. In South Africa this has been achieved by legislation which has effectively suppressed any possibility of a unified worker front by ensuring that the government has sufficient armoury to still any black worker movement which might threaten the present economic system in any fundamental way." Since the fundamental changes introduced into South Africa labour law after the Wiehahn Commission the function of the law has certainly changed from "combating" or "preserving" industrial peace to promoting it through allowing voluntary participation of everybody in the system. Access to central rule making however remains a problem.

(1990) 11 ILJ 182 (IC) and HRWU & others v Southern Sun Hotel Corporation & another (1990) 11 ILJ 198 (IC).[242]

Where the court does interfere on the basis of "fairness" in the bargaining process, the guidelines are not always clear such as "it is time for the court to find firmly and unequivocally that in general terms it is unfair for an employer not to negotiate bona fide with a representative trade union." From this statement purportedly "firmly and unequivocally" given, no clear guidelines can be derived. What does it mean "to negotiate bona fide"? When is a union "representative"?

From the "duty to bargain" in good faith an obligation for the employer to recognize the "bargaining agent" is derived, and by implication the "discussion" by the employer with the bargaining agent must be "rational" and "informed" in order to minimize the potential for "unnecessary industrial conflict". Who is the "bargaining agent"? And furthermore, who is to be represented by the bargaining agent, in other words, which employees form the bargaining unit? Once these questions are answered, what are the parties to bargain about? How much, furthermore, must the employer disclose in order to render the process "rational" and "informed"? And, finally, if conflict erupts out of this state of uncertainty, when will it be regarded as "unnecessary" and how is it to be institutionalized fairly? Or will the parties only discover in court?

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242 See Cameron, Cheadle & Thompson 105-6 for references. They refer to these cases as a "judicial inroad into the voluntarist heart of the collective bargaining process". With regard to the Southern Sun case they state (106): "The lock-out in this case followed the exhaustion of both statutory and domestic dispute procedures. In an ex tempore judgement, the court did not merely fail to find that the employer's conduct constituted an unfair labour practice (prima facie or otherwise) it actually ventured the opinion that the union's stance was ill-founded. Despite all of this the employer was interdicted from continuing with its lock-out strategy (which it had timed so as to occur during the hotel off-season). For good measure, the court also enjoined the union members from striking on any issue whatsoever until the outcome of the pending status quo proceedings."

The court finally becomes the ultimate don - of what "management seeks", "organized labour seeks" and what the "public, or consumer interest demands" - by donning (as part of its function) the duty "to settle, limit or avoid industrial interest". This is too much for adjudication to be effective let alone legitimate.[243]

> "Diversity is not the strength of the industrial court".[244] "During the course of the eighties the rules on recognition at plant level were cautiously laid out by the industrial court. The court has sometimes endorsed a formula in terms of which the union representing a majority of employees within an appropriate bargaining unit is accorded exclusive bargaining rights (see, for instance, Luthuli & others v Flortime (Pty) Ltd & another (1988) 9 ILJ 287 (IC) and Ngiba v Van Dyck Carpets (Pty) Ltd & another (1988) 9 ILJ 453 (IC)); on occasion the court has opted for a more pluralistic position, supporting employer recognition for more than one union within a bargaining unit, provided each union enjoyed support regarded as sufficient for the circumstances of the case (see Mynwerkersunie v O'Okiep Copper Co Ltd (1987) 8 ILJ 178 (IC) and Mynwerkersunie v African Products (Edms) Bpk (1987) 8 ILJ 401 (IC)); on still other occasions the court

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243 Compare De Vos 363: "Enigeen wat maar iets van die reg af weet, is daarvan bewus dat regsekerheid nooit verkry kan word nie - gelukkig ook maar vir die praktisyns! Dit beteken egter nie dat mens nou maar die hande in die lug moet opgooi, gevestigde regsreëls opsy moet skuif en alles aan die billikheidsgevoel van die hof kan oorlaat nie. Dit is die pad na chaos." He continues at 365: "Maar wat van die onbillikheid teenoor die ander party wat volgens die bestaande reg moes slaag? Hy het tot die litigasie toegetree op deskundige en korrekte advies dat hy 'n goeie saak het. Die beslissing word teen hom gevel uit hoofde van 'n wetgewingsdaad met terugwerkende krag en hy word met koste gepenaliseer. Is die billikheid? Is dit nie eerder summa injuria nie?" Compare also the discussion on adjudication and negotiation ch 2 par 3.1 above.

244 Thompson Hydra 808 discussing Natal Baking & Allied Workers Union v BB Cereals (Pty) Ltd & another (1989) 10 ILJ 890 (IC), discussed below.

has declined to fix a duty to bargain at all (see, for instance, Metal and Allied Workers Union v Hart (1985) 6 ILJ 478 (IC)), but never has it suggested that an employer is obliged to negotiate with any figure on the labour horizon."[245]

A case which has received severe criticism is Natal Baking & Allied Workers Union v BB Cereals (Pty) Ltd & another (1989) 10 ILJ 870 (IC). Here the employer granted sole bargaining rights to union A which represented the majority of weekly paid employees in terms of a recognition agreement. Union B represented the majority of van salesmen, a sub-category of the weekly paid employees. Union B wanted to negotiate wages with the employer on behalf of the van salesmen which the employer refused to do whereupon union B approached the industrial court for relief. At the time of the decision paragraph (j) of the unfair labour practice definition (the 1988 version) was still part of our law:

> "(j) [S]ubject to the provisions of this Act, the direct or indirect interference with the right of employees to associate or not to associate by any other employee, any trade union, employer, employers' organization, federation or members, office-bearers or officials of that trade union, employer, employers' organization or federation, including, but not limited to, the prevention of an employer by a trade union, a trade union federation, office-bearers or members of those bodies to liaise or negotiate with employees employed by that employer who are not represented by such trade union or federation."

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245 Thompson Hydra 809-10.

If this paragraph is interpreted against the background of the pluralist, open-ended freedom of association concept in South Africa, it should not present problems. Firstly, employees may associate or not associate with a union of their choice. Secondly, an employer is free to negotiate with any union or not to negotiate, depending on whether the union has enough power to force the employer to negotiate or not on a voluntary basis. In other words, if it makes sound business sense to both employer and union (representing employees) they will enter into a collective bargaining relationship voluntarily.

All paragraph (j) does is stipulate in addition (ex abundante cautela) that where an employer chooses to deal or negotiate with a particular union (B), another union (A) may not interfere with this relationship. It does not grant a right to be recognized to union B.[246]

The duty to bargain can be agreed to voluntarily in which case, in line with the common law, it is simply a function of dependencies (that is of power) between the parties.[247] If the law may interfere as a third power to force a recalcitrant employer (or union) to bargain, the question is when?

With the power given to the court in terms of the widely defined unfair labour practice, it would depend on the presiding official's interpretation of the facts and his own value orientation whether he would impose a duty to bargain or not (in the interest of industrial peace etc). There are

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246 let alone a right to negotiate to the individual. Compare the discussion by Cheadle "One Man, One Bargaining Unit" 1990 Employment Law 7 (2): 36-9 (Cheadle One Man).

247 See the discussion in ch 2 par 5 especially par 5.1 above.

no guidelines (except in other systems of law on an ad hoc basis) to go by.[248]

The fundamental consideration focuses on the nature of the freedom of association concept prevalent in a particular society. It provides for either an all-comer system (the right to associate or not to associate) or a majoritarian system where a particular bargaining agent is given sole bargaining rights by the state (such as the National Labour Relations Board in America) and concepts such as a right to proper representation apply with regard to those not belonging to the bargaining agent. The South African system is based on a pluralist all-comer freedom of association concept and therefore bargaining should in principle be regulated on a voluntary basis. The court should only interfere procedurally to promote bargaining in cases where an employer refuses to bargain with a union that represents the majority of employees in a particular bargaining unit and then only on the basis of a clear legal rule defined by the statute.

What is wrong with the BB Cereals judgment, it is submitted, is the interpretation of paragraph (j) because it

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248 Compare for example Thompson's reference (Hydra 872) to "the duty of fair representation" operative in North America. This comparison is valuable, but simply does not fit into our existing law (and freedom of association concept). To argue that "the unfair labour practice jurisdiction is not an adjunct to the common law: within its legitimate sphere, it supersedes it" is not entirely correct either (Cheadle One Man 37). This was not the intention of the Wiehahn Commission but, on the contrary, that it should fit in with Roman-Dutch tradition. Furthermore, the court develops mere guidelines, not legal precedents and it does not act as legislator. Cheadle may be correct on the position in fact in the sense that the industrial court has incorporated all kinds of international guidelines in its development of local guidelines and that one can even detect a consistent approach in some areas such as security of employment (see par 6.3.4 below) but he is, with respect, not correct in principle. The problem in short is that the unfair labour practice power given to the industrial court is a whole pandora's box of "hydras", "serpentines" and other coily creatures. However many heads and tentacles may be cut off as one cuts a swath through the swamp of uncertainty, like the Pilgrim's progress, one can easily be led astray by all kinds of "sermons from the Mount". It is time to plan a proper road with the guidance of all who travel the slippery path of institutionalization and to have it solidified in cemented legislation.

provides a right to all groupings of employees to insist on bargaining with the employer, whereas the provision in fact does no more than place a restriction on interference with freedom of association on a voluntary basis.[249]

In principle minority groupings can still insist on negotiating or dealing with the employer directly, but not as a right. This is so, in spite of the fact that sole bargaining rights have been granted elsewhere, because as far as the minority union is concerned, the contract between an employer and another union is res inter alios acta. Employers would be well advised not to grant sole bargaining rights, but simply to recognize a particular union to represent its members (and not employees who have not given the necessary authority to such a union to represent them).

Numerous problems arise in practice as a result of a pluralist or all-comer freedom of association concept (especially if it is to be regulated by adjudication). Consider, for example, the demarcation of bargaining units,[250] the duty to bargain[251] and bargaining

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249 In other words any individual or group is free to bargain or deal with any employer, but does not have the right to do so in common law. Whilst he or it may not be hampered in the exercise of this freedom and the employer (should his wish to participate may not be interfered with) it does not mean that the employer is obliged by law to negotiate. The common law (and par (j)) allows a freedom, but does not dictate an enforceable right.

250 Compare for example NUM v Henry Gould (Pty) Ltd & another (1988) 9 ILJ 1149 (IC); Mynwerkersunie v O'Okiep Copper Co Ltd (1987) 8 ILJ 178 (IC); Mynwerkersunie v African Products (Edms) Bpk (1987) 8 ILJ 401 (IC); Amalgamated Engineering Union of SA & others v Mondi Paper Co Ltd (1989) 10 ILJ 521 (IC); Natal Baking & Allied Workers Union v BB Cereals (Pty) Ltd & another (1989) 10 ILJ 870 (IC); BAWU & others v Edward Hotel (1989) 10 ILJ 357 (IC); Radio Television Electronic & Allied Workers Union v Tedelex (Pty) Ltd & another (1990) 11 ILJ 1272 (IC).

See also on bargaining levels UAMAWU v S Thomson (Pty) Ltd t/a Thomson Sheet Metal Workers (1988) 9 ILJ 266 (IC); Pilkington Shatterprufe Safety Glass (Pty) Ltd & another v CWIU (1989) 10 ILJ 123 (IC); MAWU v Hart (1985) 6 ILJ 478 (IC); PPWAWU v SA Printing & Allied Industries Federation (1990) 11 ILJ 345 (IC); National Union of Steel & Allied Workers v Besaans-Du Plessis (Pretoria Foundries) (Pty) Ltd (1990) 11 ILJ 359 (IC); SA Woodworkers Union v Rutherford Joinery (Pty) Ltd (1990) 11 ILJ 695 (IC); Besaans du Plessis (Pretoria Foundries) (Pty) Ltd v National Union of Steel & Allied Workers (1990) 11 ILJ 690 (LAC).

representatives,[252] majoritarianism and sole bargaining rights,[253] inter-union rivalry, simultaneous and joint bargaining, unilateral implementation of wages and back-

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[251](...continued)

[251] Compare for example NUTW & others v Sea Gift Surfware Manufacturers (1985) 6 ILJ 101 (IC); MAWU v Transvaal Pressed Nuts, Bolts & Rivets (Pty) Ltd (1988) 9 ILJ 696 (IC); Amalgamated Engineering Union of SA & others v Mondi Paper Co Ltd (1989) 10 ILJ 521 (IC); SACWU v Sasol Industries (Pty) Ltd & another (2) (1989) 10 ILJ 1031 (IC); ACTWUSA v SBH Cotton Mills (Pty) Ltd (1988) 9 ILJ 1026 (IC); Natal Baking & Allied Workers Union v BB Cereals (Pty) Ltd & another (1989) 10 ILJ 870 (IC); FAWU v Spekenham Supreme (2) (1988) 9 ILJ 628 (IC); NUM v Gold Fields of SA Ltd & others (1989) 10 ILJ 86 (IC); Buthelezi & others v Labour for Africa (1989) 10 ILJ 470 (IC); Ntsaba & others v Eastern Province Textiles (Pty) Ltd (1987) 8 ILJ 470 (IC); TWIU v Maroc Carpet & Textile Mills (Pty) Ltd (1989) 10 ILJ 526 (IC); MAWU v Hart Ltd (1985) 6 ILJ 478 (IC); BAWU & others v Asoka Hotel (1989) 10 ILJ 167 (IC); BTR Dunlop Ltd v NUMSA (1989) 10 ILJ 701 (IC); Dunlop Tyres (Pty) Ltd v NUMSA & another (1990) 11 ILJ 149 (IC); Stocks & Stocks Natal (Pty) Ltd v BAWU & others (1990) 11 ILJ 369 (IC); SACTWU v Maroc Carpets & Textile Mills (Pty) Ltd (1990) 11 ILJ 1101 (IC); BAWU (SA) v PEK Manufacturing Co (Pty) Ltd (1990) 11 ILJ 1095 (IC); Federated Mining Union v Rolan Essential Oils (Pty) Ltd, Rustenburg (1990) 11 ILJ 1086 (IC); Sentraal-Wes (Koöperatief) Bpk v FAWU & others (1990) 11 ILJ 977 (AC); Mineworkers Union v East Rand Gold & Uranium Co Ltd (1990) 11 ILJ 1070 (IC); Radio, Television, Electronic & Allied Workers Union v Tedelex (Pty) Ltd (1990) 11 ILJ 1272 (IC); Besaans-Du Plessis (Pretoria Foundries) (Pty) Ltd v National Union of Steel & Allied Workers (1990) 11 ILJ 690 (LAC); BAISEMWU & others v Iscor (1990) 11 ILJ 156 (IC); Photocircuit (SA) (Pty) Ltd v De Klerk NO & others (1991) 12 ILJ 289 (A).

[252] Compare for example Natal Baking & Allied Workers Union v BB Cereals (Pty) Ltd & another (1989) 10 ILJ 870 (IC); Mynwerkersunie v African Products (Edms) Bpk (1987) 8 ILJ 401 (IC); NUM v Henry Gould (Pty) Ltd & another (1988) 9 ILJ 1149 (IC); East Rand Gold & Uranium Co Ltd v NUM (1989) 10 ILJ 683 (LAC); Mlozana & others v Faure Engineering (Pty) Ltd (1987) 8 ILJ 432 (IC); Buthelezi & others v Labour for Africa (1989) 10 ILJ 867 (IC); SA Association of Municipal Employees v City Council of Pietermaritzburg (1991) 12 ILJ 131 (IC); SACTWU v Maroc Carpets & Textile Mills (Pty) Ltd (1990) 11 ILJ 1101 (IC); BAWU (SA) v PEK Manufacturing Co (Pty) Ltd (1990) 11 ILJ 1095 (IC); Mineworkers Union v East Rand Gold and Uranium Co Ltd (1990) 11 ILJ 1070 (IC); Federated Mining Union v Rolan Essential Oils (Pty) Ltd, Rustenburg (1990) 11 ILJ 1086 (IC); Ramolesane & another v Andrew Mentis & another (1991) 12 ILJ 329 (LAC).

[253] Compare for example BAWU & others v Edward Hotel (1989) 10 ILJ 357 (IC); Natal Baking & Allied Workers Union v BB Cereals (Pty) Ltd & another (1989) 10 ILJ 870 (IC); Mynwerkersunie v African Products (Edms) Bpk (1987) 8 ILJ 401 (IC); Ngiba & others v Van Dyck Carpets (Pty) Ltd & another (1988) 9 ILJ 453 (IC); Luthuli & others v Flortime (Pty) Ltd & another (1988) 9 ILJ 287 (IC); East Rand Gold & Uranium Co Ltd v NUM (1989) 10 ILJ 683 (LAC); FAWU v Spekenham Supreme (2) (1988) 9 ILJ 628 (IC); Mynwerkersunie v O'Okiep Copper Co Ltd (1987) 8 ILJ 178 (IC); Mazibuko & others v Mooi River Textiles Ltd (1989) 10 ILJ 875 (IC); BAISEMWU & others v Iscor (1990) 11 ILJ 156 (IC); SACWU v Pharma Natura (Pty) Ltd (1985) 6 ILJ 520 (IC); Radio, Television, Electronic & Allied Workers Union v Tedelex (Pty) Ltd & another (1990) 11 ILJ 1272 (IC).

dating of increases, good faith bargaining,[254] disclosure of information (especially where the employer has to deal with more than one union)[255] and recognition agreements.[256] If our freedom of association concept is to remain unaltered with its focus on the protection of minorities the industrial court should not interfere and the parties should be left to sort out the particular circumstances of their case on a voluntary basis by negotiation and agreement. Adjudication in a polycentric situation where no accepted principles apply (or at least not agreement on what they are or where they should be derived from) is neither effective nor legitimate, and where a value-laden concept, such as freedom of association, is the point of focus, legal bias is bound to creep in. If, on the other hand, we were to opt for a concept akin to that of the American system, it will have to be regulated clearly by statute. Only then will adjudication be an effective mechanism for the institutionalization of

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254 Unfortunately a discussion of the principles cannot be undertaken here. In general it can be said that the parties must bargain with a firm intention of reaching agreement and that any conduct not indicative of that constitutes bad faith. See for example Chamber of Mines v Mineworkers Union (1989) 10 ILJ 133 (IC); Raad van Mynvakbonde v Die Kamer van Mynwese van SA (1984) 5 ILJ 344 (IC); NUTW & others v Sea Gift Surfware Manufacturers (1985) 6 ILJ 101 (IC); Nasionale Suiwelkoöperasie Bpk v FAWU (1989) 10 ILJ 712 (IC); NUM v Henry Gould (Pty) Ltd & another (1988) 9 ILJ 1149 (IC); East Rand Gold & Uranium Co Ltd v NUM (1989) 10 ILJ 683 (LAC); BCAWUSA & others v Johnson Tiles (Pty) Ltd (1985) 6 ILJ 210 (IC); NAAWU v Atlantis Diesel Engines (Pty) Ltd & others (1989) 10 ILJ 948 (IC); FAWU & others v Sentraalwes (Koöperatief) Bpk (1989) 10 ILJ 1076 (IC); MAWU v Hart Ltd (1985) 6 ILJ 478 (IC); MAWU & others v Transvaal Pressed Nuts, Bolts & Rivets (Pty) Ltd (1986) 7 ILJ 703 (IC); UAMAWU & others v Fodens (SA) (Pty) Ltd (1983) 4 ILJ 212 (IC); Bleazard & others v Argus Printing & Publishing Co Ltd & others (1983) 4 ILJ 60 (IC); MAWU & others v Natal Die Casting Co (Pty) Ltd (1986) 7 ILJ 520 (IC); MacSteel (Pty) Ltd v NUMSA & others (1990) 11 ILJ 520 (LAC); Sentraal-Wes (Koöperatief) Bpk v FAWU & others (1990) 11 ILJ 977 (LAC); Federated Mining Union v Rolan Essential Oils (Pty) Ltd, Rustenburg (1990) 11 ILJ 1086 (IC); Gubb & Inggs Ltd and SACTWUSA (1991) 12 ILJ 415 (ARB).

255 Compare for example Nasionale Suiwelkoöperasie Bpk v FAWU (1989) 10 ILJ 712 (IC); NUMSA v Metkor Industries (Pty) Ltd (1990) 11 ILJ 1116 (IC).

256 For some considerations regarding recognition, see inter alia Natal Baking & Allied Workers Union v BB Cereals (Pty) Ltd & another (1989) 10 ILJ 870 (IC); Jacob v Prebuilt Products (Pty) Ltd (1988) 9 ILJ 1100 (IC); NUM v Gold Fields of SA Ltd & others (1989) 10 ILJ 86 (IC).

conflict. It will then be required to settle disputes of right proper.

Whether a pluralist or a majoritarian system is desirable for South Africa is a matter for political debate, provided obviously that everybody has access to central rule making (in other words has the vote in order to be able to influence legislation).

This is a challenge for the negotiators of the "new" South Africa and not a matter for petty legal debate in vacuo.

6.4.3 Security of Employment (Demarcation of the Allocation Context)

In chapter 2[257] it was pointed out that the law can adjust the power balance between employer and employee by strengthening the allocation context, in other words, by strengthening security of employment, making it more difficult for the parties to make use of alternative labour (or get rid of existing labour or jobs) and thereby increasing their dependencies.

Security of employment has become a vast subject in South African labour law and justice cannot be done to the topic in this thesis. Developments in this field have taken place largely on the basis of the unfair labour practice concept. To a large extent the industrial court has been more successful in developing a coherent jurisprudence, in line with internationally accepted standards, than has been the case with collective bargaining.

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257 Ch 2 par 5.3.2 above.

6.4.3.1 **Dismissal and Termination of Employment**[258] (4 (end note))

The guidelines for termination of employment laid down by the International Labour Organization have been largely complied with. Rules have been developed which regulate dismissal for conduct related reasons and termination of employment for reasons based on the capacity of the worker or operational requirements operative in the work environment.

In general it can be said that both dismissals and terminations have to be substantively and procedurally fair. Substantively fair in the sense that justification must exists for severance of the allocation context and procedurally fair in the sense that proper procedures must be followed before dismissal and termination can be resorted to.

6.4.3.1.1 **Dismissal**[259] (5 (end note))

A valid and fair reason for dismissal can be any serious non-adherence to acceptable standards of conduct. This includes theft, continued absence, assault, intoxication, failure to adhere to procedures, etc.

Procedural fairness entail prior warning to the accused of a disciplinary inquiry to be held. At this inquiry the accused employee must have a proper opportunity to state his case (as far as is practically possible). Such an opportunity includes the assistance of a representative of his choice (usually from the same work environment), the

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258 For material on this topic, see end note 4.

259 Compare in particular Olivier MP in Brassey, Cameron, Cheadle & Olivier 309-447 and Cameron "The Right to a Hearing before Dismissal - Problems and Puzzles" 1989 Industrial Law Journal (SA) 10: 147. See also material in end note 5.

opportunity to present evidence and to cross-examine any witness who presents evidence against him. Once a finding is made the accused employee must have the opportunity to appeal. If the accused still feels dissatisfied, he can take the matter up through any of the dispute procedures outside the disciplinary code and procedure that may be in existence.

In a nutshell, the contribution by the industrial court in this area is the introduction of (and elaboration on) the administrative law rules of natural justice - audi alteram partem and nemo iudex in sua causa - into labour law. International guidelines have served as an important additional source of reference in the development of guidelines regarding unfair dismissal.

It is submitted that enough clarity exists for this area of the law to be properly codified and regulated by legislation. Disputes regarding dismissal will then be disputes of rights proper in the sense that specific legal rules can be applied to specific circumstances by a court (the industrial court). There is no further need for the widely defined unfair labour practice concept in this area.

6.4.3.1.2 **Termination**[260] ([6 (end note)])

Under this heading falls termination of employment at the initiative of the employer for capacity related reasons or on the basis of operational requirements. Briefly summarized the guidelines developed by the industrial court are as follows.

Firstly, the employer must do everything reasonable in his power to avoid termination by exhausting alternatives in consultation with the employees or their collective

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260 Compare in particular Cheadle in Brassey, Cameron, Cheadle Olivier 280-305. See also the material in end notes 4 and 6.

bargaining representative (where they have one) or both. Alternatives include short-time, alternative employment, lay-offs, cancelling of overtime, etc.

Secondly, once the termination is inevitable and its total impact has been quantified, the employer must consult again with regard to the employees to be affected. Objective criteria (not indicative of an anti-union animus) such as LIFO, attendance, disciplinary and performance records, qualifications, age and in general the operational needs of the undertaking have to be formulated and applied consistently in order to identify employees affected.

Thirdly, adequate notice of termination must be given to affected employees.

Fourthly (and no ultimate clarity as to the duty to do so or the formula to be applied exists), the employer may be under an obligation to pay severance pay calculated on the basis of factors such as age, qualifications, work opportunities and length of service.

It is submitted that the extent to which an employer has been procedurally fair in order to avoid termination and to offer alternatives to loss of employment would affect the duty to pay (if it exists in fairness) to the extent that such a duty may disappear altogether or (where it is still felt to exist), the amount to be paid would diminish accordingly.

Manning levels and operational needs of the business are management prerogatives. These are not negotiable. Furthermore, an employer does not guarantee jobs at all costs in the sense that employees "own" their jobs and are therefore entitled to compensation when they fall away. At

most the dictates of fairness may require that severance pay be paid in appropriate circumstances.

Again, the unfair labour practice has not been a perfect vehicle for the introduction of guidelines. Employers and employees will be better off if they negotiate proper termination procedures before the need for termination (either through incapacity, retrenchment or redundancy) arises.

This area of the law can also be effectively codified and the unfair labour practice done away with.

6.4.3.1.3 **Mass Dismissal**[261] **and Re-employment**[262] ([7 (end note)])

The principles enumerated with regard to dismissal in paragraph 6.4.3.1 are also applicable to mass dismissal. In other words, where a number of employees make themselves guilty of bad conduct they must as far as possible also be granted an opportunity to state their cases. Practical problems may arise and exceptions may be allowed by the industrial court in appropriate circumstances.

Where employees are dismissed for breach of contract pursuant to a legal strike,[263] the generally accepted wisdom

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261 See in particular Brassey "The Dismissal of Strikers" 1990 Industrial Law Journal (SA) 11: 213-40 and Cheadle in Brassey, Cameron, Cheadle & Olivier 245-75. See also the material referred to in n 232 above.

262 For the material in relation to re-employment, see end note 7.

263 The dismissal must be fair to begin with. The guidelines laid down in NUM v Marievale Consolidated Mines Ltd (1986) 7 ILJ 123 (IC) still seem to hold sway. Before a dismissal can be resorted to the following must be considered: the cause of the strike; the nature of the strike; the extent of the strike; the objective of the strike; the circumstances of the employees; the circumstances of the company; the duration of the strike; the consequences of the strike; whether negotiations in good faith have been exhausted; the provisions in the agreement; the conduct of the union and its members during the strike; and the conduct of the company. These guidelines cannot readily be reconciled with other

(continued...)

seems to be that if the employer re-employs he must re-employ everybody. Where he fails to do so and re-employs selectively this must be done in accordance with fair criteria (trade union membership is for example not such a criterion). In other words, the employer is not allowed to get away with a "cheap retrenchment" under the guise of strike action. Procedures similar to the retrenchment procedures, described in paragraph 6.4.3.1.2, must be followed. These guidelines are the most important contribution by the industrial court with regard to the right to strike[264] 8(end note) in South Africa. They are not uncontested and again it is submitted that legislation can replace the unfair labour practice in this regard.

6.5 Conclusion

A detailed discussion of the unfair labour practice concept is not necessary since this thesis is ultimately concerned with the lock-out, and lock-outs are specifically excluded from the definition of an unfair labour practice.[265] Guidelines have been developed, however, that have a significant impact on the power balance between employer and employee and institutionalization in general and therefore the following conclusions can be recorded.

263(...continued)
guidelines such as the "level of tolerance" aberration offered by the industrial court in SACWU v Sasol Industries (Pty) Ltd (2) (1989) 10 ILJ 1031 (IC).

264 A comprehensive discussion on strikes is not necessary and cannot be undertaken here. Suffice to say that the development of a right to strike is closely related to the protection of security of employment in a strike situation. See also Brassey "The Dismissal of Strikers" 1990 Industrial Law Journal (SA) 11: 213; Gauntlett & Rogers "When all else has failed: Illegal Strikes, Ultimatums and Mass Dismissals" 1991 Industrial law Journal (SA) 12: 1171 and Davies Juridification. For material in relation to strikes see end note 8.

265 See the definition of unfair labour practice and the discussion in ch 5 below.

The unfair labour practice represents a significant movement beyond the parameters of contract as an act based concept focusing on the particular circumstances of each case. It has adjusted the power balance in the broad areas namely the promotion of collective bargaining and security of employment. In this way it has increased the dependency of the employer on particular employees and has accordingly strengthened the bargaining power of the latter.

Unfortunately, the wide ambit of the definition presents problems of polycentricity which cannot be subjected to adjudication as a mechanism to juridify labour relations effectively. Inconsistencies in the approach of the industrial court are particularly evident in the area of collective bargaining guidelines, which lead to uncertainty and ineffective institutionalization of conflict in practice. The concept of unfair labour practice and the way in which it has been developed represent a departure from Roman-Dutch tradition with the result that unacceptable discrepancies between the jurisprudence of the industrial court and the Supreme Court may occur and have in fact occurred.[266] This leads to confusion in practice.

From the cases decided by the industrial court, it is clear that an essentially pluralist approach, directed by the parameters set by capitalism and free enterprise has been followed. This does not necessarily coincide with the values of everybody involved in the institutionalization process.[267]

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266 See also Roos 114 and the discussion in par 6.3 above with regard to discrepancies in the Appellate Division with regard to its common-law and unfair labour practice jurisdictions.

267 See also Cockrell in general and specifically 92 98; Jordaan "Industrial Pluralism and the Approach of the Industrial Court" 1989 Industrial Law Journal (SA) 10: 791 et seq (Jordaan Pluralism); Roos 108.

It is suggested that the unfair labour practice should be regulated in more detail by statute (provided obviously that everybody involved in the institutionalization process has access to central rule making). Enough clarity exists with regard to security of employment for effective codification by means of legislation to take place. With regard to collective bargaining the unfair labour practice can be retained, but its ambit should be restricted to the regulation of freedom of association, collective bargaining and industrial action (illegal).[268] Specific unfair labour practices amenable to effective adjudication should be formulated by the legislator in a system where everybody can participate fully in the legislative process.

Future legislation should contemplate the regulation of an employment relationship which takes proper cognizance of the power dynamics between employer and employee in the system of ranks of the organization. In this regard much guidance can be gained from administrative law principles. In particular investigation of the concept of "private bureaucratic power"[269] over and above the regulation of market power can shed a valuable perspective on defects in contemporary labour law. In this regard the distinction between private and public law can be largely ignored. The law should devise ways and means of providing for negotiation and the primary source of the content of rules regulating the employment relationship.

The role of contract will then be reduced to that of a market transaction which serves as a port of entry into the organization, but thereafter a code of bureaucratic rules created by collective bargaining will govern the content of

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268 See also Jordaan Pluralism 806-7.

269 Collins 2.

the relationship.[270] Each individual must then be able to challenge the reasonable exercise of private bureaucratic power by the employer in terms of the collective agreement by means of adjudication. Such adjudication will be partly principle and partly act based[271] in line with Roman-Dutch legal tradition. In other words, capital and labour will be able to create their own clear rules free of legal bias and to submit them as disputes of right to adjudication which will then only effect marginal adjustments of discrepancies between rule and fact without interfering in the substance of the allocation process by creating new rights.

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270 This can be done so effectively that the need for an unfair labour practice concept may largely disappear, except perhaps in the procedural regulation of collective bargaining itself.

271 See the discussion in par 3.4 above.

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Mlozana & others v Faure Engineering (Pty) Ltd (1987) 8 ILJ 432 (IC).

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PPWAWU & others v Kaycraft (Pty) Ltd & another (1989) 10 ILJ 272 (IC).

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Simelane & others v Audell Metal Products (Pty) Ltd (1987) 8 ILJ 438 (IC).

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MWASA & others v Perskor (1989) 10 ILJ 441 (IC).

Kebeni & others v Cementile Products (Ciskei) (Pty) Ltd & another (1987) 8 ILJ 442 (IC).

MAWU & others v Transvaal Pressed Nuts, Bolts & Rivets (Pty) Ltd (1986) 7 ILJ 703 (IC).

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CHAPTER 4

THE INSTITUTIONALIZATION STRUCTURE IN SOUTH AFRICA

1 INTRODUCTION

If the institutionalization structure in South Africa is compared with the model developed in chapter 2, the most obvious (and most serious) shortcoming of the system is that the vast majority of employees (that is blacks) do not have access to the central rule making process - they do not have the vote. This obvious and crucial problem will have to be rectified in the broader political arena.

Before 1979 (when the Wiehahn recommendations were enacted) and the Labour Relations Act 28 of 1956 was changed to include all employees, the definition of "employee" in the Labour Relations Act 28 of 1956 did not include blacks. The position therefore was that these employees did not enjoy full freedom of association and therefore lacked the industrial power to participate meaningfully in the institutionalization process. Since the change in the definition in 1979 the position has changed dramatically.[1]

Employees have also succeeded in influencing the legislative process by means of a series of talks which they have had, together with employers, with the National Manpower Commission. The agreement, called the SACCOLA-COSATU-NACTU Accord, which employer representative bodies reached with two trade union federations, significantly influenced the National Manpower Commission's

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1 See the discussion in ch 2 par 5.3.1 above. Through full freedom of association there has been a dramatic increase in union membership of black employees.

recommendations and the subsequent amendments to the Labour Relations Act promulgated in May 1991.[2]

Apart from this limited participation in central rule making, the pluralist assumption that all employees have open access to local and central rule making in a tripartist institutionalization system applies in South Africa only to local rule making by means of collective bargaining.[3] This lack of participation has serious, if not disastrous consequences for legitimacy of the institutionalization structure and leads to additional conflict on the local level which cannot be institutionalized properly between management and workers without changing the political system itself to one more acceptable to the majority of workers.[4]

This chapter does not deal with this highly controversial issue, but focuses on the regulation of collective bargaining, the nature of disputes and the actual institutionalization structure in the Act and elsewhere in order to enhance a perspective on the position and use of the subject-matter of management power, the lock-out, in the settlement of disputes vis-à-vis other institutionalization mechanisms in South Africa.

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2 For a full discussion of the process and the legislative changes, see Labour Law Briefs 3 (9) and 4 (8).

3 For a discussion on pluralism and the tripartist institutionalization model, see ch 1 par 1.1.2 1.2.2 1.2.4 above. See also Jordaan "Industrial Pluralism and the Role of the Industrial Court" 1989 Industrial Law Journal (SA) 10: 791.

4 Most stay-away actions are politically inspired. See figure 3 in endnote 1 for an explanation of the irregular dynamics of the rule making process of a system ostensibly based on pluralist assumptions.

2 RELATIONSHIP AGREEMENTS

Before the design of the Labour Relations Act (LRA) itself is addressed, it is important to note that collective bargaining in South Africa does not only take place in terms of the official system (that is the system regulated in the LRA). An unofficial system consisting of relationship agreements (more popularly referred to as recognition agreements)[5] has developed side by side with the official system. These agreements are sometimes complementary to the LRA and sometimes parallel to it. They are contracts which are enforceable if they comply with the requirements for a valid contract and with section 31A of the LRA.

Usually, but not exclusively, these agreements regulate collective bargaining at plant level. Their content is generally procedural and is formulated by the parties by negotiation and agreement on a largely voluntary basis. Typical issues regulated in a recognition agreement are the following (but agreements vary widely from industry to industry): A preamble which sets the tone or general approach envisaged by the parties (usually pluralistic),[6]

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5 For a general discussion of recognition agreements see Piron Recognising Trade Unions. For further in-depth discussions on collective bargaining in South Africa see Piron Collective Bargaining in South African Labour Law; Woudstra Die Kollektiewe Arbeidsooreenkoms; Kelling Aspekte van die Aard en Uitwerking van Arbeidsooreenkomste in die Suid-Afrkikaanse Arbeidsreg.

6 A good example of such a preamble is the following:

"The parties to this agreement acknowledge the need for a sound relationship to be established and maintained between management and employees within the parameters of the law, based on mutual respect and trust with the objective of promoting co-operation between them and ensuring the efficiency and prosperity of the company for the benefit of all concerned.

In the pursuit of this objective, both parties undertake to:

- promote the growth and success of the company and the wellbeing of the employees in an atmosphere of industrial peace and stability and in accordance with

(continued...)

a definition section which contains important definitions and a range of other clauses. Some of these are the demarcation of the bargaining unit and the level of representativity, rights and duties of shop stewards, election of shop stewards, meeting procedures, notice-boards, access, union subscriptions, negotiating committees, negotiation procedures, dispute settlement procedures, grievance procedure, disciplinary procedure, retrenchment procedure, the peace clause, etc. Substantive conditions of employment are bargained periodically (usually annually) in terms of the procedural provisions of the recognition agreement. These substantive conditions, once agreed, are enforceable contracts (provided they comply with the requirements for a valid contract and s 31A of the LRA). Disputes about them are therefore disputes of rights because they involve the protection of scarce resources or the application of existing rules.

The analysis of recognition agreements is a comprehensive topic. For the purposes of this thesis, it is important to note that these agreements come into existence by negotiation. They have a consensus basis and can therefore be regarded as enjoying legitimacy. The parties are free to agree on any set of institutionalization procedures as long as these are not in conflict with the LRA or any other law. It must furthermore be kept in mind that the industrial court, through its unfair labour practice jurisdiction and arbitration, has laid down guidelines on topics such as the duty to bargain, bargaining in good faith and so on, which are important

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[6](...continued)

recognised health, safety and operational standards in a free enterprise society;

- develop and foster sound employee / management relationships in a spirit of good faith;
- ensure just and fair treatment of all employees.

It is therefore specifically agreed as follows ...."

when assessing the efficiency and legitimacy of the unofficial system.[7]

3 THE OVERALL PHILOSOPHY OF THE LABOUR RELATIONS ACT 28 OF 1956 (THE LRA)

The long title of the LRA is worded as follows:

> "To consolidate and amend the law relating to the registration and regulation of trade unions and employers' organizations, the prevention and settlement of disputes between employers and employees, and the regulation of terms and conditions of employment by agreement and arbitration; to provide for the establishment of a National Manpower Commission and to define its functions; to provide for the establishment of a labour appeal court and to define its functions; to provide for the control of labour brokers and the registration of labour brokers' offices; and to provide for incidental matters."

From the long title, it is evident that the LRA is based on a pluralist premise. It recognizes the existence of conflict between "employers and employees" in that it attempts to regulate "the prevention and settlement of disputes" between them.

Terms and conditions of employment (that is disputes of interest) are regulated by "agreement and arbitration". If the LRA is studied further, it becomes

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7 See the discussion and authorities quoted in ch 3 par 6 above especially the section on collective bargaining. In general it can be said that a duty to bargain in good faith with a representative union exists in SA, which is the same as saying that a duty to recognize exists (especially where such a union enjoys a democratic majority). See also "Arbitration and Collective Bargaining" 1992 Employment Law 8 (3): 59. See also the quotation by Davis Voluntarism 69 (n 18 below) with regard to in-company procedures.

evident that "agreement", which is the result of collective bargaining, is the focus point or preferred mechanism for the prevention and settlement of disputes.

That collective bargaining is the primary institutionalization mechanism is particularly clear from the following characteristics of the LRA: First, the formation of collective power is guaranteed under section 78 which allows for full freedom of association when interpreted against the background of the common law. Employees are free to associate or not to associate and may not be required by a term or condition of employment to become or not to become a member of a trade union or similar association. Section 80 provides for the registration of employer and union federations allowing them further to enhance power bases. Additional protection potentially exists under the unfair labour practice jurisdiction of the industrial court in terms of section 17(11)(f).[8]

Second, trade unions are regarded as the preferred form of worker participation and their registration and regulation (together with employers' organizations) are dealt with extensively in sections 3 to 16. Legitimate trade union activities are furthermore protected under the victimization provisions of section 66(1)(c) and potentially under the unfair labour practice jurisdiction of the industrial court in terms of section 17(11)(f).

Third, the use of collective power in proper bargaining forums is regulated comprehensively in sections 18 to 42. These sections regulate the registration and functions of industrial councils and in similar vein, the application for ad hoc conciliation boards where no industrial councils are in existence. It is clear that

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8 See the discussion in ch 3 par 6 above in general.

disputes arising out of the application of promulgated industrial council and conciliation board agreements are disputes of rights. Section 48(1) makes provision for the minister to promulgate industrial council and conciliation board agreements (section 48(9)) by notice in the Gazette and provides that such an agreement shall from the date and for a period fixed by him be binding on the employers (and employers' organizations) and trade unions which have entered into the agreement and on employers and employees who are members of such organizations and unions. The agreement may also be extended to employers and employees other than these, but who are also employed in the undertaking, industry, trade or occupation. It may furthermore be extended to areas additional to that in respect of which an industrial council is registered.

Section 65(1)(a) provides that no industrial action may be taken during the period of the currency of such agreements and section 53(1) makes it a criminal offence to contravene a binding agreement.

The enforceability of recognition agreements is regulated partly in section 31A (the rest is governed by common-law principles) and passing reference is made to works councils in sections 34A and 34B. Sections 17(11)(a) and 43 both provide for interim relief on the basis of the unfair labour practice concept until the parties have exhausted bargaining at either an industrial council or a conciliation board.

It is evident from the above and an overall reading of the LRA and cases decided by the industrial court that collective bargaining is the preferred institutionalization

mechanism in the South African industrial relations system[9] although it cannot be said that bargaining is entirely voluntary from the way in which provision is made for the extension of industrial council and conciliation board agreements to non-parties. Moreover, the fact that promulgated agreements are supported by a criminal sanction unduly involves the state in the protection of scarce resources. The parties should be able to decide whether they want an agreement enforced in a civil case and should not be made dependent on the apparatus of the state outside their own volition.

Fourth, a freedom to implement industrial action is envisaged in section 1 (the definitions of strike and lock-out), section 65 (which stipulates certain prohibitions against strikes and lock-outs) and section 79 which provides for immunities against certain common-law consequences concomitant with strikes and lock-outs. The industrial court under its unfair labour practice jurisdiction has also contributed significantly towards regulating industrial action during the last decade or so.[10]

Fifth, "arbitration" as a compulsory means of regulating terms and conditions of employment only enjoys limited application under section 46 in the case of local authorities or employers which provide light, power, water, sanitation, passenger transportation or fire extinguishing services or which have been declared essential services under section 46(7).

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9 See also the discussion on collective bargaining in ch 3 par 6 above and in general Jordaan 791 et seq. See also ch 2 par 3 above where it is argued that the law should be prepared to enforce agreements for certain fixed periods of time.

10 See the discussion in ch 3 par 6 above and ch 5 below.

Sixth, the industrial court has followed a largely pluralist approach with its emphasis on voluntarism when giving substance to its unfair labour practice jurisdiction, but this approach has not been consistent.[11]

Seventh, when the subject-matter of collective bargaining in section 24 of the LRA is considered, it is clear that the scope of employer-employee activities is limited to matters of "mutual interest to employers and employees" (section 24(11)), such as minimum rates of pay, prohibition of deductions, keeping of records and the establishment of pension, sick, medical, unemployment, holiday, provident and other insurance funds. Political affiliation is prohibited under section 8(6)(e). The approach is certainly not radical,[12] because the scope of activity is limited to the strict management-worker relationship or to local rule making.

Eighth, the pluralist assumption that employers and employees operate in a situation of roughly equal bargaining power[13] is evident from the way in which strikes and lock-outs are regulated on a parity basis in the formulation of the definitions in section 1 and also elsewhere in the LRA, for example sections 65 and 79.

On the whole, little doubt therefore exists that the LRA articulates an essentially pluralist approach to industrial relations and the institutionalization of conflict when evaluated in terms of this succinct summary of pluralism by Jordaan:

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11 Note for example its emphasis on voluntarism in MAWU v Hart Ltd (1985) 6 ILJ 478 (IC), and the comments of Jordaan 792-3 about the court's inconsistency. See also the discussion on collective bargaining in ch 3 par 6 above.

12 See the discussion in ch 1 par 1.1.3 and 1.1.4 above.

13 See the discussion in ch 1 par 1.1.2 above.

"To summarize: industrial pluralism has as its broad aim the accommodation of employee interests in decisions and issues that affect their working lives. It acknowledges that conflict is inevitable in the relationship between management and labour, but seeks to contain it. This it attempts to achieve by encouraging unionism on the one hand, and by creating structures for collective bargaining on the other. Fundamental to this approach are the assumptions that organized employees are possessed of a bargaining power more or less comparable to that enjoyed by their employer, and that they willingly participate in (and thereby legitimize) the bargaining process. Yet pluralism either appears to assume that the conflicting interests are not too divergent and thus incapable of compromise, or positively limits the nature and extent of legitimate employee demands by vaguely demarcating the employees' interests in wages and other terms of employment, from the `interests of the enterprise' in general. The overall effect is that control over the enterprise and the employment relationships within it effectively remains in the hands of the employer. This explains the observation of Flanders, one of the main exponents of pluralism, that `the paradox, whose truth managements have found it so difficult to accept, is that they can only regain control by sharing it'."[14]

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14 Jordaan 803. See also n 13 above and the discussion in ch 1 par 1.1.2. Davis "Voluntarism and South African Labour Law - Are the Queensbury Rules an Anachronism?" in Labour Law 50 (Davis Voluntarism) agrees that the LRA is based on voluntarist assumptions: "Although the collective bargaining mechanisms were contained in a statutory instrument, there was a form of voluntarist philosophy underpinning the Labour Relations Act. This statute promoted collective bargaining as a primary means of resolving industrial conflict. It supported the freedom of workers to join unions of their choice, and its provisions aimed at ensuring that voluntary collective bargaining took place between the collectives of labour and capital. The reports of the

(continued...)

Whether these pluralist assumptions correspond with the values and expectations of the majority of participants in the South African industrial relations system and industrial relations reality are matters for empirical evaluation. Although not the subject-matter of this thesis, it can be concluded from the regular stay-away and industrial action directed at the LRA in recent years, that it does not satisfy the majority of the workforce. It is therefore imperative that access to central rule making be opened up for the effective survival of the system itself.

A different, but valid question is, however, whether the existing system when subjected to the scrutiny of all the participants in the system is likely to change dramatically for the better (or even for the worse) when judged against international standards (incorporated in the institutionalization model developed in chapters 1 and 2).[15]

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[14](...continued)
Wiehahn Commission are full of these views. `[T]he relationship between employer and employee is the fundamental or primary relationship. `[C]ollective bargaining is a process of decision-making between employers and trade unions with the purpose of aiming at an agreed set of rules governing the substantive and procedural terms of the relationship between them and all aspects of and issues arising out of the employment situation.' The role of the State is essentially confined to: `setting the broad framework within which employer and employee should have the maximum degree of freedom to regulate their various relationships'."

15 Judged by the contents of the SACCOLA-COSATU-NACTU Accord on 7 May 1990 and the subsequent bill (and legislation on 1 May 1991): "Those more critical of the process and the Bill it produced might argue that the consummation was more of a defilement than a gracious acquiescence" and furthermore that it was not really the context (or philosophy) of the LRA that was at stake, but the ability to participate in its formulation. The latter achievement certainly heralds one of the "most significant events in recent South African labour history" (Van Niekerk Labour Law Briefs 4 (8): 50). The findings of the recent ILO Commission are summarized by Landman "The ILO Commission: Its Findings and the Implications for Future Labour Legislation" 1992 Contemporary Labour Law 1 (11): 117. Most of the findings related to widening and improving freedom of association in South Africa. See also 1992 Employment Law 8 (6), which is devoted in its entirety to the ILO Report and which concludes (127) that aspects of freedom of association are the most important issues that are in need of reform.

It is therefore necessary to have a closer look at the existing institutionalization structure in order to evaluate the design independently from political expectations and dynamics. This is done in the following section.

4 THE INSTITUTIONALIZATION STRUCTURE OF THE SOUTH AFRICAN INDUSTRIAL RELATIONS SYSTEM

4.1 Introduction

This section investigates the structure of institutionalization mechanisms around various disputes and vis-à-vis one another and does not explore the nature of the various mechanisms or whether the South African system complies with international guidelines as, for example, those laid down by the International Labour Organization.[16] The object is to typify the nature of disputes, to evaluate the importance attached to negotiation as an institutionalization mechanism and to ascertain the place of management power in the overall structure. The way in which the lock-out itself is regulated is discussed in chapter 5.

In order to save space, this discussion will be conducted by reference to the colour dispute settlement chart[17] in figure 4 below.

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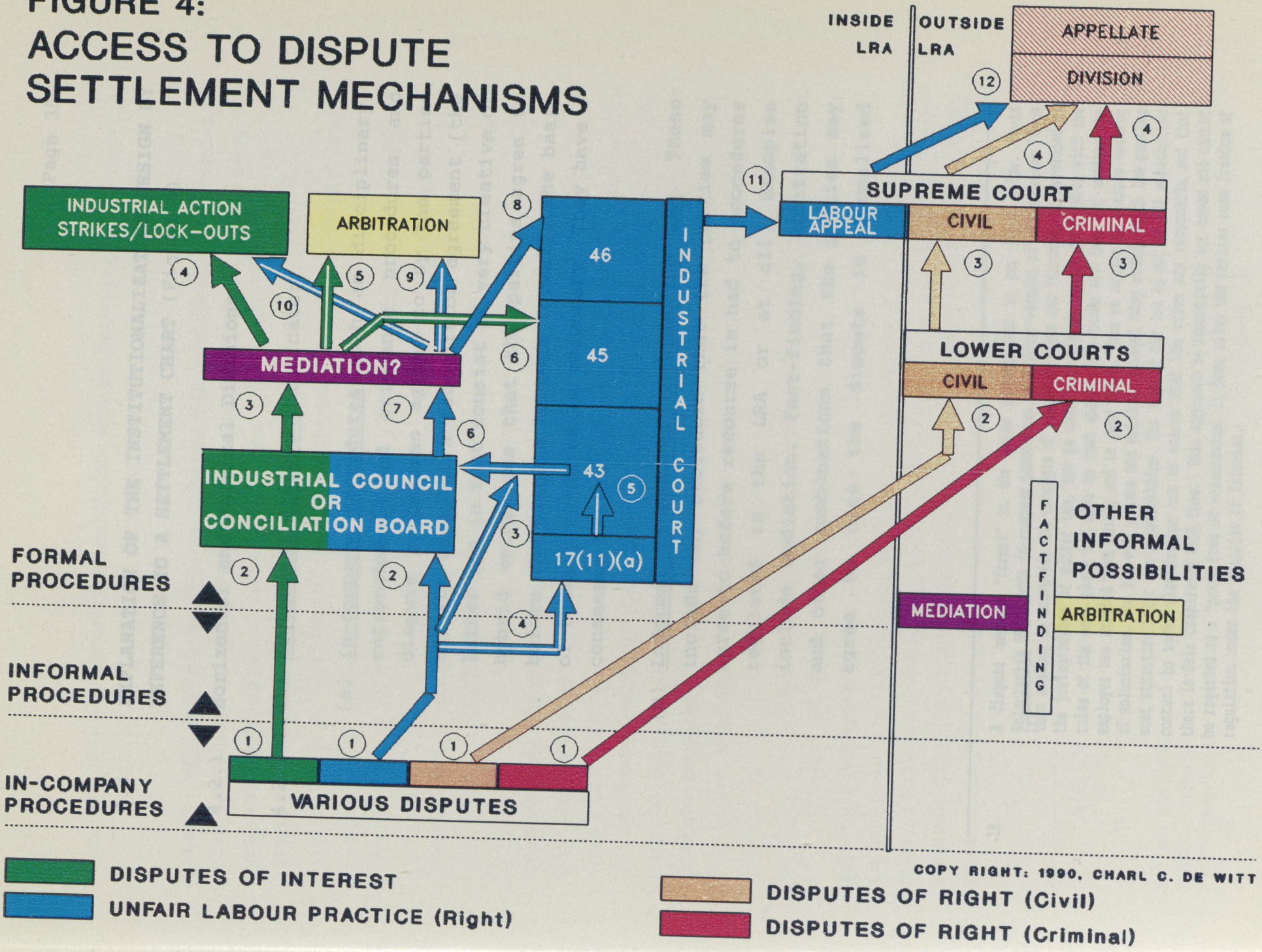
16 For an interesting comparison of the provisions of the LRA with Convention 87 of 1948 of the International Labour Organization see Bosman Industrial Relations in South Africa: Some Aspects of Theory, Conventions and Practice. Compare also the detailed discussion of collective bargaining structures by Piron; Woudstra and Kelling. It is not necessary to repeat those discussions here.

17 See also Albertyn L.R.A Disputes Chart. In order to contain the discussion, unnecessary technical detail is left out.

FIGURE 4:
ACCESS TO DISPUTE SETTLEMENT MECHANISMS



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4.2 EXPLANATION OF THE INSTITUTIONALIZATION DESIGN BY REFERENCE TO A SETTLEMENT CHART (Figure 4)

4.2.1 Horizontal and Vertical Divisions

4.2.1.1 The horizontal divisions indicate:

(a) In-company procedures such as disciplinary, retrenchment and grievance procedures and dispute procedures agreed to by the parties in, for example, a recognition agreement (the latter can in fact consist of very creative or hybrid mechanisms that the parties agree to before the dispute becomes formal). The basis of these procedures is voluntary. They have a consensus basis.[18]

(b) Informal procedures outside the LRA. These include any procedure that the parties may agree to before recourse is had to procedures regulated in the LRA or at all. Examples include mediation, fact-finding, arbitration and other combinations that the parties may agree to once the dispute is formalized

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18 A dispute becomes "formal" in the sense contemplated in par 4.2.2 below. Davis Voluntarism 69 regards in-company procedures as a micro-version of voluntarism: "Once this analogy is accepted, the concepts of reasonableness and fairness, as developed by the jurisprudence of public law, can be used not only to ensure conformity with the rules of the work place but also to test whether the rules are fair and whether the employer has applied them fairly and in good faith. Thus we arrive at a micro-version of voluntarism. The law will create and maintain a legal ring within which the parties must structure their own relationships. The role of the law is not to add substantive content to such relationships but to ensure that the rules are reasonable and that there is fair compliance with them." This approach is essentially act based and cannot be regarded as a "pure" form of voluntarism. It does allow the parties some freedom of regulation under the auspices of fairness.

outside the in-company procedures. The basis again is consensus.[19]

(c) Formal procedures in terms of the LRA. These are procedures provided for by the LRA once disputes are formalized outside the company and no alternative means of settlement have been agreed to by the parties.

4.2.1.2 The vertical division shows:

(a) On the left, those dispute settlement mechanisms regulated by the LRA.

(b) On the right, those dispute settlement mechanisms outside the LRA. These include the ordinary courts, arbitration, mediation, fact-finding and other alternative or hybrid mechanisms that the parties may agree to such as med-arb, final-offer arbitration, mini-trials, rent-a-judge, etc.[20]

4.2.2 **Kinds of Disputes**

The LRA does not define the term "dispute" (except that for the purposes of section 17(11)(a) and section 43 applications to the industrial court the dispute must involve an alleged unfair labour practice).[21] Another ground exists for section 17(11)(a) applications, namely

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19 See the discussion on alternative dispute resolution in ch 2 par 4.2 above.

20 See n 19 above.

21 The term is not defined in s 1 or elsewhere. Section 43(1) states that "the term `dispute' means a dispute concerning an alleged unfair labour practice". Section 17(11) deals with disputes concerning unfair labour practices and contraventions of s 65. See also s 17D.

contraventions of section 65 (that is, illegal industrial action).

When a dispute comes into existence is therefore a question of fact and, depending on the circumstances, may arise where -

(a) there is a clear claim by one party and a clear refusal by the other;[22]
(b) there is a clear claim by one party with no reaction from the other and a reasonable time period has expired, or
(c) there is a formal declaration of a dispute (which is desirable and most common in practice).

The LRA does not explicitly make a distinction between disputes of interest and disputes of rights, but does so by implication in that it regulates the procedure for disputes of interest (in nature) in a different manner from disputes of rights (in nature).[23]

From a practical point of view, four different "kinds" of disputes can be identified in the South African system:

Firstly, green represents disputes of interest such as disputes relating to wages and conditions of employment which involves the creation of new rules.[24]

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22 This was provided for in s 35(7) prior to the September 1988 amendments to the LRA, but has unfortunately fallen away in subsequent amendments.

23 See the discussion on dispute settlement structures in pars 4.2.4.1 and 4.2.4.2 below.

24 The kind of subject-matter regulated in s 24 of the LRA.

Secondly, blue represents disputes regarding alleged unfair labour practices as defined in section 1 of the LRA, for example dismissals. These are disputes of rights. These first two kinds of disputes are regulated in the LRA.

Thirdly, yellow represents civil disputes of rights. These are disputes involving the application of existing legal rules of a civil nature such as disputes concerning breaches of contract, mistake, specific performance and delict.

Fourthly, orange represents criminal disputes of rights. These are legal disputes involving the application of existing legal rules of a criminal nature such as contraventions of statutory enactments and common-law offences such as theft, assault and fraud. These latter two disputes are not regulated in the LRA.

Disputes are therefore categorized as disputes of interest on the one hand and three different kinds of disputes of rights on the other for the purposes of access to the dispute settlement mechanisms in the LRA and outside the LRA.

4.2.3 **Dispute Settlement Mechanisms**

The following mechanisms are provided for in the South African system for the settlement of the various kinds of disputes described in paragraph 4.2.2 above.

Firstly, there is a group of mechanisms designed for the parties to reach agreement (which is a final settlement mechanism). These mechanisms are:

(a) Contract,[25] which is always available as a means of reaching agreement in negotiations whether individual or collective.

(b) Collective bargaining at an industrial council or conciliation board, which results in agreements supported by criminal sanction when promulgated in the Gazette.[26]

(c) Mediation, which is a form of third-party intervention designed to promote agreement.[27]

(d) Industrial action (strikes and lock-outs), which are power mechanisms designed to induce or compel agreement.[28]

Secondly, there is a group of adjudication mechanisms. These are:

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25 For such a contract to be enforceable, it has to comply with the common-law requirements for a valid contract.

26 Sections 18-34 deal with various aspects relating to industrial councils and ss 35-42 deal with those concerning the application for, composition of, functions, etc of conciliation boards. Section 48 allows for promulgation of industrial council and conciliation board agreements in the Gazette and s 53 makes a contravention of such agreements a criminal offence.

27 Mediation can be conducted in terms of s 44 of the LRA, but this procedure is seldom used in practice. The parties more often choose their own private mediator.

28 "Strike" and "lock-out" are defined in s 1 of the LRA and further primarily regulated in ss 65 and 79 of the LRA.

(a) Action in the ordinary courts[29] both lower and higher, civil and criminal.

(b) Action on the basis of the unfair labour practice in the industrial court[30] and thereafter on appeal or review in the labour appeal court[31] and still further in the Appellate Division.[32]

(c) Arbitration proceedings, which can be voluntary or compulsory, in terms of the LRA, in terms of the Arbitration Act 42 of 1965 and lastly in terms of the common law (where the parties reach agreement with regard to the terms of reference of the arbitrator).

Thirdly, fact-finding and any alternative dispute resolution mechanism that the parties may agree to are also available.

4.2.4 **Disputes and Desired/Prescribed Settlement Mechanisms**

Various access routes for different kinds of disputes are prescribed or possible (by agreement or otherwise) for these disputes. The different kinds of

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29 See Erasmus & Van Loggenberg Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa; Van Winsen, Eksteen & Celliers Herbstein and Van Winsen: The Civil Practice of the Superior Courts in South Africa and Hunt & Milton South African Criminal Law and Procedure.

30 The industrial court is created and regulated in s 17 of the LRA. One of its functions is to determine unfair labour practice disputes (s 17(11)(f)).

31 The composition and functions of the labour appeal court are regulated in ss 17A and 17B.

32 s 17C.

disputes and the settlement mechanisms utilized to institutionalize them are traced on the settlement chart.

4.2.4.1 **Disputes of Interest (green)**

A good example of a dispute of interest is a wage dispute.[33] Such a dispute usually proceeds as follows:

step 1	-	the dispute originates;[34]
step 2	-	the dispute is referred to conciliation at an industrial council or a conciliation board (if no industrial council exists in the industry);[35]
step 3	-	the parties may make use of mediation which is optional;[36]
step 4	-	industrial action is taken in an attempt to induce or compel agreement;[37]
steps 5 and 6	-	the parties may refer the dispute to arbitration by an outsider (5)[38] or the industrial court (6).

It is important to note that where an employer is a local authority, provides essential services or is declared to be an essential service[39] the dispute must go

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33 See in general s 24 for the kind of subject-matter that may be negotiated about.

34 See par 4.2.2 above.

35 in terms of s 27A or 35 respectively.

36 See n 27 above.

37 See n 28 above and discussion in ch 5 above.

38 s 45.

39 in terms of s 46(7).

to arbitration in terms of section 46 by either an outsider or the industrial court.

Furthermore, the use of mediation, arbitration, fact-finding or other alternative mechanisms is possible by agreement between the parties (even before use is made of the formal procedures) in the informal stage and also by agreement at any time during the formal stage.[40]

4.2.4.2 **Disputes of Rights - Unfair Labour Practice**[41] (blue)

Typical unfair labour practice disputes are alleged unfair dismissals and terminations of employment, bad faith bargaining, duty to bargain, unprocedural industrial action,[42] etc. The dispute can proceed as follows:

step 1 - the dispute originates;[43]

step 2 - the dispute is referred to conciliation at an industrial council or a conciliation board (if no industrial council exists in the industry);[44]

step 3 - the dispute may be referred to the industrial court (directly) in terms of section 43 for an <u>interim status quo</u> order <u>together</u>[45] with the referral to conciliation. It is important to

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40 Settlement by negotiation and agreement is therefore possible at any stage.

41 See the definition of "unfair labour practice" in s 1 of the LRA and also the discussion in ch 3 par 6 above.

42 See the discussion in ch 3 par 6 above.

43 See par 4.2.2 above.

44 See n 35 above.

45 or within ten days of the referral in terms of s 43(2).

note that referral to conciliation is compulsory while making use of the status quo mechanism is optional;[46]

step 4 - in urgent cases the dispute may first be referred (directly) to the industrial court in terms of section 17(11)(a)[47] for urgent interim relief until use is made of section 43. It is important to note that referral to conciliation is not compulsory at this stage, but must be done together with the section 43 application.[48] Section 17(11)(a) may also be used in the case of contravention of section 65;

step 5 - the dispute proceeds from section 17(11)(a) to section 43 if not settled by agreement between the parties. If it proceeds to section 43, referral to conciliation must also be made;[49]

step 6 - the dispute may proceed from the industrial court to conciliation depending on the nature of the order made.[50] It has to be subjected to conciliation in any event, unless the parties settle;[51]

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46 This does not mean that the parties may not settle before conciliation, but if they wish to proceed to a final determination in terms of s 46(9) they must go via conciliation.

47 See in general Le Roux & Landman "Urgent Interim Relief in the Industrial Court: A Review of Section 17(11)(a) Orders" 1978 Mercantile Law Journal 1 (2): 208. See also n 21 above.

48 See n 45 above.

49 See n 45 above.

50 s 43(4).

51 s 43(6).

step 7 - use can be made of mediation although this is not common in practice;

step 8 - if the dispute is not settled by conciliation, any of the parties to the dispute may refer it to the industrial court for a final determination in terms of section 46(9);

step 9 - the parties may agree on voluntary arbitration if they wish;[52]

step 10 - it is theoretically possible that the parties may not refer the dispute to either the industrial court or voluntary arbitration in which case industrial action becomes a possibility. This option is unlikely and undesirable in practice;[53]

step 11 - an appeal on the basis of the unfair labour practice and costs as well as review by the labour appeal court are available;[54]

step 12 - a further appeal is possible to the Appellate Division.[55]

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52 in terms of s 45 or the common law.

53 Before 1 May 1991 s 46(9)(5)(i) and (ii) was worded in peremptory language, ie "shall ... refer the dispute to the industrial court ... unless all the parties to the dispute agree that the dispute shall not be so referred". This wording was more acceptable than the present wording where either of the parties "may" refer the dispute to the industrial court (or, by implication, elsewhere). This change is unfortunate for it allows industrial action on an unfair labour practice (dispute of rights) in principle.

54 ss 17(21A), 17B(i)(b) and (2)(a).

55 s 17C. The first case was recently decided in the Appellate Division. See the discussion by Thompson "The Appellate Division's First Unfair Labour Practice Appeal NUM v East Rand Gold and Uranium Co (1991) 12 ILJ 1221 (A)" 1991 Industrial Law Journal (SA) 12: 1202.

It is also possible to refer the dispute to any alternative dispute resolution mechanism at any stage. Arbitration has become very popular in practice especially with regard to individual dismissals.

4.2.4.3 **Disputes of Rights - Civil**[56] **(yellow)**

These are disputes such as claims in delict for damages and other civil common-law disputes of rights (for example a claim based on a breach of contract). Such a dispute proceeds as follows:

step 1	-	the dispute originates;
steps 2 and 3	-	depending on the amount involved the dispute can go to the lower civil courts and on appeal or review to the Supreme Court or directly to the Supreme Court and thereafter on appeal to the Appellate Division.

4.2.4.4 **Disputes of rights - Criminal**[57] **(orange)**

These are disputes relating to common-law offences (for example theft and assault); the contravention of a criminal provision contained in any act (such as the LRA, the Basic Conditions of Employment Act 3 of 1983, the Machinery and Occupational Safety Act 6 of 1983); the contravention of promulgated industrial council or conciliation board agreements, or the contravention of a wage determination in terms of the Wage Act 5 of 1957. Such a dispute proceeds as follows:

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56 See inter alia Van Winsen, Eksteen & Celliers and Erasmus & Van Loggenberg.

57 See inter alia Hunt & Milton.

step 1	-	the dispute originates;
steps 2 and 3	-	depending on the seriousness of the alleged offence the dispute can go either to the lower criminal courts and on appeal to the Supreme Court or directly to the Supreme Court and thereafter on appeal to the Appellate Division.

5 CONCLUSION

The LRA is premised on pluralist assumptions about the nature and institutionalization of industrial conflict. This is evident from the all-comer freedom of association concept, the largely voluntary regulation of collective bargaining, the preference given to trade unions as a form of worker participation, the assumption of equal bargaining power in the regulation of strikes and lock-outs on a parity basis and the way in which the industrial court has predominantly developed the unfair labour practice concept. The pluralist idea is further evident from the limitation of the scope of activity of employers and employees to matters of mutual interest and the exclusion of political activities.

When the assumptions underlying the LRA are evaluated against the background of the institutionalization model developed in chapters 1 and 2 the following general shortcomings emerge: Firstly, access to central rule making is barred for the majority of workers. Secondly, the assumption that trade union activities are (and can be) limited to matters of mutual interest between employer and employee in the management-worker relationship does not correspond with (and does not address) institutionalization dynamics in practice (see figure 2). Thirdly, the mandatory extension of agreements

to those who are not participating partners inhibits the free flow of industrial power and raise problems of legitimacy. Fourthly, the assumption of equal bargaining power is a fiction which hides the fundamentally inferior bargaining power of employees in a capitalist system. (The regulation of managerial collective power receives detailed attention in chapter 5.)

When a closer look is taken at the nature and structure of disputes and institutionalization mechanisms the following conclusions can be drawn:

First, the LRA does not define the term "dispute" and it does not formally make the distinction between disputes of interest and disputes of rights. It is highly desirable that the LRA should do so in order to identify and process disputes effectively and legitimately.

Second, while the LRA does not make a clear distinction between disputes of interest and disputes of rights and does not structure settlement mechanisms with regard to the various kinds of disputes properly, disputes of rights are not clearly defined and are routed via conciliation to adjudication. This results in compulsory reallocation of scarce resources by obliging the parties to bargain again regarding allocated resources instead of providing direct access to protection of scarce resources by means of adjudication. A form of dynamic bargaining is promoted here instead of the more effective contractual model in respect of disputes of rights. Rights are furthermore too widely defined to be amenable to effective adjudication. Although the LRA does not make the distinction between disputes of interest and disputes of rights the distinction is to a large extent recognized by implication in the regulation of access to dispute settlement mechanisms and their structuring vis-à-vis one another. Disputes of interest are routed via negotiation,

supported by the ultimate implementation of industrial power, towards agreement. In general these agreements are enforceable for certain periods of time. During such periods the implementation of industrial power is prohibited (that is a contractual bargaining idea). Disputes regarding unfair labour practices (disputes of rights) are formally routed through negotiation to ultimate settlement by adjudication. Direct access to interim adjudication by the industrial court is possible but only as an additional mechanism to promote collective bargaining and settlement by agreement. Although unfair labour practice disputes can be regarded as disputes of rights, problems of polycentricity together with the wide ambit of the definition make adjudication ineffective and unacceptable because of the possible introduction of bias by outsiders to the relationship between employer and employee. It is desirable that unfair labour practices be specifically defined and that direct access to final adjudication be made possible (leaving space for voluntary informal settlement negotiations should the parties wish to do so). Unfortunately, the wide ambit of the unfair labour practice concept causes further problems because parallel and potentially conflicting jurisdiction is given to the industrial court, the labour appeal court, the ordinary courts and the Appellate Division. This can create confusion (as was illustrated in chapter 3 paragraph 6.2) and should be rectified. Direct access to adjudication (outside the LRA) for criminal and civil disputes of rights is possible.

Allowing the possible use of industrial power towards settling unfair labour practice disputes of rights is highly undesirable since the procedure involves the reallocation of scarce resources and is not in the interest of industrial peace. Unfair labour practices must be specifically defined and not be made subject to settlement by industrial power, but be routed directly towards final

settlement by adjudication as procedural disputes of rights (allowing only for voluntary informal settlement by negotiation and agreement should the parties wish to do so).

Third, the LRA makes provision for settling disputes of interest by compulsory arbitration in essential services. Although arbitration is not an effective mechanism to settle disputes of interest, its use in these circumstances is justified by the public interest. The prohibition against industrial action is usually more effective in the case of employers since they are from a practical point of view more vulnerable to legal action than large numbers of employees. Where employees in essential services take industrial action in spite of the prohibition, the law should not allow the prohibition to continue, since employers may be placed at a substantial disadvantage.

Fourth, enforcement by means of criminal sanction of contraventions of promulgated industrial council and conciliation board agreements, industrial court determinations, arbitration awards, victimization and illegal industrial action allows for illegitimate and ineffective interference by the state in the institutionalization process. The state should only be prepared to protect allocated resources (that is, to adjudicate on disputes of rights) at the request of the parties and in terms of what was agreed to between the parties. Criminal sanctions eventually take the subject-matter of a dispute of rights out of the hands of the disputing parties without allowing for the possibility of settlement negotiations. Furthermore, penalties imposed by the state usually do not correspond with market realities and do little if anything to promote industrial peace and protect the public interest because of the sheer insignificance of the penalties and the procedural

difficulties involved in prosecuting collectivities. The place of criminal sanction (if it has a place) in industrial relations is a subject which requires detailed research which cannot be undertaken in a thesis of this nature.

Fifth, when the regulation of industrial power is considered more closely it can be concluded in general that the LRA does make adequate provision for the formation of power (freedom of association), the use of power by providing collective bargaining structures and the implementation of power by restricting its use as a last resort. (The last point is discussed in detail in chapter 5.) Unfortunately the LRA potentially allows for the use of industrial power in respect of unfair labour practice disputes of rights and for the use of compulsory arbitration in respect of disputes of interest (although this may be justified in the public interest). The fact that the LRA treats strikes and lock-outs on a parity basis as part of its underlying pluralist philosophy has serious implications for the balance of power between employers and employees. This is also addressed in chapter 5.

Sixth, apart from the structural problems outlined above, the LRA allows ample room for the parties to create settlement mechanisms by means of bargaining that are appropriate to settle particular kinds of disputes.

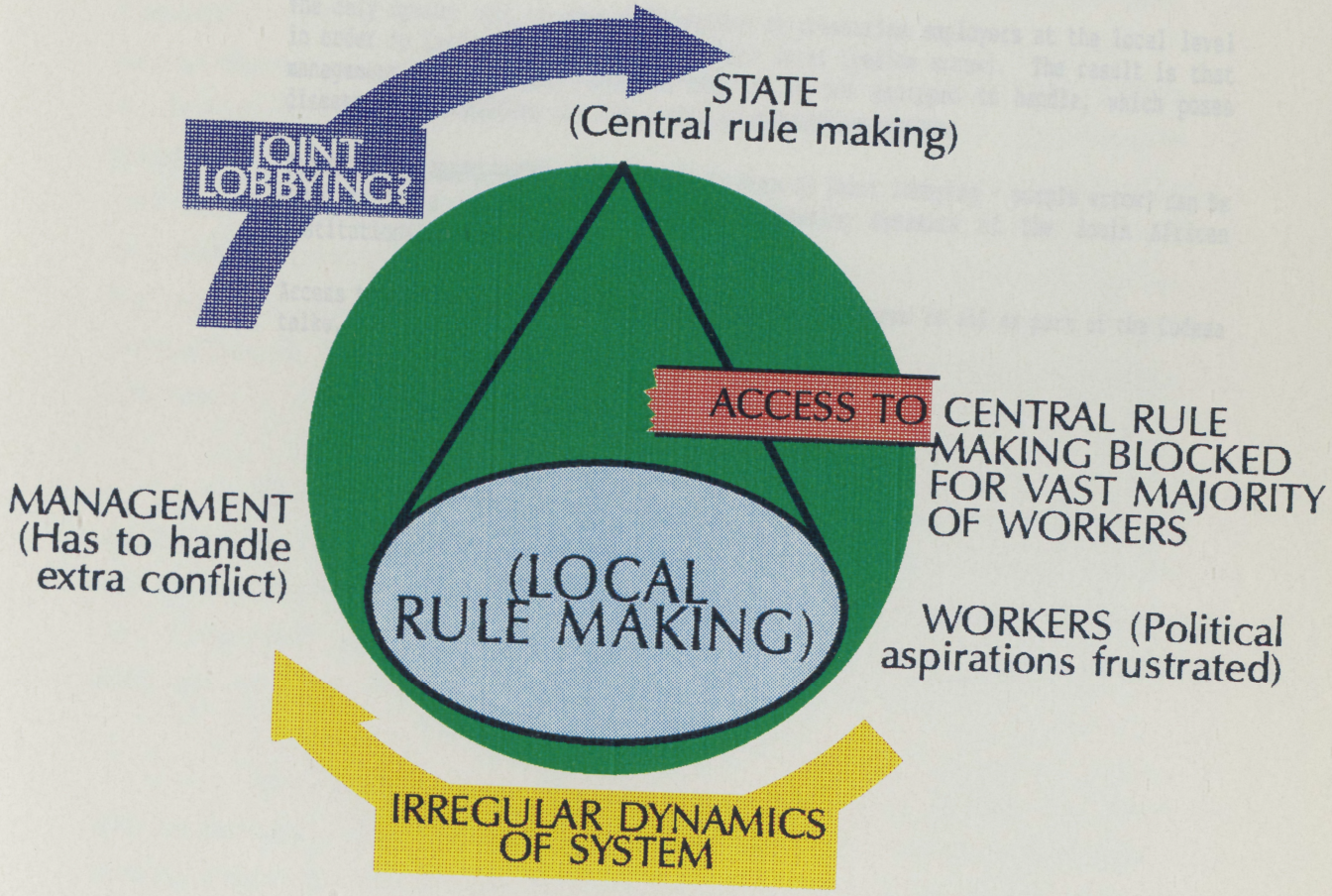
Seventh, the LRA provides loop-back possibilities (for example, after interim adjudication) to negotiation and adequate coolin-off periods before the implementation of power.

Lastly, it is possible to improve on and supplement some of the inadequacies of the LRA by means of

relationship or recognition agreements of a contractual nature.[58]

58 For some valuable comments on the possibilities of "contracting out" see Piron 18-21.

Figure 3: STRUCTURAL DYNAMICS



END NOTES

1 Figure 3 depicts the tripartist institutionalization structure between the state, management and workers discussed in chapter 1.

The blue circle represents local rulemaking (inner society) and the green circle central rulemaking (wider society).

Pluralist assumptions hold that everybody involved in the inner society are able to influence events in the wider society (ie central rulemaking).

This is not the case for the vast majority of black workers in the country (orange area). They do not have the vote and therefore have no say in legislation (central rulemaking).

The only option left to them is therefore to pressurize employers at the local level in order to influence decisions at central level (yellow arrow). The result is that management is faced with conflict that it is not equipped to handle, which poses disastrous consequences for the institutionalization system.

The SACCOLA-COSATU-NACTU negotiations (a form of joint lobbying - purple arrow) can be seen to be a result of the stilted rulemaking dynamics of the South African institutionalization system.

Access to central rulemaking will hopefully soon be opened to all as part of the Codesa talks.

CHAPTER 5

THE REGULATION OF THE LOCK-OUT IN THE LABOUR RELATIONS ACT 28 OF 1956

1 INTRODUCTION

In chapters 1 and 2 conflict and its institutionalization were analysed inter alia by means of reference to the use of own power (industrial power) in dispute of interest situations. In chapter 3 the contract of employment as a basis for the employment relationship was evaluated and the impact of the unfair labour practice on the institutionalization process was broadly outlined. Chapter 4 dealt with the nature of disputes and the structure of dispute settlement mechanisms in the South African industrial relations system. In this chapter a detailed look is taken at the regulation of the lock-out in South Africa in order to gain a perspective on the mechanics, size, objectives and structural position of managerial power in the bargaining system.

The lock-out is traditionally considered to be a mechanism at the disposal of the employer by means of which it can exercise pressure on employees to accept its demands in disputes of interest.[1] It is seen as the counterpart of strike action by employees.

The exact nature of the lock-out, when it may be implemented, the consequences of its implementation and its legal regulation in general have received less attention than strikes in most countries.

South African legislation is an exception, but more often than not discussions on the lock-out are fragmentary

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1 That is, disputes about the creation of new rules, sometimes referred to as economic disputes as opposed to legal disputes or disputes of rights (see ch 2 par 3 and the definition of lock-out in ch 2 par 4.3.1 above).

and superficial and tend to create more confusion than enlightenment.[2]

2 THE LOCK-OUT, THE LAW AND POWER

Law is a set of rules governing human conduct supported in the final instance by the power of the state. It is a form of power regulating social power. One manifestation of social power in the industrial relations context is the lock-out.[3]

Underlying the lock-out as a manifestation of employer power are a number of factors which constitute the amount of power which an employer enjoys in any given situation. These factors determine whether an employer can effectively make use of alternative labour or not. In other words, these factors determine how dependent the parties are on each other and therefore how powerful they are vis-à-vis

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2 Some of the more helpful publications are Thompson De Kock's Industrial Laws of South Africa especially ch 5 sections V, VII and X; Cameron, Cheadle & Thompson The New Labour Relations Act. The Law After the 1988 Amendments; Brassey, Cameron, Cheadle & Olivier The New Labour Law Strikes, Dismissal and the Unfair Labour Practice in South African Law especially sections B and D; Labour Law Briefs especially 1990 Labour Law Briefs 3 (7) (LLB); Moodley "The Key to Unlocking the Lock-out" 1990 Industrial Law Journal (SA) 11: 1; Le Roux "Strikes and Lock-outs - A Re-assessment" 1986 MB 8: 99; "Lock-out: To Induce or Compel" October 1989 IR Data 8 (1); "Strikes and Lock-outs" February 1984 Industrial Relations Trends 48; Shilling "Lock-outs - Their Tactical Use by Management in Dispute Situations"; Van der Merwe "Stakings en Uitsluitings Tegelykertyd" 1986 Industrial Law Journal (SA) 7: 259; Bendix Industrial Relations in South Africa; Claasen "Stakingsreg in Diensverband in Suid-Afrika"; Van Jaarsveld & Coetzee Suid Afrikaanse Arbeidsreg; Nel & Harper Seifsa Management Guidelines Lock-out; Prior "The Luck of the Lock-out: A Brief Examination of the Lock-Out Option" 1990 Industrial Law Journal (SA) 11: 460; Brand "Lock-out and Mass Dismissal" 1991 Employment Law 8 (2): 31; Trollip & Gon Power, Law and Procedure. A Contemporary Guide to Industrial Relations; Mischke "Industrial Action in German Law" 1992 Industrial Law Journal (SA) 13: 1.

There is also a host of material on strikes which is referred to when necessary, although the strike itself is not the subject under discussion. See also ch 3 n 261 above for further reference material and endnote 1 for some cases dealing with aspects of the lock-out.

3 another example is the strike. For a definition of the law as power and its functions in industrial relations see ch 2 par 1 above. See also Olivier "Uitsluitings" 1992 De Rebus 555-7; Olivier "Lock-outs" 1992 De Rebus 626-8; Campbell "Handouts for Lock-outs" 1992 Employment Law 9 (1): 6.

each other.

In a voluntarist industrial relations system the law interferes as little as possible with the quantum of industrial power, but regulates and supports its implementation procedurally as a final resort. In mandatory systems the law may play a more active part in the size of power, but its role is never definitive.[4]

Examples of factors which constitute employer power are the availability of labour, the skills of the workforce and the amount of money spent to train it, the logistics involved in finding alternative labour, the nature and vulnerability of the business with regard to stoppages in production, etc. In short, employer power is a function of its ability to cope without given incumbents in given jobs in given circumstances either temporarily or permanently and/or the ability to find and utilize alternative labour. Employer power is not capable of exact quantification ex ante, but can only be assessed in motion, that is in its implementation.[5] Employee perceptions about employer power before its implementation are therefore as important as the experience of power during its implementation with a view

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4 Aaron & Wedderburn "All regulation in this field is bound to have only limited effects. This is a general statement that can be extended to all the problems concerning the status of the individual employee in case of industrial action. The rules enacted by the legislature or laid down by the courts in each country are certainly very important for the individual worker; they are even necessary to make effective the official proclamations about the right to organise and the right to strike, but their importance should not be exaggerated in practice, and one should never forget the fundamental impotence of the law in such matters. It is beyond doubt that the best protection of the employee still lies in the strength of his union and the ratio of forces which exists between the union and the employer: for, in fact, it is the relation of power that will determine the content of the agreement which will be finally entered into by both parties at the end of the conflict, and it is this agreement that will determine in a sure and definitive way the status of the individual worker." Blanc-Jouvan Industrial Conflict. A Comparative Legal Survey. See also the discussion in ch 1 par 1; ch 2 par 5.2; ch 3 par 6 above on the role of the law in a voluntarist scenario.

5 Godsell "Industrial Relations in the 1980's: Some Conceptual Signposts" in Barling, Fullager & Bluen. See also the discussion on the nature of power and its use in ch 2 par 5 and par 4.1.2.2 above.

towards inducing employees to accept employer demands. The lock-out would be more effective as a power tool in collective bargaining if the perceptions surrounding it were of real power. It would mean that employees would be more inclined to come to terms with an employer's demand than to risk withstanding it because they know or perceive that they are more dependent on the employer than the latter is on them.

The whole process is a game. It involves an interplay of power in a situation intermixed with facts real and perceived. The ideal is to reach a compromise in the end. This process should be left to the parties to complete without interference by the law, because they best know their needs and relative strengths and weaknesses in an allocation process determined by collective bargaining.[6]

How does the law operate as a technique for the regulation of power? It is a set of rules derived from many sources such as the common law, statute, contract, collective agreements, custom and precedent. Each of these sources contributes to a larger or lesser extent to the sum total of rules which make up a particular legal position depending on the particular legal system under consideration. These rules determine dependencies and should ideally be procedural rather than substantive.[7]

In what follows the position in South Africa is considered following the accepted rules of legal

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6 This would serve the interest of industrial peace which is the purpose of most labour legislation. It would of course only be acceptable if the employees also enjoy equal power in the form of a right to strike. See also n 5 above. The issues in rule making negotiations are essentially polycentric and therefore not suitable for adjudication (see the discussion in ch 2 par 4.1 above).

7 Cheadle "The Law of Employment" in Wille and Millin's Mercantile Law of South Africa 340 et seq. See the discussion on power and its use in ch 2 par 5 and in particular par 5.2 above.

interpretation[8] as laid down by the courts. This calls first

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8 See in general Steyn Die Uitleg van Wette. Du Plessis Inleiding tot die Reg 212 214-15 postulates the basic approach of the courts as follows: "Die standaard regterlike benadering tot wetsuitleg in Suid-Afrika berus op die volgende uitgangspunte:
- wanneer 'n wetsbepaling geïnterpreteer moet word, moet die woorde en uitdrukkings wat gebruik word volgens hulle gewone, alledaagse betekenis verstaan word, en
- indien hierdie gewone betekenis duidelik en ondubbelsinnig is, kan aanvaar word dat dit meteen ook die bedoeling van die wetgewer korrek weerspieël en dat dit bygevolg die betekenis van die betrokke wetsbepaling is.

Die uitgangspunt is dus dat wetstaal eintlik maar `gewone taal' is, en dat die betekenis van wetstaal in beginsel dieselfde as the `gewone' betekenis van taal as sodanig is."
"Ten einde die gevolge van 'n té kru letterknegtige benadering enigermate te temper en erkenning te verleen aan die feit dat 'n wetsteks tog wel binne 'n eiesoortige jurisdiksie konteks betekenisdraer is, is die `goue reël' van wetsuitleg geformuleer. Volgens hierdie reël moet die wetsuitlegger aan die letterlike betekenis van die woorde van 'n wet gevolg gee, behalwe indien dit
- tot 'n absurditeit sou lei, of so nie,
- in stryd met die bedoeling van die wetgewer is."

Compare also the cases quoted by Du Plessis: Venter v R 1907 TS 910; Bhyat v Commissioner for Immigration 1932 AD 125; Volschenk v Volschenk 1946 TPA 486; Odendaalsrus Municipality v Odendaalsrus Gold General Investment and Extensions Ltd 1959 (1) SA 374 (A); Norden v Bhankie 1974 (4) SA 758 (A); Woodley v Guardian Assurance Co of SA Ltd 1976 (1) SA 758 (W); Mandela v Minister of Prisons 1981 (1) SA 531 (C); Owner of MV Aegean Sun v Caisse Generale de Perequation Aif de Prix BP 1982 (4) SA 625 (C); Van den Berg v Direkteur van Ekonomiese Sake 1983 (1) SA 106 (A); Gordon v Standard Merchant Bank Ltd 1983 (3) SA 68 (A).

Du Plessis 213 criticizes the approach of the courts: "Die grootste tekortkoming van die bedoelingsteorie as hermeneutiese teorie, is dat dit nie kan verklaar waarom woorde, sinsnedes, sinne, paragrawe ensovoorts wat nie die bedoeling van hulle onteurs tot uitdrukking bring nie, steeds betekenis het! Die bedoelingsteorie as wetsuitlegteorie word in feite nie as 'n suiwer ideëteorie nie, maar as 'n letterknegtige teorie in 'n bedoelingsgewaad toegepas." The qualification to the literal interpretation, namely that is should not give rise to absurd consequences and that it should not be in conflict with the intention of the legislator is also criticized (215): "'n Absurditeit, word gesê, regverdig afwyking van die letterlike betekenis van die woorde slegs indien dit `utterly glaring' (volstrek opvallend) is. Hoedat 'n volstrek opvallende absurditeit van enige ander absurditeit onderskei kan word, is hoegenaamd nie duidelik nie. 'n Absurditeit kan immers nie anders as volstrek opvallend wees nie, anders sou dit geen absurditeit wees nie!

Voorts word gesê dat afwyking van die letterlike betekenis van die woorde van 'n wet op grond van 'n `ander bedoeling' van die wetgewer, alleen geoorloof is indien die bedoeling van die wetgewer duidelik is. Wat die bedoeling van die wetgewer is, kan egter eers duidelik word nadat die wetsbepaling geïnterpreteer is ... en die goue reël (wat sê dat die uitlegger van die letterlike betekenis kan afwyk indien die bedoeling duidelik is) is juis 'n reël wat 'n mens met die interpretasie van die wet (en dus die vastelling van die bedoeling van die wetgewer) moet help! Die kwalifikasie verskaf dus ernstige probleme en maak van die goue reël 'n onbetroubare middel om by wetsuitleg aan te wend."

(continued...)

and foremost for a literal interpretation of the Labour Relations Act 28 of 1956 (as amended) (the LRA) which regulates the lock-out in some detail.[9] To the extent that the LRA relies on sources such as the common law and contract for its proper functioning, these as well as other accepted sources of law are considered in order to arrive at the true intention of the legislature.[10]

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[8](...continued)

See also Du Plessis "Die Teoretiese Grondslae van Wetsuitleg" in Joubert Petere Fontes: LC Steyn-Gedenkbundel; The Interpretation of Statutes; "Is alles net Taal en Woorde?" 1986 SA Public Law 266 and Cowen "The Interpretation of Statutes and the Concept of the Intention of the Legislature" 1980 THRHR 43: 392-3 (quoted by Du Plessis 213 ns 5 7 8). Whatever the problems with the approach of the courts may be, it is submitted that their point of departure, namely the word and its ordinary meaning, is the safest point of departure in order to assess what is intended by the legislature and through that what the law is in any particular situation.

9 Steyn 4 states: "Uit die aard van die saak moet die woorde van die wet die eerste en hoofbron van inligting wees aangaande die werklike inhoud van die wetgewende wil. En waar die wetgewer woorde gekies het om sy wil uit te druk teenoor sy onderdane, kan ook wel vermoed word dat hy, om 'n bepaalde betekenis weer te gee, dié woorde sal gebruik het wat vir sy onderdane daardie betekenis sal hê, anders sal sy wetgewing onverstaanbaar en futiel wees. Vandaar die vermoede dat sy woorde volgens hul gewone betekenis verstaan moet word, d.w.s. volgens die betekenis wat hul gewoonlik in die samehang waarin hul gebruik word in die mond van sy onderdane het." (See also the authorities referred to at ns 4-7.) Moodley's "teleological interpretation" to the extent that it does not take cognizance of the literal meaning of the words used in the Labour Relations Act is therefore unacceptable for as Wessels J put it in Seluka v Suskin and Salkov 1912 TPD 258 265: "[T]he true concern for construction of a statute is to find out what the legislature intended from the words it has employed. What the legislature meant to say neither the court nor anyone else can tell. As Pollock has it, the intention must be collected from what the legislator has said, not arrived at by conjectures of what the legislator might or ought to have meant." He continues at 270: "My function is jus dicere not jus facere, and if the legislature did really intend to protect rather the innocent purchaser than the owner, what jurisdiction have I to question their right to make such a law. I have only to interpret what the legislature enacts and apparently intends, and if they did not mean what they have clearly said they did mean, then it is for them to alter this law and make it quite clear what they do mean."

It is also worthwhile to remember that "if the words of an Act are clear, the court is not concerned with the propriety of the legislation or the policy of the Legislature" (Union Government v Thompson 1919 AD 404 425). See also Bunting v Minister of Justice 1963 (4) SA 531 (C) 533 and Gouws v Oranje-Vrystaatse Ongedierte Bestrydings-en Wild Beskermingsvereniging 1970 (1) SA 505 (A) 519.

10 "Casus a statuto omissus remanet in dispositione juris communis", quoted by Steyn 16 with other authorities. Important also is the presumption that "in construing the statute the existing law is not presumed to have been altered" unless the language used is clear: Innes CJ in Johannesburg Municipality v Cohen's Trustees 1909 TS 818. In the same case

(continued...)

Care is taken to state the legal position as it is and not as it is desired to be by reference to other systems of industrial relations.

3 WHAT IS A LOCK-OUT?

The Act defines a lock-out as follows:[11]

"`Lock-out' means any one or more of the following acts or omissions by a person who is or has been an employer -

(a) the exclusion by him of any body or number of persons who are or have been in his employ from any premises on or in which work provided by him is or has been performed; or

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[10](...continued)

Solomon J states: "It is a sound rule to construe a statute in conformity with the common law rather than against it except where and so far as the statute is plainly intended to alter the course of the common law."

It is often argued that modern labour law cannot rely on the common law for its proper functioning because of the outdated concepts inherent in the common law. See Brassey, Cameron, Cheadle & Olivier 2-9 for example. To some extent this is true, but it is for the legislator to decide where to deviate. Where the legislator chooses to make use of common-law concepts these have to be applied. After almost a century of labour legislation, one must credit the South African legislator with some experience in the field of labour legislation, whether that experience manifests in acceptable legislation or not. It is not the duty, as discussed above, of the interpreter of a statute to evaluate the policy behind it, or worse, to ignore it and try to read in his own.

[11] s 1(1). This definition was first introduced in 1937 in s 1 of Act 36 of 1937 and remained the same when the Industrial Conciliation Act 28 of 1956 (s 1) was introduced. Thereafter it remained unchanged even after the most recent changes to the Labour Relations Act 28 of 1956 in September 1988 and May 1991.

The Industrial Conciliation Act 10 of 1924 contained the following definition of a lock-out in s 24: "`Lock-out' means the act of an employer in causing a suspension or temporary cessation of the work of any number of his employees and done in consequence of any dispute with him in reference to any specific terms of the employees' contract of service or in order to compel his own employees or to assist other employers to compel their employees to accept specific terms or conditions of employment."

(b) the total or partial discontinuance by him of his business or of the provision of work; or

(c) the breach or termination by him of the contracts of employment of any body or number of persons in his employ;

(d) the refusal or failure by him to re-employ any body or number of persons who have been in his employ,

if the purpose of that exclusion, discontinuance, breach, termination, refusal or failure is to induce or compel any persons, who are or have been in his employ or in the employ of other persons -

(i) to agree to or comply with any demands or proposals concerning terms or conditions of employment or other matters made by him or on his behalf or by or on behalf of any other person who is or has been an employer; or

(ii) to accept any change in the terms or conditions of employment; or

(iii) to agree to the employment or the suspension or termination of the employment of any person."

From the definition it is clear that the lock-out consists of two broad elements.[12] Firstly, it consists of a

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12 Compare LLB 48 and Thompson 642D-642E. Claassen 72 lists four elements, namely "handeling", "planmatigheid", "stopsetting van loonbetaling" and "dwangmatigheidseffek". Although his categorization is not necessarily wrong, the division into acts and purposes is preferred.

wide range of acts which form the basis of the lock-out. These all have to do in one way or other with the availability of work and compensation. The ambit of the constituent acts is far wider than the traditional idea of a lock-out as merely a refusal to provide work.

Secondly, these acts have to be implemented to achieve certain specified purposes. If any of the acts is committed without the purpose of inducing or compelling agreement or acceptance of the listed ends, it does not constitute a lock-out. This second element of the lock-out limits its scope of application to a certain extent.[13]

The definition of a lock-out bears some similarity to the definition of a strike. The latter definition also provides for a series of acts which all have to do with the provision of work and availability to perform it. Similar to the lock-out these acts also have to be implemented towards the achievement of certain purposes, which are similar to those of the lock-out. The strike definition contains a third element, namely concerted activity, since only two or more employees can strike, whereas a single employer can implement a lock-out (hence the lock-out has two and not three elements).

The similarity of the definitions (especially the acts) sometimes makes it difficult to establish whether a particular act constitutes a strike or a lock-out, but it must be remembered that the demands are never the same.[14] Furthermore, it is of the utmost importance to realize that although the definitions are based on contractual principles,

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13 Section 65(1B) also makes it a criminal offence to commit any of the specific acts without a specific purpose or to assist someone in doing so.

14 The interests of the parties cannot be the same, if so no dispute will exist in any event. Compare inter alia Thompson 642D-642E and Brassey, Cheadle & Olivier 112-16. Whether a strike and lock-out can occur simultaneously will be discussed in more detail in par 4.5 below.

the normal operation of these principles is qualified[15] in order to create the power (dependencies) for the collective bargaining strategy mechanisms which strikes and lock-outs are.[16] Whereas, for example a repudiation (like a failure to work or to provide work or pay) would in ordinary contractual practice (if serious enough) constitute a breach which would enable the other party to accept the repudiation and cancel the agreement or to maintain it and claim damages, such a breach could be responded to by an opposing breach[17] since the purpose of collective bargaining is primarily to reach agreement and not to terminate the employment relationship or to claim damages. Whereas a dispute about a typical breach of contract and accompanying remedies would constitute a dispute of rights involving the application of existing rules by a third party, breach of contract is made possible in the definitions of strike and lock-out as an inducement towards reaching agreement (that is the creation of new rules) by the parties themselves in a dispute of interest situation.[18]

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15 Compare for example the indemnity provided for in s 79 of the LRA which is discussed in par 4.4 below.

16 The following statements by Van der Merwe 260 261 therefore do not take cognizance of the power dynamic underlying the regulation of strikes and lock-outs: "Onder normale omstandighede en in die verre meerderheid van gevalle is dit gewoonlik die een of die ander kontraksparty wat versuim om sy verpligting volgens die kontrak gestand te doen. Na aanleiding van die aard en erns van die versuim kan die ander kontraktant hom beroep op die aanvaarde remedies by kontrakbreuk." "Dit is bykans onmoontlik om gevalle te bedink waar dit kan gebeur dat teenoorgestelde kontrakspartye op een en dieselfde oomblik kontrakbreuk pleeg."

17 For example, employees may refuse to work coupled with a demand for a 50% wage increase. The employer's option is not only to accept their repudiation and dismiss them. He may respond by closing his business and refusing to pay coupled with a demand for a 20% increase. This counter-breach boils down to the same factual state of affairs, namely that no work is done and no compensation paid. The important difference is that not one of the parties knows how long the other is going to last and both want to reach agreement on their own terms, or put differently, to realize their own interests by exercising power. Put simplistically, the hardship endured by a particular party can be felt as a matter of fact whereas the hardship endured by the other party (and how long he is likely to endure it) is a matter of perception. The collective bargaining game and the eventual agreement (if any) is fed by an interplay of fact and perception between the parties against the background of security of employment and the provision of labour.

18 A dispute of interest involves the creation of new rules whereas a dispute of rights involves the application of existing rules. See the discussion in ch 2 par 2 above.

This does not mean that a breach of contract which forms part of a strike and a lock-out cannot be responded to in the normal way, which will result in dismissal or cancellation of the contract by the employee or employer respectively. These possibilities are, however, qualified by the unfair labour practice jurisdiction of the industrial court.[19]

From the definition and the discussion thus far, it appears that the legislator largely retained the mechanics of contract as a vehicle for the establishment and operation of rights and duties surrounding the lock-out.[20] The definition is now analysed piecemeal.

3.1 Who May Institute a Lock-out?

The definition stipulates that the acts or omissions may be implemented by a person "who is or has been an employer".

It is clear that anybody who is an employer at the time of planning a lock-out may make use of it. The term "who has been an employer" creates the impression that anybody who was an employer at any time in the past may institute a lock-out. This is clearly absurd.[21] The phrase must be read with paragraph (d) of the definition, "the refusal or failure by him to re-employ any body or number of persons who have been in his employ".

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19 Compare s 1(1) of the preamble to the previous (1988) definition of the unfair labour practice and par (o). See also Brassey, Cameron, Cheadle & Olivier section B and Landman "The Dismissal of Striking Workers: An Analysis of Industrial Court Decisions" 1986 MB 39. See also the discussion in ch 3 par 6 above which explains the position since the latest definition introduced on 1 May 1991 (essentially the same as that prior to September 1988). Guidelines in terms of the 1988 definition may still be unfair labour practices therefore the wording of this definition is also referred to.

20 By the mechanics of contract is meant breach, termination, offer, acceptance, etc. See the discussion in ch 3 par 3.2 especially par 3.2.4 above.

21 For what is an "employer" without employees?

The use of the present perfect tense, "has been" and "have been", is indicative of a state of affairs which continues to the present, but from that moment onwards is no longer to be.

In other words, if the employer decides to make use of re-employment as one of the acts upon which it wishes to base its lock-out, it would do so as part of a continuous process of exercising power to put pressure on its employees to induce them to accept its demand. Although it is no longer legally the employer, because the contract of employment is terminated, the process of inducement continues beyond the legal parameters of the relationship, since the employer in the ordinary course of events is not keen to lose its employees on whom it may, for example, have spent a lot of money for training and whom it may find difficult to replace. The power realities of the relationship continue beyond the legal parameters thereof. In other words, the facts operative in the situation make it difficult for the employer to find or make use of alternative labour despite of the legal position. Put succinctly, the dependencies continue beyond the legal parameters of the relationship.

"`Employer' means any person whomsoever who employs or provides work for any person and remunerates or expressly or tacitly undertakes to remunerate him or who subject to subsection (3) permits any person whomsoever in any manner to assist him in the carrying on or conducting of his business, and `employ' and `employment' have corresponding meanings."[22]

The identification of the contract of employment has given rise to a vast amount of litigation and academic writing regarding the hallmark of the employment

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22 s 1 of the LRA.

relationship, namely an element of subordination.[23] The phrase "permits any person whomsoever in any manner to assist him" is problematic because it seems to be wider than the relationship envisaged by the common-law contract of employment. It is submitted however that because of the hierarchical nature of the employment relationship the words "whomsoever", "any manner" and "assist"[24] suggest some kind of subordination and do not include the work done by a partner or an agent for example.

Subsection (3) provides that a labour broker is deemed to be the employer of workers he procures for a client.

The 1991 amendments changed section 2(1) as follows:

> "Section 2 of the principal Act is hereby amended -
> (a) by the substitution for subsection (1) of the following subsection:
> "(1) This Act shall, subject to the provisions of subsection (2), apply to every undertaking, industry, trade or occupation, including an undertaking, industry, trade or occupation performing work in, on or above the continental shelf referred to in section 7 of the Territorial Waters Act, 1963 (Act 87 of 1963), and in so far as the continental shelf is concerned is deemed to be part of the Republic."

Section 2(2) excludes certain people from the ambit

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23 Compare inter alia Cheadle 343-5 and the authority relied on. See also the discussion in ch 3 par 3.4 above and especially Brassey "The Nature of Employment" 1990 Industrial Law Journal (SA) 11: 889-936 and Mureinik "The Contract of Service: An Easy Test for Hard Cases" 1980 SALJ 97: 246.

24 "Assist" means help; be present and "assistant" means helper, a subordinate in a particular job according to The Concise Oxford Dictionary. See also the discussion in ch 3 par 3.5 above.

of the LRA. The definition of the lock-out and other provisions regulating the lock-out therefore do not apply to employment in farming operations, domestic service, officers of parliament, employees of the state, administrative officers of local authorities, people who work for charitable institutions who receive no remuneration and persons who teach, educate or train other persons at any university, technicon, college, school or other educational institution maintained wholly or partly from public funds.

This does not mean that a farmer, for example, may not lock-out his workers by for instance a refusal to provide work or pay or by means of a threat of termination or a refusal to re-employ. The lock-out will however be solely determined by the power position between the parties and the common law or any agreement that may be in existence between them.[25] The indemnity of section 79 will for example not be available to the farmer if his workers claim their wages for the period of the lock-out. Employees employed in the public sector usually have their own legislation governing their particular position and more often than not industrial action is prohibited.[26]

Lastly, the provisions of sections 46 and 65 of the LRA are applicable. Section 46(1) provides that for the purposes of compulsory arbitration "employer" shall mean -

"(a) any local authority: or

(b) any employer other than a local authority who within the area of a local authority provides

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25 Farmers are usually very powerful vis-à-vis their employees because of their strong economic position and the easy availability of unskilled labour.

26 See the discussion by Van Jaarsveld & Coetzee ch 14 236-249 and the legislation referred to.

light, power, water, sanitation, passenger transportation or a fire extinguishing service; or

(c) any employer to whom the provisions of this section have been applied under subsection (7); or

(d) any registered employers; organization acting on behalf of one or more of the employers referred to in paragraph (a), (b) or (c) who is a member or who are members of that organization."

Section 46(7) empowers the minister to extend the provisions of compulsory arbitration by notice in the Gazette to employers engaged in activities connected with the supply, distribution, canning or processing of perishable foodstuffs or the supply or distribution of petrol or other fuels for use by local authorities or other employers connected with the services mentioned in paragraph (b) above.

Section 65(1)(c) prohibits in absolute terms the instigation of a lock-out by employers referred to in section 46(1).

Section 65(2)(a) similarly provides that no employers' organization and no member of such an organization may take part in a lock-out by members of the organisation if the organisation is party to an industrial council the constitution of which provides that disputes which cannot be settled by the council be referred to arbitration. Since the section only refers to employers' organizations belonging to industrial councils and members of such organizations, it appears that individual employers (not belonging to organizations) who belong to industrial councils are not covered by the prohibition. It is submitted however that they

are also prohibited from instigating a lock-out since they are bound by the constitution of the council.

3.2 What Constitutes an Act for the Purposes of a Lock-out?

The first part of the definition of the lock-out stipulates a number of acts which can form the basis of the lock-out.

"Any one or more" of the "acts or omissions" may be used by the employer. In other words, the employer may exclude its workforce for some time in order to induce the employees to accept its demand and may thereafter lift the lock-out. It may also exclude them and refuse to pay them and later terminate their services and still later refuse to re-employ them[27] all as part of an attempt to induce the employees to accept its demand. The employer may start off with termination and decide not to make use of re-employment as a further leg of the lock-out at all. In short, the lock-out is a flexible mechanism which the employer can structure and time at its own discretion in order to attain maximum inducement against the background of its own real or perceived power.

Since the employer confronts its employees with a choice throughout it must take the utmost care that the choice that they have is communicated very clearly.

3.2.1 Paragraph (a)

> "[T]he exclusion by him of any body or number of persons who are or have been in his employ from any premises on or in which

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27 Problems may arise inter alia with ss 14 and 19 of the Basic Conditions of Employment Act 3 of 1983, which is discussed in par 4.4 below. At present the discussion is confined mainly to the meaning of the definition itself.

work provided by him is or has been performed".

To "exclude" means to shut out a person or thing from a place, to make impossible or to prevent the occurrence of.[28] "Exclusion" therefore simply means any action by the employer which makes it impossible to gain or effectively denies access to the premises where work is provided or performed in order not to allow work to be performed. The classic example is the locking of factory gates.

"Any body or number of persons who are or have been in his employ"[29] may be excluded. The employer is free to exclude some or all of its employees; if for example it cannot afford to bring the whole factory to a standstill the employer may exclude certain employees in an attempt to pressurize only them or by pressuring them to pressurize everybody into accepting its demands.[30] The employer must however take care not to contravene any victimization provisions in relevant acts,[31] such as section 66 of the LRA which inter alia prohibits an employer from altering the position of any employee relatively to other employees to his disadvantage[32] because the employer suspects or believes rightly or wrongly that the employee has given information

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28 The Concise Oxford Dictionary.

29 The meaning of "have been in his employ" is discussed in par 3.1 above.

30 Whether it is advisable from an industrial relations point of view to exclude selectively is a different matter, since it may easily lead to an escalation of industrial unrest especially where employees enjoy strong solidarity.

31 Compare s 18 of the Basic Conditions of Employment Act 3 of 1983, s 18 of the Machinery and Occupational Safety Act 6 of 1983 and s 25 of the Wage Act 5 of 1957. Contraventions of these provisions are criminal offences, therefore the employer may lose the immunity provided for in s 79 of the LRA.

32 The acts described in par (c) of the lock-out definition namely a breach or termination, may even provide more difficulty for the employer who locks-out selectively. Since s 66 does not mention re-employment, par (d) of the definition should not present problems if this act is implemented as the basis of the lock-out.

which he is under the LRA obliged to give, or the employee has refused or omitted to do any act which the employer may not require or permit him to do in terms of section 52,[33] or the employee belongs to or has belonged to a trade union or similar body and has participated in its formation or lawful activities outside working hours or with the consent of the employer within working hours.

"Premises" means "any land and any building or structure above or below the surface of any land and includes any vehicle, aircraft or vessel". Whether the definition includes buildings or structures below the surface of the sea, like an oil-rig, is not clear. It is submitted that it does.[34]

"Work provided by him is or has been performed".[35] "Work" means inter alia the application of mental or physical effort to a purpose; the use of energy, a task to be undertaken, the materials for this, a task occupying a specified time, a person's employment or occupation especially as a means of earning income.[36] It is submitted that "work" includes the situation where an employer for whatever reason does not have anything to do available, but the potential for work exists and its employees therefore have to be ready to work.

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33 An employer may for example not require an employee to agree to remuneration less than provided for in a binding agreement or award. Since lock-outs may only be applied where there are no such agreements or awards dealing with the subject-matter of the lock-out in force, legal lock-outs (that is, those that comply with s 65 of the LRA) will not encounter problems with the provisions of s 52 (see s 65(1)(a)). Lock-outs that are illegal because they do not comply with s 65(1)(a) will constitute criminal offences under both s 52 and s 66.

34 s 1 of the LRA. It is now clear that it does in terms of the 1991 amendments to s 2(1). See the discussion in par 3.1 above.

35 "has been performed", see in n 29 above.

36 The Concise Oxford Dictionary.

3.2.2 Paragraph (b)

"[T]he total or partial discontinuance by him of his business or of the provision of work".

"Total"[37] means whole, complete, including all and "partial"[38] means relating to a part only, not total or entire. "Discontinuance"[39] means to cease to continue, to put an end to, to leave off, to stop or to be separated.

"Business"[40] means amongst other things employment, trade, profession, a task or errand, dealings, commercial activity or a commercial or industrial concern.

"Work"[41] has many meanings but the following are appropriate: effort directed to an end, employment, that on which one works, anything made or done, to make efforts to achieve or attain anything or to be occupied in business or labour.

From the wide range of meanings possible for the words used in the definition it is clear that the employer has a very wide discretion as to how it wishes to implement a lock-out on the basis of a discontinuance of business or the provision of work.

It is not clear from the definition whether the discontinuance can be permanent or only temporary. The purpose

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37 Chambers Twentieth Century Dictionary. See also The Concise Oxford Dictionary for a similar meaning.

38 Chambers Twentieth Century Dictionary, The Concise Oxford Dictionary.

39 Chambers Twentieth Century Dictionary, The Concise Oxford Dictionary.

40 Chambers Twentieth Century Dictionary, The Concise Oxford Dictionary adds "a thing or things needing to be dealt with", "saying and selling", etc.

41 Chambers Twentieth Century Dictionary, The Concise Oxford Dictionary.

of the action is to induce or compel workers to accept employer demands. Once it has achieved its purpose or the lock-out is lifted for some other reason one would expect that the business or provision of work would continue again unless it is no longer possible or desirable from an operational point of view. Where the latter is the case and the employees' job security, in the sense that jobs are no longer available, is affected and retrenchment has to take place, the usual retrenchment procedures will have to be followed.[42]

3.2.3 Paragraph (c)

> "[T]he breach or termination by him of the contracts of employment of any body or number of persons in his employ".

Breach of contract can take a number of forms.[43] These are not discussed in detail, but simply referred to in order to enhance a perspective on the possibilities available to the employer should it wish to base a lock-out on a breach of contract.

The first form of breach discussed by De Wet & Van Wyk is mora debitoris:[44]

> "Met mora debitoris of versuim van die skuldenaar het mens te doen wanneer die skuldenaar talm met die nakoming van sy verpligting. As selfstandige vorm van kontrakbreuk kan dit slegs bestaan waar

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42 For a discussion of these, see Cheadle in Brassey, Cameron, Cheadle & Olivier section E 280 et seq.

43 See De Wet & Van Wyk Kontraktereg en Handelsreg. See also Lubbe & Murray Farlam and Hathaway: Contract Cases Materials and Commentary; Kerr The Principles of the Law of Contract; Joubert General Principles of the Law of Contract.

44 De Wet & van Wyk 142-152 in general and specifically 142.

prestasie in weerwil van die versuim nog moontlik is."

In terms of the definition an employer is therefore free to delay payment of wages or to provide work in an attempt to induce its employee to accept its demands. In the ordinary course of events this entitles the employees to their usual contractual remedies depending on the seriousness of the delay. Section 79 of the LRA however indemnifies the employer against civil claims for damages as long as its breach does not constitute a criminal offence. Section 19 of the Basic Conditions of Employment Act[45] (which is supported by a criminal sanction) prohibits the employer from doing any act or permiting any act to be done "as a direct or indirect result of which an employee is deprived of the benefit or of any portion of the benefit of any remuneration so payable or paid".[46] An employer shall also "not later than the day agreed upon between him and an employee for the payment of the employee's wage, pay such employee his wage in the prescribed manner".[47]

In the light of these provisions, mora debitoris as a basis for the lock-out could be doubtful. There are however more convincing counter-arguments which are addressed below.[48]

Repudiation is the next form of breach discussed by De Wet & Van Wyk:[49]

"Die grondslag van die leerstuk is dat die

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45 3 of 1983.

46 s 19(1)(b).

47 s 19(2).

48 See par 4.4 below. See particularly n 200.

49 De Wet & Van Wyk 152-156 in general and specifically 152.

> kontraksparty, wat op ondubbelsinnige wyse te kenne gee dat hy hom aan die afspraak nie gaan hou nie, daardeur die verwagting wek dat die doel, wat met die ooreenkoms beoog is, in ieder geval, wat hom betref, nie bewerkstellig gaan word nie, en dat die ander hom derhalwe op sy woord mag neem, uit die kontrak mag terugtree en die repudieerder vir skadevergoeding aanspreeklik mag hou."

Some of the examples given by De Wet & Van Wyk[50] are, "weiering om prestasie te ontvang en daarvoor te betaal, ongeregverdigde poging tot terugtrede uit die ooreenkoms, kennisgewing deur een van die partye dat hy nie kan presteer nie, aanbod van onvoldoende of gebrekkige prestasie as volle prestasie, onvoldoende kennisgewing van opsegging by 'n ooreenkoms met deurlopende verpligtings" (like the contract of employment). It is clear that the employer can utilize repudiation in any of the above forms as a means of inducement. The employees will have their usual contractual remedies, subject to the indemnification of section 79 of the LRA.[51] In particular, the employees can in some cases where the breach by the employer is serious enough cancel the agreement. A good example is where the employer dismisses an employee unlawfully as was the case in NTE Ltd v SACWU & others (1990) 11 ILJ 43 (N). The dismissal was in fact a breach by repudiation since the purported termination did not comply with the common law or the provisions of the Basic Conditions of Employment Act 3 of 1983. Such a breach is a sufficient basis for the lock-out, but not a final termination unless accepted by the employees.

The employees have a choice whether to accept the repudiation and cancel the contract of employment. They are not able to claim damages because of the immunity provided

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50 De Wet & Van Wyk 154.

51 See however the comments with regard to mora debitoris and compare n 48 above.

against civil claims by section 79 of the LRA.

Somewhat ironically, just as an employer has to be fair in acceptance of the repudiation which a collective refusal to work constitutes in a legal strike situation (that is dismissal for legal strike action) the employees have to be fair in a mass resignation. Resignation, like dismissal, is covered by the unfair labour practice jurisdiction of the industrial court and, since it does not constitute a civil claim for the purpose of section 79, the immunity in that section, as in the case of dismissals, is not applicable. This remedy amounts to a cancellation of the contract of employment and not a civil claim for damages or specific performance.

Making it impossible[52] for the other party to perform is also a form of breach of contract. To constitute a breach of contract impossibility must be attributable to the guilty conduct of the party responsible for the breach.[53] An obvious example of this form of breach as a basis for the lock-out is a refusal to allow employees to work. If the employer continues to pay wages it should not have problems with claims for damages in general. Where employees work on a commission basis and are therefore not able to earn their commission, section 79 is designed to provide the necessary indemnity against civil claims for damages.[54] This should also be the case where additional interests such as publicity or the maintenance of skills are at stake.[55]

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52 "Onmoontlikmaking van die prestasie" as discussed by De Wet & Van Wyk 156-61.

53 De Wet & Van Wyk 156.

54 Compare however ns 48 and 51 above.

55 such as where a singer or a choir is prevented from performing on the opening night or a trapeze artist is excluded from a circus tour. This also includes claims for specific performance where these can be brought timeously.

Inadequate performance[56] is also a form of breach:

> "Positiewe wanprestasie kan, na dit my voorkom, twee verskyningsvorms aanneem, t.w. hy presteer wel maar lewer 'n onbehoorlike of gebrekkige prestasie, ... of die skuldenaar doen iets wat hy kragtens die ooreenkoms nie mag doen nie, bv. hy handel 'n stryd met 'n obligatio non faciendi ...."

As a means of establishing power for the lock-out this seems to be a less desirable basis. Failure to pay some remuneration, for example, will provide less of an inducement than failure to pay anything at all.[57] It is hard to conceive of a way in which an employer will make use of an obligatio non faciendi as part of a lock-out except, perhaps, to employ other employees to do the work in the meantime.

A last form of breach of contract discussed by De Wet & Van Wyk is mora creditoris:

> "Mora creditoris of versuim van die skuldeiser is kontrakbreuk deur iemand in sy hoedanigheid as skuldeiser."

A good example relevant to employment contracts is failure by an employer to allow an employee to work.

In a lock-out an employer can commit breach of contract as debtor and as creditor:

> "By wederkerige of sinallagmatiese kontrakte kan dit natuurlik gebeur dat 'n kontraksparty hom tegelyk as skuldenaar en as skuldeiser aan kontrakbreuk skuldig maak."

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56 "Positiewe wanprestasie": De Wet & Van Wyk 161-3 specifically 161.

57 See also ns 48 51 and 54 above.

An example is where an employer refuses employees access to work and refuses to pay them in spite of the fact that they have tendered their services.[58]

Termination of the contract of employment of any body or number of persons in the employ of an employer can also form the basis of a lock-out. What is meant by "termination"?[59] In common law[60] the most typical ways of bringing a contract of employment to an end are summary dismissal for anything amounting to a serious breach of contract, such as theft, assault or bad faith, and termination, which is the giving of an agreed or reasonable period of notice of termination by the one party to the other. The employer may make payment in lieu of notice.

A significant difference between dismissal and termination, from an employer's point of view, is that in the case of a dismissal it reacts to something done by the employee, whereas in the case of termination it takes the initiative. Dismissal is the worst form of punishment for bad conduct (that is, the loss of the job itself) whereas termination is not intended to be punishment. It is an initiative which an employer takes because an employee is not capable of doing a job properly or because the operational circumstances of the employer are such that it is no longer desirable or possible to keep the employee in his job.

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58 See n 57 above. See also the phrase "any one or more of the following acts or omissions" discussed in par 3.2 above.

59 "Diensbeëindiging" can take on many forms, as discussed by Van Jaarsveld & Coetzee ch 7 121-8, for example by agreement between the parties such as where they agree during the contract that it is to terminate, or when they enter into the contract they may agree that it will terminate after the affluxion of a fixed period or the performance of a specific task. Termination can also take place by the giving of reasonable notice or payment in lieu of notice. Impossibility of performance, such as the death of the employer (where services are rendered to the employer personally), death of the employee and insolvency of the employer (sequestration) terminates the contract of employment. The parties can also include a resolutive condition in their contract.

60 See the distinction made by Riekert Basic Employment Law chs 7-8 62 et seq. See also the discussion in ch 2 par 4.3.2 and ch 3 par 6 above on dismissal and termination.

The distinction between dismissal and termination was also made in the 1988 definition of the unfair labour practice concept.[61]

On interpretation of the definition of a lock-out[62] it is clear that dismissal (except as a form of repudiation) is not capable of forming an act as a foundation for the lock-out, firstly because of its reactive nature and secondly for the simple reason that it is not mentioned as one of the possible acts.[63]

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61 Section 1(1)(a) made dismissal "by reason of any disciplinary action against one or more employees" an unfair labour practice. Section 1(1)(b) reads as follows:

"(b) the termination of the employment of an employee on grounds other than disciplinary action, unless -

(i) such termination of employment takes place during the first six months of such employee's employment with a particular employer or during such period as may have been agreed upon; and in accordance with any applicable agreement, wage regulating measure or contract of service; or

(ii) (aa) prior notice of such termination of employment in accordance with any applicable agreement, wage regulating measure or contract of service, has been given either to the employee, or if such employee is represented by a trade union or body which is recognised by the employer as representing the employees or any group of them, to such trade union, body or group; and

(bb) prior consultation in regard to such termination of employment took place with either such employee or where the employee is represented by a trade union or body recognised by the employer as representing the employees or any group of them with such trade union, body or group; and

(cc) such termination of employment takes place in compliance with the terms of an agreement or contract of service, regulating the termination of employment of the employee whose employment is terminated; and

(dd) such termination of employment takes place in a case where the number of employees in the employment of an employer is to be reduced, according to reasonable criteria with regard to the selection of such employees, including, but not limited to, the ability, capacity, productivity and conduct of those employees and the operational requirements and needs of the undertaking, industry, trade or occupation of the employer."

62 See the definition quoted in par 3 above.

63 See Cameron, Cheadle & Thompson 87: "Lock-outs are a form of economic pressure in the collective bargaining context; they are not the penalty for blameworthy conduct on the

(continued...)

Termination is one of the acts mentioned. Should termination comply with the requirements of termination as stipulated by the industrial court under its unfair labour practice jurisdiction (and stipulated in the 1988 version of the definition)? The answer seems to be "no" for three reasons. Firstly, the legislator could not possibly have intended a collective bargaining strategy mechanism with its element of surprise to comply with requirements such as prior notice and prior consultation and compliance with the provisions of agreements or contracts of service, and the application of reasonable criteria such as ability, capacity and productivity.[64] Secondly, the legislator (in the 1988 version of the unfair labour practice concept) made it quite clear that the termination contemplated only applied to situations where "such termination of employment takes place in a case where the number of employees in the employment of an employer is to be reduced, according to reasonable criteria with regard to the selection of such employees".[65]

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[63](...continued)
part of the employees". Dismissal as a form of breach by repudiation is however possible as discussed under repudiation as a form of breach for the purposes of the lock-out above. See also n 49 above.

[64] This is exactly why the indemnity in s 79 makes provision for breaches of contract and statutory duties as well as for certain delicts to be committed in the furtherance of a legal lock-out. The idea is to enhance power in a situation of structured collective self-help towards agreement. The process is not one of consultation, but is aimed at reaching agreement by the application of collective power. One can argue that the indemnity in s 79 also covers breach of a statutory duty to act fairly if termination for the purposes of the lock-out is regarded as the same as for the purposes of the unfair labour practice concept and that power in case of legal lock-outs is therefore not curbed. This argument is however not necessary since it is quite clear that "termination" is not the same for the purposes of the two definitions. See also Brand 31: "The first issue was whether the dismissals were justiciable as ULP's - Some mass dismissals are not; if their object is to secure compliance with a demand, they will amount to a lock-out, and lock-outs are expressly excluded from the ambit of the ULP definition."

[65] Note the use of the word "and" between pars (aa), (bb), (cc) and (dd) which narrows the wide phrase "on grounds other than disciplinary action" in the preamble down to a specific situation. Cameron, Cheadle & Thompson 119-129 regard the definition as covering termination for "incompetence" and "incapacity" as well as for "retrenchments". Trollip 86 believes that termination for the purposes of a lock-out is "a peculiar and specific statutory form of termination" (other than the one mentioned in the unfair labour practice definition).

A lock-out is never intended to reduce the number of employees, but rather to "induce and compel any persons who are or have been" in employment to agree to certain demands (and to stay in employment).[66] No criteria are stipulated for the termination of contracts of employment of "any body or number of persons" in the definition of lock-out. It is therefore abundantly clear that "termination" for the purposes of the lock-out is not the same as "termination" for the purposes of the unfair labour practice definition. Thirdly, the present definition of lock-out has remained unchanged since 1937, well before the introduction of the unfair labour practice concept in 1979 and the latest versions thereof in 1988 and 1991.[67]

Cameron, Cheadle & Thompson regard termination as termination by notice or pay in lieu of notice as contemplated by the common law (as qualified by section 14 of the Basic Conditions of Employment Act 3 of 1983).[68]

On a proper interpretation of the LRA it is correct to assume that the legislator intended to deviate as little as possible from the common law[69] and that termination for the purposes of interpreting the lock-out definition should be regarded as termination with notice or pay in lieu of notice.

This interpretation makes no difference to the flexibility of a legal lock-out as a meaningful collective

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66 See the definition of lock-out.

67 See n 11 above.

68 Cameron, Cheadle & Thompson 86-7. This seems to be the generally accepted view. Compare LLB 47; NTE Ltd v SACWU & others (1990) (11) ILJ 43 (N) 46; Millin in De Beer v Walker NO 1947 (4) SA 654 (T) 660; Ngubane v NTE Ltd (1991) 12 ILJ 138 (IC); NUMSA v Eveready SA (Pty) Ltd (1990) 11 ILJ 338 (IC); FAWU v Middevrystaatse Suiwel Koöperasie Bpk (1990) 11 ILJ 776 (IC); CWIU v Indian Ocean Fertilizer (1991) 12 ILJ 822 (IC). See also NTE Ltd v Ngubane & others (1992) 13 ILJ 910 (LAC).

69 See Steyn 102-6.

bargaining mechanism in view of the indemnity provided in section 79. This was what the legislator intended the position to be in the 1937 Industrial Conciliation Act[70] as well as the 1956 version[71] and all subsequent amendments including the latest amendments in 1988 and 1991.[72]

Cameron, Cheadle & Thompson[73] however point out that because the Basic Conditions of Employment Act 3 of 1983 is supported by a criminal sanction termination of employment, unless it complies with section 14[74] of that Act, is not protected by section 79 of the LRA since the indemnity in the latter section does not cover criminal offences. On a superficial interpretation of the two Acts as they stand this view appears to be correct, but can with respect, not be accepted as the true intention of the legislator.

Section 14(5)(a) stipulates that the provisions of section 14 do not apply to termination "without notice for any cause recognised by law as sufficient". Cameron, Cheadle & Thompson[75] argue that this provision refers to summary dismissal at common law as a result of a fundamental breach of contract. The question is, however, why the legislator chose the word "termination" and not "dismissal"? Surely it means some other kind of termination, such as termination for impossibility of performance or in terms of an agreement

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70 Act 36 of 1937 ss 1 and 79.

71 Act 28 of 1956 ss 1 and 79.

72 Although the wording of s 79 has changed somewhat, the intention of the legislator remains the same. See also LLB 52.

73 Cameron, Cheadle & Thompson 86-8. See also Campbell 6.

74 Section 25 provides for offences and penalties. Section 14 inter alia provides for certain notice periods (14(1)(a)-(b)), that notice must be in writing and at certain stipulated times (14(2)), and that the employer must pay during the notice period (14(3)).

75 Cameron, Cheadle & Thompson 87.

between the parties[76] or as provided for in legislation other than the Basic Conditions of Employment Act, such as in the definition of lock-out in the LRA? On the basis of the rule of interpretation inclusio unius est exclusio alterius termination is what is contemplated and not dismissal.[77]

Further support for the argument against the view of Cameron, Cheadle & Thompson is to be found in the rule of interpretation that the legislator does not wish to derogate from prior legislation.[78] Because the Basic Conditions of Employment Act is a younger piece of legislation than the LRA[79] and especially because the Basic Conditions of Employment Act itself makes provision for cases where it may be in conflict with the LRA,[80] one must accept that where the Basic Conditions of Employment Act is in conflict with the clear intention of the LRA the latter should prevail.[81]

Employers who wish to ensure that they will not be hampered in the institution of a lock-out by the Basic Conditions of Employment Act can apply to the minister for

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76 See n 59 above.

77 Steyn 52.

78 Steyn 159-60.

79 of 1983 as opposed to 1956 and even before.

80 In s 1(3): "The Mines and Works Act 1956 (Act 27 of 1956), The labour Relations Act, 1956 (Act 28 of 1956), the Wage Act, 1957 (Act 5 of 1957), and the Manpower Training Act, 1981 (Act 56 of 1981), or any matter regulated thereunder in respect of an employee, shall not be affected by this Act, but this Act shall apply in respect of any such employee in so far as a provision thereof provides for any matter which is not regulated by or under any of the said Acts in respect of such employee." Stipulations in promulgated industrial council agreements are not covered by s 1(3) and may present problems to employers.

81 For a similar view see LLB 51-2 and Prior 465. This view is preferred because adherence to the Basic Conditions of Employment Act would make nonsense of the clear intention of the legislator when constructing the lock-out in the LRA. (Compare for example s 14(2)(b)(ii) and (iii) of the Basic Conditions of Employment Act which requires inter alia that notice may only be given at certain stipulated times and that notice may not be given concurrently with ordinary, sick or military leave. The legislator could not have intended that lock-outs may not take place at such times. See also the discussion in par 4.4 in general and particularly n 200 below.

an exemption from the relevant provisions under section 34 of that Act. They can also try to obtain a certificate of nolle prosequi from the attorney general.[82]

Wage determinations and promulgated industrial council agreements often contain similar provisions to those in the Basic Conditions of Employment Act and should be kept in mind, since these wage regulating measures are also supported by criminal sanction.[83]

Trollip[84] argues that the LRA creates through the lock-out "a peculiar and specific statutory form of termination". This is with respect not correct in view of the above arguments, but would, if it were correct, have made the position much simpler.[85]

Is termination as part of a lock-out permanent? In other words, does the employee lose his job permanently?

Moodley[86] contends, in line with the Sentrachem decision, that there is a distinction between the termination of a contract and the termination of employment. The

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82 Such a certificate will safeguard the employer against criminal prosecution but whether it will on its on validate the indemnity provided in s 79 is doubtful. It is submitted that it will, since the employer's action will not constitute a criminal offence unless this is proved. Certain categories of employees are not covered by the Basic Conditions of Employment Act (see Exemption annexed to that Act).

83 Exemptions from wage determinations are possible under s 19 of the Wage Act 5 of 1957 and exemptions from promulgated industrial council agreements are governed by s 51 of the LRA especially if the employer can show that the conditions of employment in his enterprise are not substantially less onerous. In this regard and also for the purposes of exemption under the Basic Conditions of Employment Act the employer can guarantee that his conditions will not be less onerous. The idea is after all to get rid of the criminal sanction not the substance of the provisions.

84 Trollip 86.

85 See inter alia Cameron, Cheadle & Thompson 86-8: LLB 47 and Moodley 6 for different approaches.

86 Moodley 6. See SACWU & others V Sentrachem Ltd (1988) 9 ILJ ch 3 par 4.5.

employment relationship continues despite the termination of the contract. He applies this distinction to the lock-out and argues:[87]

> "For a lock-out to remain a lock-out the employer's action must be to achieve one of the purposes contained in the definition. This conclusively demonstrates that a lock-out cannot result in a permanent severing of the employment relationship. To terminate the relationship permanently for the purposes of pressurizing employees to accept a change in the terms of the relationship is an absurdity. Once the employee is no longer able to resume employment on the employer's terms the lock-out is over."

He continues:[88]

> "That the definition envisages the continuity of the relationship, notwithstanding the termination of the contract, is shown by the consistent use of the phrase `persons who are or have been employed' throughout the definitions of strike and lock-out. Since the relationship endures despite the termination of the contract, the proper interpretation of the phrase `termination of the contract' implies a suspension of the contract during the strike."

The term "employment relationship" is not a term of art in the sense that it is given a specific meaning by a definition in the LRA or that it is one of the recognized

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87 Moodley 6.

88 Moodley 8.

sources of rights and duties in South African law.[89] Where the term is used in the LRA it is merely used descriptively.

Moodley is guilty of conceptual jurisprudence[90] by arguing firstly that an employment relationship exists independent from contract and then deriving rights and duties from it, such as his notion of suspension of the contract during a strike or a lock-out.

Where the legislator makes use of existing legal concepts they have their ordinary accepted meanings unless the legislator specifically alters those meanings. Where the term "termination" is therefore used it means the bringing to an end of the contractual relationship between the parties by means of notice or pay in lieu of notice.[91] No legal

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89 See par 2 and n 7 above. See also the discussion in cha 3 par 4.5 above.

90 That is the practice of creating a concept and then deriving legal consequences from it. For a similar mistake see Prior 462 who contends that the employment relationship exists on two levels, "namely the contractual and the wider relationship that may persist after a formal termination". The only legal entity, source or mechanism regulating the position between the employer and his employees is contract and nothing else (since the unfair labour practice jurisdiction is not applicable) and a source of rights and duties called the "employment relationship" does not exist. See De Kock Ngubane & Others v NTE Ltd (1991) 12 ILJ 138 (IC) 146: "The employment relationship is a relationship which arises and subsists solely by virtue of the contract of employment. It ceases to exist when that contract is terminated. Rights and duties which arose out of the contract and thus the employment relationship and which accrued while the contract was extant would continue after termination but that is something entirely different to this vague `continuing employment relationship' to which reference is made.

Those who contend that an employment relationship continues after the contract has been terminated have never discussed, even in general terms, how, where or why this continuing relationship commences, what rights and duties flow from the relationship (one cannot conceive of a relationship which grants to one party rights only) nor when, why and under what circumstances it would end. Is this not due to the fact that the so-called continuing relationship does not, in fact or in law, exist?"

For another example of "those who contend that an employment relationship continues" without explaining how, see Brand 32: "It is the fixation with contract that creates the problem. If the relationship is seen as decisive, the problem goes away." This line of argument amounts to nothing more than wishful thinking.

91 See discussion by Cameron, Cheadle & Thompson 86-7 and n 68 above. See also NTE Ltd v SACWU & others (1990) 11 ILJ 43 (N) 46 and De Beer v Walker NO 1947 (4) SA 654 (T) 660. See also n 200 below.

relationship for the purposes of the LRA continues beyond contract.

Of great importance however is the fact that the power realities between the parties continue. The employer is perhaps loathe to lose its well trained employees in a market where such people are hard to come by. It may therefore give notice of termination but offer re-employment in the hope of keeping them. If they agree to its demands before the notice of termination expires or accept re-employment on its terms the contract of employment is novated, if they do not the employer must either decide to agree to employee demands or try to find alternative labour on a permanent basis that would suit his pocket. In other words, in spite of the termination of contract, the dependencies of the parties may continue.

The legal mechanics of termination and re-employment are those of contract, that is notice or pay in lieu of notice and offer and acceptance. The factual dynamics are those of power.[92] It is power that continues beyond contract and which can descriptively be termed the employment relationship: "Hopefully our courts will understand that industrial relations are a power, and not a legal dynamic."[93] This statement is valuable, as long as it is remembered that industrial relations as a power dynamic is also dependent on the law as an additional source of power.[94]

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92 Hence the use of the term "are or have been" in par (a) of definition of the lock-out. Note however that par (c), which deals with termination, contains the phrase "in his employ" which means that while the contracts are not terminated the employees are still employed and par (d), dealing with re-employment, which contains the phrase "have been in his employ" meaning that the legal relationship is over and that no other legal nexus remains. The fact that the legal nexus has gone does not necessarily mean that the employer no longer wants its employees. It uses the job opportunity itself as a means of inducing the employees to accept a contractual relationship on new terms.

93 Trollip 85.

94 Law is a technique for the regulation of social power (see ch 2 par 1 above).

The important point is that an employer's ability to threaten with and to effect termination on a permanent basis is a form of real employer power supported by the law for the purpose of effective inducement. The risk of permanent loss of jobs in the threat to terminate employment is therefore not absurd, but is necessary to create (and use) power on a real as well as a perceived basis.[95]

The fact that there is no continuing relationship does not mean that the employer can utilize the lock-out as a guise for dismissal or retrenchment. It is only a lock-out if the purpose of the termination "is to induce or compel any persons ... to agree to or comply ... or to accept ... or to agree ...".[96]

Inherent in the construction of the lock-out is the idea of choice. This is consistent with the main purpose of collective bargaining, namely to reach agreement. If employees choose not to accept the employer's demands within the time stipulated for termination, the termination is effected and it is permanent.[97] This in turn is in line with

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95 Trollip 86 agrees: "[A]n interpretation favouring the efficancy of a lock-out dismissal even after the termination of a lock-out is consonant with the `pressure' which lock-outs and strikes are meant to exert upon the parties. ... [I]nasmuch as it is sometimes argued that the right to strike is meaningless unless it entails the right not to be dismissed, I believe that it can be argued that the right to lock-out is meaningless unless it entails the right to dismiss in such a way that the dismissal remains effective."

96 See the definition of lock-out.

97 Trollip 87 agrees although he sees termination as a specific statutory creation. What in effect happens is that the employer (under the protection of s 79) offers the employees a choice: If they do not accept the employer's demands they indicate that they are more powerful, in other words, that they are capable of finding alternatives and that they are not dependent on the employer. Agreement is in effect tacitly (or expressly) reached that they will no longer be employed. Olivier 627-8 states: "Although it is sometimes alleged that a lock-out dismissal will be regarded as final if the employer's offer has not been accepted when the lock-out is terminated, it is doubtful whether the provisions of the LRA support such a contention."

Olivier does not elaborate on the provisions of the LRA. In view of the arguments advanced above it is submitted that he is wrong. What Olivier and cases such as NUMSA

(continued...)

the idea of competition and choice central to a free enterprise economy.

Whilst the lock-out is in motion the employer is bound to take back every employee who chooses to continue his employment on the terms and conditions demanded.[98]

The following serves as an example of a lock-out based on termination. Company X demands that its employees accept Y conditions of employment. The employees refuse. All the legal procedural requirements are met.[99] Now the company can institute a lock-out along the following lines (on say the first of the month): "Unless you accept Y conditions of employment by noon on the third of the month, your employment will be terminated."

Everybody who accepts Y conditions of employment

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[97](...continued)
v Eveready SA (Pty) Ltd (1990) 11 ILJ 338 (IC) (which he quotes in support of his argument that the unfair labour practice is applicable) fail to grasp is the fact that the lock-out consists of two elements - an act (eg termination) and a purpose (eg to accept changes in conditions of employment) and that as long as both elements are present one is dealing with a lock-out as defined which is excluded from the definition of the unfair labour practice concept (1991). The justification for termination is not conduct, capacity or operational requirements (as discussed in ch 2 par 5.3.2 above) but the choice which the employees have either to work for the employer in terms of the conditions demanded or to allow their employment to terminate permanently. From a power perspective (because the lock-out is a power mechanism) the employees actually indicate that they are not dependent enough on the employer to be induced/compelled to accept the terms demanded and that they are capable of finding suitable alternatives elsewhere in the labour market. This means that the employer is not powerful enough to induce/compel them to accept its demands. If the employer cannot afford to lose its employees it can continue the lock-out by means of an offer of re-employment on the terms demanded. If this fails the lock-out fails and the employer will have to change its offer in order to keep its employees. If the employer can afford to lose its employees, the termination is final and it can start looking for alternative labour in the market (without necessarily extending the lock-out by means of an offer of re-employment to all or some of its ex-employees). It is also interesting to note that re-employment is not one of the acts mentioned for the purposes of victimization in s 66 of the LRA with the result that the employer will be able to discriminate on the basis of trade union activities and still enjoy the immunity of s 79 of the LRA whilst being excluded from the unfair labour practice jurisdiction.

98 See also Trollip 87 for a similar view.

99 When a lock-out can be implemented is discussed in par 4 below.

before noon on the third must be taken back. If at noon on the third day some employees are still unwilling to accept, the employer can terminate without notice[100] or if it feels less powerful it can terminate by giving notice or offer re-employment on its terms and conditions before a certain time. The time-limits are within the discretion of the employer[101] to be determined against the background of the real or perceived power situation.

A question to consider under this heading is whether the employer can terminate selectively as part of a lock-out. The definition makes provision for the termination of contracts of employment of "any body or number of persons in his employ". This means that the employer has a choice as to whom it wishes to lock-out in order to achieve the best effects with as little cost to itself as possible as long as it heeds the provisions of section 66 and does not terminate for trade union activities or for safety information given to an inspector or any of the other protected activities under this section.[102]

Lastly, a problem may arise in the mining industry where termination (and cessation of operations) is used as the basis for the lock-out. In terms of sections 164 and 165 of the Mining Rights Act 20 of 1967 it is necessary to inform

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100 Since his breach is protected by the indemnity in s 79.

101 Herein partly lies the flexibility of the lock-out as a collective bargaining strategy mechanism.

102 It may be argued that selective termination as part of a lock-out is an unfair labour practice in terms of the 1988 definition. This question is addressed in par 4.2 below. For the purposes of this discussion it is submitted that the indemnity in s 79 also covered the statutory duty to act fairly in cases of legal lock-outs (prior to 1 May 1991). The 1991 definition makes it abundantly clear that strikes and lock-outs are excluded from the ambit of the unfair labour practice jurisdiction (see ch 3 par 6 above). The 1988 as well as the 1991 definitions are discussed here because it is argued that civil claims in respect of unfair strikes and lock-outs (in terms of 1988 definition) were also covered under the s 79 indemnity. See also the comments in n 97 above regarding selective re-employment as part of a lock-out and the fact that S 66 is not applicable and therefore the application of the indemnity in s 79. See also n 103 below.

the minister of any intended action. In terms of section 164 three months' notice of termination of employment must be given to the minister where five hundred or more employees are "discharged" or where 20% of the workforce is "discharged" in one month. It is submitted that these provisions do not affect the proper operation of the lock-out, if they did they would totally deprive the mechanism of any element of surprise.

3.2.4 Paragraph (d)

> "[T]he refusal or failure by him to re-employ any body or number of persons who have been in his employ".

The refusal to re-employ as part of a lock-out must be aimed at inducing or compelling employees "to agree or comply with", "to accept" or "to agree to" any of the purposes mentioned as part of the lock-out.

The employer is free to choose the time-limit for re-employment and those it offers it to, but everybody who is offered re-employment and accepts the employer's demands within the period stipulated for re-employment must be given back his employment since the purpose of the lock-out is to reach agreement.[103]

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103 The phrase "any body or number or persons who have been in his employ" means that the employer can offer re-employment on a selective basis to those employees it is not keen to lose and can refuse or fail to offer re-employment to others who it can replace. (Since selective re-employment is not prohibited in s 66 the employer will not lose its indemnity in terms of s 79.) The employer would then only induce or compel the employees to whom it offers re-employment by refusing to re-employ them unless they accept re-employment on its terms and conditions. Those who it does not offer to re-employ have lost their jobs permanently. The reason why they lose their jobs and not the others is because they are more dispensable or in a less powerful position vis-à-vis their employer (ie the employer is less dependent on them). Of critical importance is the fact that the power game is played on both real and perceived levels. Employees who perceive that they are indispensable, but are in fact not, lose the power contest. See the discussion in ch 2 par 5 above. In practice it would be wise to offer re-employment to everybody, or else the employer may experience detrimental industrial relations perception problems amongst

(continued...)

Peculiarly, section 66 of the LRA does not make re-employment one of the forbidden acts for the purposes of victimization as a criminal offence. The offence therefore does not have any application in a re-employment situation whether as part of a lock-out or otherwise.

3.3 What Constitutes a Purpose for the Lock-out?

A lock-out consists of two elements: an act and a purpose. Without a purpose being stipulated in the definition of the lock-out the series of acts discussed in the previous paragraph would be nothing more than exercises in the law of contract with traditional common-law contractual implications.

The lock-out is a power mechanism to be utilized strategically in the collective bargaining process. As such it is designed to achieve the ultimate purpose of collective bargaining, namely consensus. In other words, the acts discussed above are merely contractual mechanisms designed to exert pressure towards consensus, hence the words "induce or compel".

The acts may not be utilized to exert pressure willy-nilly, but only with regard to certain specific purposes. These purposes are preceded by the use of the phrases "to agree to", to "comply with" and "to accept" all indicating an absence of consensus at the time of implementation of the act. In other words, the lock-out is designed to achieve consensus, that is, to create rules and as such it is designed to settle disputes of interest.

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[103](...continued)
the workforce.

As will be seen below it is argued here, contrary to some commentators and in some instances even the industrial court, that the indemnity in s 79 also covered the statutory duty to act fairly (for the purposes of the 1988 definition). See par 4.2 below.

The second part of the definition of the lock-out is now discussed in detail.

> "[I]f the purpose of that exclusion, discontinuance, breach, termination, refusal or failure is to induce or compel any persons, who are or have been in his employ or in the employ of other persons ...."

The acts listed, namely, "exclusion", "discontinuance", "breach", "termination", "refusal" and "failure" are a summary of the acts elaborated on in the first part of the definition. They are all actions with contractual implications regarding the availability of work and payment for work in that they all relate to the job (labour and remuneration) which is the point of focus of the lock-out (similar to a strike). Both strikes and lock-outs are concerned with the content of the job and the candidate for the job. They are reciprocal pressure mechanisms designed to create the content of the abstraction "job" on acceptable terms and also to determine the candidate for the job.

The exact outcome of the bargaining process (that is the terms of consensus reached) depends on the interchange between potential and real strikes and lock-outs. The result of bargaining is the conditions pertaining to the job and the candidate for the job and is a function of power. Power in this context is the ability, real or perceived, to utilize the acts in both the definitions of strike and lock-out towards fixing an acceptable content and candidate for the job in a particular market. The amount of power an employer has is a function of how dependent it is on the goals (that is, the labour and price of labour) the employee mediates and the extent to which the employer is able to cultivate alternative sources of labour at an acceptable price according to Emerson's principles discussed in chapter 2.

The content of the job and the candidate for the job

cannot be fixed until consensus is reached, in other words, before rules are created which determine the content and nature of the job and its incumbent.

Cameron, Cheadle & Thompson[104] quote the following extracts with approval:

> "A lock-out is not the employer equivalent of a strike ... the reciprocal employer lever is really the management prerogative to maintain or to change the terms and conditions which the employer would pay its employees who want to work in its operations. If the law is to be fair ... it must accompany any ban on strikes with an added alternative by which the union and its members may challenge that basic management prerogative of capital."[105]

> "[T]he ability of management to institute changes unilaterally is perhaps the employers' real equivalent of the employees' strike. Certainly a resort to industrial action would be an obvious response of the employees to unilateral management changes that are unwelcome .... The introduction of status quo clauses can be seen as the acquisition by the employees of some real consideration for the "no strike - no lock-out" clause, which on its own is rather one-sided."[106]

Unilateral action by the employer will only determine the content and candidate for the job if the employees in the undertaking are powerless in the sense that

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104 Cameron, Cheadle & Thompson 31.

105 Weiler Reconcilable Differences - New Directions in Canadian Labour Law 67.

106 Davies & Freedland Labour Law 132-3.

they are not prepared to take industrial action.[107] If they do not take industrial action it can be argued for the purpose of consensus and the creation of rules on that basis that they simply accepted the new conditions either explicitly (if they said so) or tacitly.

Unilateral action is actually a breach of contract by repudiation. An acceptance of the new state of affairs by the employees constitutes a novation of the contract of employment. A lock-out achieves the same purpose, using inter alia exactly the same mechanisms. One could say that unilateral action by the employer is akin to the lock-out and as such, as Cameron, Cheadle & Thompson argue, it is a counter-action for strike action.[108] But, the lock-out is a much wider concept than unilateral action because it allows for its successful furtherance acts other than unilateral changes in conditions of employment to achieve consensus and new rules with regard to the nature and incumbents of jobs.

Consensus alone (except in cases where a form of adjudication such as arbitration is prescribed for example in essential services) brings an end to disputes regarding the creation of new rules, that is disputes of interest. If consensus is explicitly or tacitly reached by unilateral action by of the employer merely because employees are powerless or unwilling to disapprove, then unilateral action may be seen as one of the counters to strike action, but certainly not the only one.

In South Africa, unilateral action may in any event only be taken once bargaining has reached deadlock (according to Cameron, Cheadle & Thompson) which is also the time when

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107 Cameron, Cheadle & Thompson 33 seem to agree. They are however wrong in citing retrenchment as an example since the need for retrenchment is induced by operational dictates outside the control of the employer and is conceptually different to a competitive, bargaining process.

108 Cameron, Cheadle & Thompson 30-5.

a lock-out may be implemented. Both a lock-out and unilateral implementation may only be implemented once bargaining has reached impasse.[109] The only difference between the lock-out and unilateral implementation is therefore that the latter may achieve consensus without complying with any procedural requirements other than bargaining to impasse (where the workforce is powerless).

This certainly does not mean that it and not the lock-out is the true counter to a strike. On the contrary, whilst unilateral action may resemble the lock-out in certain cases it is the latter that is the true employer counter to strike action in South Africa.

Unilateral implementation is merely the repudiation of old conditions of employment and the introduction of new conditions without resistance from the workforce (if it is successful), whereas a lock-out can be based on a series of acts including repudiation towards the achievement of a number of specified purposes. Unlike unilateral implementation one of these purposes relates to "the employment or the suspension or termination of the employment

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109 See inter alia Cameron, Cheadle & Thompson 32-3 and their conclusion after a rather circular argument on 34: "When exactly is deadlock reached? In respect of the statutory procedures, the Act again furnishes the answer: at the point where the employer is entitled to lock-out and the employees are entitled to strike over the issue, assuming the parties have had an opportunity to bargain and that the employer has bargained in good faith. A unilateral act, it has been suggested above, is the equivalent of industrial action and so it would be legitimate when the latter action is legitimate."

For the procedural requirements of the Act, see par 4.3 below. Heller "Unilateral Action in a Concession Bargaining Context" 1984 Labour Law Journal (35): 747 761 states: "We know the fundamentals of the `good-faith-impasse - unilateral action' chain. We know that an employer must bargain with an honest objective of making an agreement (good faith) and must do so until neither party is willing to move from its position (impasse). Only having fulfilled these two prerequisites is a unilateral change permitted." Heller 748-9 emphasizes the fact that consensus has to be reached and that failure to do so is inconsistent with American national labour policy.

Employers should also be very careful not to make themselves guilty of bad faith bargaining when they deal directly with employees. See NUM v East Rand Gold & Uranium Co Ltd (1991) 12 ILJ 1221 (A) and Thompson "The Appellate Division's First Unfair Labour Practice Appeal" (1991) ILJ 12: 1202.

of any person" (that is the incumbent in the job also) and not only its content.[110]

The words "induce or compel" signify the effect that the action taken is designed to have on employees. "Induce" inter alia means to prevail on or to cause or persuade and "inducement" means persuasion.[111] "Compel" has a somewhat stronger meaning. It means to drive or urge on forcibly, to oblige or to force or bring about by force amongst other things.[112]

Both these terms connote an attempt to overcome the will of the other party by the use of economic power towards reaching agreement.[113] If the workforce refuses to accept the new conditions imposed by unilateral implementation the dispute continues since no agreement is reached. With a lock-out additional pressure, refusal to allow work, failure to pay, termination and failure to re-employ, can be applied until agreement is compelled. It is therefore abundantly clear that unilateral implementation of wages is not the true counter to strike action contemplated by the South African legislator.

The other party (to the employer) would be "any

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110 par (iii) of the definition of lock-out. Cameron, Cheadle & Thompson 69 n 4 are therefore wrong in saying that "it is (management's) ability unilaterally to implement decisions regarding the workplace that constitutes the proper equivalent to the union's strike weapon".

111 Chambers Twentieth Century Dictionary, The Concise Oxford Dictionary.

112 Chambers Twentieth Century Dictionary, The Concise Oxford Dictionary.

113 "When all negotiating procedures are exhausted and attempts at conciliation have failed what next? As the bargaining environment toughens and the possibility of settlement recedes employers have increasingly turned to the use of economic pressure to persuade workers to accept their demands. By refusing to provide work and consequently withholding pay from his workers the employer seeks to induce or compel them to agree to his terms.... By locking out a workforce the employer essentially breaches or terminates their contract of employment until they comply with his demands." "Lock-Out: To Induce or Compel" October 1989 IR Data 8 (1): 1.

persons, who are or have been in his employ or in the employ of other persons". The lock-out can therefore firstly, be utilized to compel or induce the employer's own employees. The mention of any persons "who have been in his employ" simply refers to a "refusal or failure" by the employer to "re-employ any body or number of persons who have been in his employ" contemplated in paragraph (d) of the definition as a basis (or act) for structuring the lock-out. It does not refer to people who were his employees some time in the past but to people who have been his employees up to the time of the lock-out.

"The employ of other persons" refers to the possibility of embarking on sympathy lock-outs to assist other employers to reach agreement with their workforces.[114]

The employer may only induce or compel with regard to three specific purposes.

3.3.1 Paragraph (i)

> "[T]o agree or comply with any demands or proposals concerning terms or conditions of employment or other matters made by him or on his behalf or by or

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114 Paragraph (1) of the unfair labour practice definition (1988 amendments) prohibited any strike, lock-out or stoppage of work, if the employer was not directly involved in the dispute which gave rise to the strike, lock-out or stoppage of work". This formulation was not very clear for it referred to employer involvement only and not as could be expected, employee involvement as well. It is submitted however that there were cases where the employer would be allowed to lock-out in sympathy such as where an established employer bargaining forum was endangered by a union's insistence that a particular member of the employer's association bargained elsewhere such as at plant instead of centralized level or vice versa. As will be argued in par 4.2 below a legal lock-out (in terms of the 1988 definition) was also protected where it was a breach of the duty to act fairly against civil actions as contemplated by s 79. This included actions in the industrial court since it was vested with jurisdiction to determine unfair labour practice applications which were civil actions. (See par 4.4 below for the effects of s 79.) With the changes to the unfair labour practice definition on 1 May 1991, it is clear that legal strikes and lock-outs can never be unfair labour practices. This includes, it is submitted, sympathy industrial action. (See n 117 below.)

on behalf of any other person who is or has been an employer".

"Comply with" has a similar meaning to "agree". It means to yield to the wishes of another and to agree or consent to or to act in accordance with.[115] "To agree or comply with" suggests an absence of consensus, in other words an attempt to establish a rule in a dispute of interest.

"Demands or proposals concerning terms or conditions of employment or other matters" stipulates the subject-matter of the bargaining process for which the lock-out may be utilized. Consistency demands that these should be the same as those regulated in section 24 which deals with matters that may be dealt with in collective agreements. In general it would mean anything of "mutual interest" between employer and employee.[116] It is clear that the subject-matter also includes anything of mutual interest between another employer and its employees.[117]

3.3.2 Paragraph (ii)

"[T]o accept any change in the terms or conditions of employment".

This phrase is quite clear and has the same scope with regard to subject-matter as is contemplated in section 24 discussed above, that is, anything of "mutual interest" between employer and employee. Again it is clear that a

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115 Chambers Twentieth Century Dictionary.

116 Section 24(1) ends with the words "... or as to any matter whatsoever of mutual interest to employers and employees, the scope of this provision not being limited in any way by the mention in this sub-section of particular matters". See also the discussion in ch 4 par 4.2.4.1 above.

117 from the words "by or on behalf of any other person who is or has been an employer". Note the comments with regard to sympathy industrial action in n 114 above.

dispute of interest situation is envisaged by the use of the words "to accept". The purpose is to create new rules by means of agreement.

3.3.3 Paragraph (iii)

> "[T]o agree to the employment or the suspension or termination of the employment of any person".

"To agree to" again indicates a search for consensus in a dispute of interest situation.

It is not entirely clear why an employer would try to reach agreement with its employees with regard to the "employment" of any person, since the employer is free to employ whomsoever it chooses as long as it does not discriminate. A possible scenario is where the employees object to the employment of any person and the employer wishes to induce or compel them to accept such a person by the use of economic power (reactively) and not simply by relying on its rights in law. This could be the case especially where employees try to induce/compel an employer to employ a particular person by means of a strike.

The "suspension or termination of the employment of any person" is similarly unclear. It could simply mean that the employer may use the lock-out to induce or compel employees to accept a suspension or termination which the employer has resorted to and which the employees feel unhappy about. It would then be used rather in reaction to employee pressure than as an initiative on the part of the employer since the employer has the right to terminate services subject to compliance with certain legal requirements.

If the employer, for example, terminates services in accordance with the law, this involves the application of

existing rules. If the legality of the termination is in issue this would be a dispute of rights suitable for adjudication. If, regardless of the legality of the termination, the employees simply want the employee whose services were terminated back or the employer regardless of the legalities wants to terminate the services of an employee this involves a dispute of interest between the employer and the workforce. The important point is that where the consensus of the workforce or the employer is sought with regard to a particular action it involves a dispute of interest which, it is submitted, is what is probably envisaged in this paragraph.

In terms of the 1988 amendments, a lock-out in respect of the legality or fairness of a suspension or termination as provided in the unfair labour practice concept was only possible if both parties agreed that the dispute would not be referred to the industrial court and they did not agree on arbitration or mediation or failed to settle it otherwise by agreement.[118]

The 1991 amendments now provide in section 46(9) that any party "may" refer the dispute to the industrial court, which seems to suggest that industrial action in respect of an unfair labour practice is now possible (without consensus not to refer it to the court). It is submitted that this is not in line with the overall design of the LRA, not desirable in practice and not in the public interest or the interest of industrial peace.

As discussed in paragraph 3.2 above the word "termination" for the purposes of an act under paragraph (c) of the definition of lock-out means common-law termination, that is, termination by notice or pay in lieu of notice. One

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118 See s 46(9)(a), (b) and (d) of the LRA and the discussion in par 4.3 below. See also the discussion in ch 4 par 4.2.4.2 and n 53 above.

must assume that the meaning remains consistent in paragraph (iii) which means that the purpose should be a common-law suspension or termination of employment of any person. "Any person" presumably means somebody other than the "persons" to be induced or compelled and it means one as opposed to a number of persons. Using the common-law meaning of the word "termination" does not cast much more light on the uncertainty of the purpose mentioned in paragraph (iii), except that if it is something other than the suspension and termination contemplated in the unfair labour practice concept (1988 amendments) industrial action with regard to it was not hampered by the peremptory referral to the industrial court under section 46(9).[119] In terms of the 1991 amendments it is clear that common-law termination is contemplated since strikes and lock-outs are specifically excluded from the ambit of the definition.

4 LOCK-OUTS, LEGALITY AND FAIRNESS

In paragraph 3 the definition of lock-out was analysed in some detail. It is now necessary to investigate the effect of implementing a lock-out on the common-law contract of employment and how the Labour Relations Act and the unfair labour practice concept qualify the position. Other legislation, like the Basic Conditions of Employment Act 3 of 1983, is also considered and finally a number of cases in both the industrial court and the Supreme Court are reviewed.

It is not possible to compartmentalize the discussion neatly into the above categories since the total

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119 Note the use of the peremptory "shall" in s 46(9)(b)(i) and (ii) and (c) (in the 1988 version). It is submitted that the suspension and termination contemplated here are something other than those described in the unfair labour practice concept. (See n 118 above and the discussion in par 3.2 in respect of "termination"). See also the submission with regard to how the 1991 amendments should be interpreted.

legal position is made up from all the above and other sources of rights and duties.

4.1 Lock-outs and the Common-law Contract of Employment

From the discussion of the definition of lock-out it is clear that the legislator made use of the mechanics of contract to structure the power for the strategy mechanism which the lock-out is designed to be in the collective bargaining process.

The ordinary principles of the law of contract are not qualified in the definition itself and, save for legislative inroads such as section 79 which is discussed below, these principles remain intact.[120]

In general these principles are as discussed by De Wet & Van Wyk, Van Jaarsveld & Coetzee, Riekert, Norman-Scoble and other writers and need not be repeated here.[121]

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120 For a discussion of s 79, see par 4.4 below. Moodley 10-17 is therefore wrong to argue that the lock-out suspends the contract and specifically (at 16) that there are major differences with respect to the conceptual approach to lock-outs between South Africa and Britain. Whilst the approach in South Africa is not exclusively contractual, contractual principles and dynamics are still largely relied on as a basis for the operation of the lock-out as regulated in the LRA. It would be correct to say that whilst legal recognition of the lock-out is given in the LRA, it is done largely in terms of contractual principles. This is also evident from the following statement by Booysen NTE Ltd v SACWU & others (1990) 11 ILJ 43 (N) 46D: "The effect of s 65 of the Labour Relations Act 28 of 1956, when read with the definition of lock-out in s 1(1) of that Act, is to prohibit strikes and lock-outs in certain circumstances by constituting them criminal offences. Section 65 does not convert a strike or a lock-out which would at common law constitute a breach of contract into something other than a breach of contract which does not have the normal consequences of a breach of contract." (See also Ngubane & others v NTE Ltd (1991) 11 ILJ 138.

121 See references in n 2 above. Claassen 77-81 discusses the consequences of a lock-out and agrees: "Die Suid-Afrikaanse wetgewer, net soos sy Engelse eweknie, gee, m.i. korrek geen groter beskerming aan enige van die partye by 'n nywerheidsdispuut waar een van hulle tot 'n uitsluiting of staking oorgaan nie. In Suid-Afrika sal die gevolge volgens algemene regsbeginsels beslis moet word."

Since he wrote his thesis some legislative changes have taken place which are discussed below. His approach (79) to the consequences of the lock-out is also too narrow: "'n

(continued...)

4.2 Lock-outs and the Unfair Labour Practice Concept

Both the 1988 amendments and the 1991 amendments are referred to in order to gain a perspective of the fundamental design of the LRA and the impact of the concept of fairness on power. Strikes and lock-outs were excluded from the definition of the unfair labour practice concept in force prior to the 1988 amendments.[122] The preamble was worded as follows:

> "Any labour practice or any change in any labour practice, other than a strike or lock-out, which has or may have the effect that ...."

The definition introduced by the 1988 amendments made illegal strikes and lock-outs specific unfair labour practices.[123] It also made certain legal strikes and lock-outs unfair labour practices.[124]

It seemed to be generally accepted, in addition, that legal strikes and lock-outs other than those specifically rendered unfair labour practices could also be

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121 (...continued)

Uitsluitingshandeling is nie een van die erkende wyses wat 'n diensverhouding beëindig nie. Vir my is 'n uitsluitingshandeling in feitelike sin, 'n verskynsel van onmoontlikmaking van prestasie en wel gedeeltelike onmoontlikmaking."

The point is that the lock-out can firstly be based on termination which is a final form of terminating the employment relationship and secondly on other grounds than causing impossibility to perform such as other forms of breach, for example repudiation and other grounds such as failure to re-re-employ. (See the discussion in par 3.2 above.)

122 Some debate took place whether both legal and illegal strikes and lock-outs were excluded, but the consensus opiniorum seemed to be that it only excluded legal strikes and lock-outs. The definition introduced in the 1991 amendments reverted back to the pre-September 1988 formulation (see ch 3 par 6 above).

123 Paragraph (n) which made any strike or lock-out in contravention of s 65 an unfair labour practice.

124 Paragraph (l) prohibited sympathy strikes and lock-outs and par (m) made repeat strikes and lock-outs unfair labour practices.

unfair labour practices in appropriate circumstances since the definition was wide enough to empower the industrial court to make findings with regard to fairness concerning industrial action, whether legal or illegal, in general.[125]

The recommendations of the National Manpower Commission[126] in the SACCOLA-COSATU-NACTU[127] agreement proposed one of two possibilities: to retain the 1988 definition with the exclusion of strikes and lock-outs or to revert to the previous definition from which strikes and lock-outs were excluded. The subsequent legislation which came into effect on 1 May 1991 reverted to the pre-September 1988 position (which excluded strikes and lock-outs from the definition of the unfair labour practice concept).

It is highly desirable that the industrial court should not interfere in the bargaining process; therefore legal strikes and lock-outs should be excluded from the definition of the unfair labour practice.[128]

The position of the lock-out in the previous definition (the one introduced in September 1988) is now briefly considered. This is considered necessary because unfair labour practices in terms of the 1988 amendments can

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125 Prior 460 states that the September 1988 amendments "brought strikes and lock-outs firmly within the jurisdiction of the unfair labour practice", without any motivation. Cameron, Cheadle & Thompson 71 88, also without motivation, states the following "However, strikes and lock-outs have for the first time been included in the definition of an unfair labour practice, so that the court is now empowered to deal directly with the phenomenon of industrial action." "The amended definition affords to the industrial court the power to scrutinise almost all forms of industrial action and hence the question of the fairness of that action will be brought into sharp relief in future." The industrial court itself was not slow in grabbing the opportunity to interfere in legal industrial action by interdicting legal lock-outs in HRWU v Karos Hotels (1990) 11 ILJ 182 (IC) and HRWU and others v Southern Sun Hotel Corporation & another (1990) 11 ILJ 198 (IC).

126 Gazette 12591 dated 29 June 1990 (NMC Recommendations).

127 Gazette 12491 dated 23 May 1990 (SACCOLA Recommendations).

128 For similar views see inter alia LLB 50-1, Cameron, Cheadle & Thompson 88 and 1989 I R Data 8 (1): 1.

still be unfair labour practices. It is also discussed in order to gain a perspective on the consistency in the institutionalization design of the South African legislator.

> "`Unfair labour practice' means any act or omission which in an unfair manner infringes or impairs the labour relations between an employer and employee and shall include the following...."

This introductory part is certainly wide enough to include strikes and lock-outs, especially because it does not exclude strikes and lock-outs specifically.

The definition thereafter stipulates certain specific types of strikes and lock-outs which are regarded to be unfair, namely those in contravention of section 65,[129] sympathy strikes and lock-outs[130] and repeat strikes and lock-outs.[131]

By including only these one can assume that other strikes and lock-outs are excluded on the basis of the rule of interpretation inclusio unius est exclusio alterius.[132] This would certainly emphasize the underlying pluralist philosophy of the LRA and the fact that courts are in general not allowed to interfere with orderly collective bargaining. Such an interpretation also ties in well with the approach of the legislator in the previous definition of unfair labour practice and the way in which both the National Manpower Commission and the SACCOLA Recommendations intended to deal

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129 par (n).

130 par (l).

131 par (m). This does not include intermittent lock-outs. See Cameron, Cheadle & Thompson 92.

132 See Steyn 52 211 and the authority relied on. One can certainly argue that the legislator, by including certain examples of industrial action that are not acceptable, intended to exclude other forms of industrial action.

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with it in future. (It is moreover in line with the purpose behind the 1991 amendments.)

If this interpretation is correct then the omnibus clause at the end of the definition does not present a problem for it is introduced by the words, "any other labour practice or change in any labour practice", meaning practices other than those specifically dealt with in paragraphs (a) to (n).[133]

Other specific unfair labour practices that may resemble actions which can form part of a lock-out are dismissal and termination. Dismissal is not dealt with in the definition of a lock-out and the termination contemplated as one of the acts for the purposes of the lock-out is common-law termination.[134] "Unfair unilateral suspension of an employee or employees"[135] and the "unfair amendment of terms of employment",[136] although arguably breaches of contract, are not coupled with a purpose and are therefore something other than a lock-out (consisting of an act and a purpose) which is excluded from the definition of the unfair labour practice (except for the specific examples discussed above).

Paragraph (k), which makes it an unfair labour

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133 and presumably not in the same class. In other words, examples of the class strikes and lock-outs are dealt with, therefore the omnibus clause refers to other "classes" of actions and not to other actions in the same class. See Administrator Cape Province v Ruyteplaats Estates (Pty) Ltd 1952 (1) SA 541 (A) 555, where the judge referring to the inclusio unius est exclusio alterius rule states: "Moreover, when it is applicable, it is in cases where the specific inclusion of matters of a particular class indicates an intention to exclude matters of the same class ...."

134 See the discussion under par 3.2.3 above.

135 par (c).

136 par(d).

practice not to comply with an agreement,[137] may be applicable where a lock-out is implemented contrary to the provisions of a peace clause in for example an industrial council agreement or a recognition agreement.

One could argue further as is done below[138] that the duty to act fairly in terms of the unfair labour practice concept is a statutory duty, that legal proceedings in terms of the unfair labour practice concept constitute civil legal proceedings and that the immunity granted in terms of section 79 is therefore also applicable to actions on the basis of the unfair labour practice concept. This makes sense since, for example, a failure to work or to provide work and pay, typical of a strike or lock-out respectively, would always be unfair. If the immunity therefore does not include actions in terms of the unfair labour practice definition (especially in view of the fact that the payment of compensation can also be ordered by the industrial court)[139] it would be worth nothing and the industrial court would be free to interfere in the collective bargaining process at will.

If the argument above is correct that the unfair labour practice definition (1988 version) only covers the strikes and lock-outs specifically mentioned[140] and not other legal strikes and lock-outs, then the immunity would only find application with regard to sympathy and repeat strikes

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137 "Agreement" is defined as follows in s 1 of the LRA: "`Agreement' means an agreement entered into or deemed to have been entered into by parties to an industrial council or conciliation board under this Act: Provided that for the purposes of the unfair labour practice, it shall include any agreement enforceable in terms of this Act and entered into between an employer and a trade union or any group of employers in the employment of such employer."

138 In par 4.4 see also ns 141-144 below.

139 in terms of s 46(9)(c).

140 under par (l) and (m).

strikes and lock-outs.[141]

If the position, however, is that the preamble and paragraph (o) of the definition of the unfair labour practice cover all forms of legal industrial action then the immunity would also cover such unfair labour practices and only exclude industrial action in contravention of section 65.[142]

On the whole therefore it appears that the unfair labour practice jurisdiction of the industrial court did not impact on legal lock-outs[143] even in terms of the 1988 definition of the unfair labour practice concept.[144] It is now clear in terms of the new definition of the unfair labour practice concept (1991) that all strikes and lock-outs are excluded and that section 17(11)(a) interdicts may only be sought in respect of illegal strikes and lock-outs (that is, those in contravention of section 65) and unfair labour practices. Section 43 applications may still only be brought on the basis of an unfair labour practice (which of course excludes strikes and lock-outs).

In short, in terms of both the 1988 and 1991 amendments legal strikes and lock-outs were excluded from the unfair labour practice jurisdiction of the industrial court

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141 In other words, sympathy and repeat strikes and lock-outs, which would constitute a breach of the statutory duty to act fairly, would be immune against civil proceedings in any court including the industrial court. This might not have been the intention of the legislator, but it was up to it to correct the formulation of s 79 if the immunity was not to cover sympathy and repeat strikes.

142 In other words, the industrial court (or any other civil court) may not interfere with any legal industrial action.

143 that is, those lock-outs that complied with s 65 of the LRA.

144 In spite of views to the contrary and the fact that the industrial court has appropriated the right to interfere (see n 125 above). Only where an otherwise legal lock-out takes place in contravention of an agreement would it constitute an unfair labour practice and even then the immunity in s 79 would seem to cover it unless of course such an agreement is supported by a criminal sanction such as a promulgated industrial council agreement. Section 79 does not apply to actions in furtherance of a lock-out which are criminal offences. For the text of the 1991 definition see ch 3 par 6 above.

and therefore the power position remained as regulated by common law (and qualified by section 79).

4.3 Lock-outs and Procedure

The LRA contains a number of provisions dealing with procedural aspects of the lock-out, conditions that have to be met before the lock-out can be considered to be legal.

Most important of these are firstly, the definition of lock-out which was discussed in paragraph 3 above. Secondly, section 65 contains various preconditions that have to be satisfied before a lock-out is legal. (Paragraph (n) of the previous definition of unfair labour practice also rendered strikes and lock-outs which did not comply with section 65 specific unfair labour practices.) Section 65 is supported by a criminal sanction.[145] The provisions contained therein do not change the position in contract[146] and although criminal prosecution for illegal lock-outs rarely if ever occurs, contraventions of section 65 serve as a basis for interdicts in both the industrial court and the ordinary courts.[147] Compliance with section 65 is also one of the prerequisites for the immunity provided for in section 79(1) of the LRA.

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145 s 65(3).

146 R v Smit 1955 (1) SA 239 (C) 241H-242A: "At Common Law an employer clearly has the right to dismiss a servant who refuses to carry out his contractual obligation to work. Mr Gordon was unable to point to, and I have been unable to find, any provision in Act 36 of 1937 which `legalises' strike in the sense that it authorises an employee to break his contract of employment by participating in a strike. All that the Act has done is to declare that striking in certain circumstances constitutes a criminal offence (See sec. 65). If those circumstances are not present then no criminal offence is committed, and in that limited sense the strike is `legal'. It does not however follow that an employer is deprived of his Common Law right to dismiss an employee who refuses to work." See also NTE Ltd v SACWU & others (1990) 11 ILJ 43 (N) quoted in n 120 above. Mass resignation in a legal lock-out situation like mass dismissal in a legal strike situation may however constitute an unfair labour practice. See the discussion in par 3.2.3 above. See also Van Jaarsveld & Coetzee 267.

147 See inter alia LLB 50 and s 17(11)(a).

What then are the requirements for a legal lock-out in terms of section 65?[148] Firstly, there is an absolute prohibition against lock-outs where -

(a) there is a binding industrial council or conciliation board agreement,[149] arbitration award[150] or determination[151] dealing with the matter in dispute;

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148 For a general discussion see inter alia Van Jaarsveld & Coetzee 263-5; Nel & Harper and LLB 50. It is clear that both strikes and lock-outs are subject to the same restraints on a parity basis.

149 s 65(1)(a). "Agreement" is defined in s 1 of the LRA and means an industrial council or conciliation board agreement. For the purposes of the unfair labour practice only (1988), it can be some other agreement, for example a recognition agreement or a substantive agreement entered into outside the above forums. It is submitted that the contravention of a recognition agreement can still be an unfair labour practice under the 1991 definition.

150 s 65(1)(a). "Award" is defined in s 1 of the LRA to mean an award in terms of s 45 (voluntary arbitration), s 46 (compulsory arbitration) and s 49 (which deals with the effect of arbitration awards).

151 s 65(1)(a). "Determination" in terms of s 1 of the LRA means a determination made under s 46, 76 or 77, as the case may be. Determinations under s 46 are determinations by the industrial court of unfair labour practices (s 46(9)). This is a clear indication that any unfair labour practice dispute once determined by the industrial court cannot form the subject-matter of a lock-out (or a strike). Furthermore, in view of the peremptory provisions of s 46(9)(b)(i) and (ii) and (c) in the 1988 amendments it could be argued that if all the parties did not agree not to refer a dispute regarding an unfair labour practice to the industrial court, a strike or lock-out might never be implemented with regard to an unfair labour practice dispute whether a determination had been made or not (see the discussion in par 3.3.3 and ns 118 and 119 above).

The 1988 position makes sense since it is undesirable to allow strikes and lock-outs in respect of disputes of rights which disputes regarding unfair labour practices are. It is equally undesirable to allow the industrial court under the auspices of the unfair labour practice to interfere in the outcome of collective bargaining once procedures regarding strikes and lock-outs have been adhered to. It may however interfere where procedures are not met, as provided for in par (n) of the unfair labour practice definition (1988). (See also the discussion in par 4.2 above and ch 3 par 6 above.) Unfortunately the new (1991) s 49(9) uses the word "may" instead of the peremptory "shall" which seems to indicate that industrial action becomes an option in respect of unfair labour practice disputes.

Determinations under s 76 deal with demarcations between undertakings, industries, trades and occupations and s 77 deals with determinations of the undertaking, industry, trade or occupation in which a labour broker is engaged. To prohibit strikes and lock-outs in these cases is desirable since these are rights issues more suitably dealt with by adjudication (in these cases by the industrial court).

(b) there is a binding wage determination in terms of section 14(2) of the Wage Act 5 of 1957 in existence which is less than a year old and deals with the matter in dispute;[152]

(c) the parties are subject to compulsory arbitration in terms of section 46 of the LRA;[153] and

(d) an employers' organization (including an office-bearer, official or member of such an organization) belongs to an industrial council the constitution of which provides that disputes that cannot be solved by the council shall be referred to arbitration.[154]

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152 s 65(1)(b). A wage determination is not the result of collective bargaining. The minister appoints a wage board consisting of three members in terms of s 3 of the Wage Act. This board may then make investigations regarding conditions of employment in general (s 8) and report to the minister who then makes a determination (s 14) which is backed up by criminal sanction (s 20). Although it is undesirable to have conditions of employment determined by the state from a pluralist, voluntarist point of view, s 65(1)(b) does not allow strikes and lock-outs once conditions are determined. Disputes arising out of wage determinations are disputes of rights and should be dealt with by the courts (ss 20 and 23).

153 s 65(1)(c). Section 46 defines "employer" as any local authority or any employer other than a local authority who, within the area of a local authority, provides light, power, water, sanitation, passenger transportation or fire extinguishing services or any employer to which the compulsory arbitration provisions are made applicable under s 46(7). In terms of this subsection the minister may apply the provisions of s 46 by notice in the Gazette to employers' activities connected with the supply, distribution, processing, canning or preserving of perishable foodstuffs or the supply and distribution of petrol or other fuels. Although it is desirable to maintain industrial peace in "essential services" because of the vulnerable nature of the business to the employer and the community at large, this is a further inroad on the scope of collective bargaining in the South African industrial relations system. Very often in practice the provisions of s 46 are ignored by employees employed in these activities and it has perhaps become necessary to consider the viability of such a provision, especially in view of the fact that employers who contravene the section by, for example, implementing a lock-out are more vulnerable to criminal prosecution and damages than a large number of employees who participate in an illegal strike.

154 s 65(2)(a). This would be voluntary arbitration in terms of s 45 of the LRA. Although s 65(2)(a) only makes provision for a registered employers' organization (or its office-bearers, officials and members) it is submitted that parties (registered or not) who agree

(continued...)

Where none of the above absolute prohibitions apply, a lock-out will only be legal if the following conditions are met:

(a) If there is an industrial council with jurisdiction, only after the matter giving occasion for the strike or lock-out had been considered by that council and after -

(i) the secretary of the council or a person designated by the council for that purpose, reported thereon to the director-general in writing, or

(ii) a period of 30 days reckoned from the date on which the matter was submitted to the council, or such longer period as the council may fix, expired, whichever event

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[154](...continued)

at a conciliation board or at an industrial council (whose constitution does not provide for arbitration) to refer the dispute to voluntary arbitration and such an agreement is promulgated, may also not strike or lock-out with regard to such a dispute. One may argue one step further, that is, whenever parties agree to refer a dispute to arbitration in terms of s 45 (which of necessity should be at an industrial council or conciliation board in terms of s 45(11)) whether such agreement is promulgated or not no strike or lock-out may be implemented in respect of such a dispute. See LLB 50 which seems to be of the same view. See also s 65(1)(d)(iii).

Although not provided for in s 65 and therefore not supported by criminal sanction, one may argue even further and that is whenever there is an arbitration clause contained in an agreement (like a recognition agreement) which is enforceable in terms of the LRA for the purposes of the unfair labour practice (1988) (that is presumably in terms of s 31A if the definition of "agreement" is interpreted correctly) and the dispute is referred to an industrial council or conciliation board, or not, the institution of a strike or lock-out in contravention of such an agreement would be an unfair labour practice and could be interdicted in the industrial court.

One can take the argument yet one step further and that is whenever an agreement to arbitrate which binds the parties to the outcome of the arbitration is reached in common law, a strike or lock-out during the course of such arbitration proceedings or thereafter would be illegal and therefore subject to an interdict in the ordinary courts.

It is submitted that the above interpretation is correct and acceptable since it is not desirable to allow industrial action in respect of or in contravention of existing rights whether procedural or substantive.

occurred first.[155]

(b) If there is no industrial council and an application was made for the establishment of a conciliation board under section 35 which considered the dispute and only after -

(i) the chairman of the conciliation board or a person designated by the chairman for that purpose, had reported to the director-general in writing, or

(ii) the period or periods envisaged by section 36(1)(a) had expired whichever event occurred first.[156]

(c) If it has been decided in terms of section 45 to refer the matter to arbitration pending the settlement of the dispute and the cessation of the arbitration proceedings in terms of subsection (15) of section 45 or the making of an award, whichever event occurs first.[157]

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155 s 65(1)(d)(i).

156 s 65(1)(d)(ii). Section 36(1)(a) reads: "A conciliation board shall endeavour to settle the dispute referred to it within 30 days from the date on which the application was lodged or within such further period or periods as may be agreed upon by the parties involved in the conciliation board." The attitude that an employer cannot institute a legal lock-out unless it also applied for a conciliation board in a case where the union applied for a conciliation board in a wage dispute is obviously nonsensical since legal industrial action is not concerned with who applied for the conciliation board but with the exhaustion of bargaining and the nature of the dispute first and foremost (see Ngubane & others v NTE Ltd (1991) 12 ILJ 138 (IC) 144H-I). In NTE Ltd v Ngubane & others (1992) 13 ILJ 910 (LAC) it has now been held that either party can apply for a conciliation board.

157 s 65(1)(d)(iii). Section 45(15) makes provision for settlement before an award in which case it must be reported to the minister that arbitration is no longer desired. The impression is created in s 65(1)(d)(iii) that a strike or lock-out may take place after arbitration proceedings have ceased or after an award has been made. This is not correct,

(continued...)

(d) If an employers' organization is to implement the lock-out the majority of the members in good standing[158] of the organization in the area and in the particular undertaking, industry, trade or occupation in which the lock-out is called for must vote in favour of such lock-out by ballot after expiry of the periods stipulated in section 65(1)(d)(i) for industrial councils and conciliation boards respectively.[159]

Section 65(1B) also contains an important provision:

"No person who is or has been an employer shall commit and no employer or other person shall incite, instigate, command, and endorse, encourage or procure any employer or other person to commit an act contemplated in paragraph (a) of the definition of `lock-out' in section 1(1) if such act is committed or is to be committed for any purpose other than a purpose referred to in the said definition."

157(...continued)
since firstly, if the dispute is settled, no lock-out will be necessary and secondly, if the award is made, it is binding in terms of s 49 and strikes and lock-outs are prohibited for the duration of the award (s 65(1)(a)). See also the comments in n 154 above.

158 See s 1(2)(a) for a description of members in good standing (ie a member who has paid his entrance fee and who is not more than three months in arrear with his membership fees).

159 s 65(2)(b). This is only the case where s 65(2)(a) (see n 155 above) does not apply, in other words where there is no arbitration provision in an industrial council constitution. It is not clear whether a ballot must still be taken by the organization as a whole when an individual member of the employers' organization wishes to lock-out. It is submitted that it is not necessary since the introduction to s 65(2) refers to members (the plural) and not a single member. (See also LLB 50 which seems to agree and Nel & Harper.)

It is quite clear that an individual employer not belonging to an employers' organization does not need to take a ballot (how could it) but merely a resolution. Section 8(1)(p) of the LRA provides that the constitution of the employers' organization must provide for the manner in which a ballot shall be conducted. Section 65(4) provides that any member is free to take a ballot with regard to the calling of, taking part in or continuation of a strike or lock-out.

The impression is gained that this provision was merely included because of the similar provision[160] prohibiting concerted action by employees for purposes other than those stipulated in the definition of strike.

Does this provision mean that where a single employer commits a breach of contract, or terminates services or refuses to re-employ workers who have behaved badly during a strike, a criminal offence is committed? And, does it further mean that because his actions constitute a contravention of the LRA they will also automatically have been unfair labour practices in terms of paragraph (f) of the definition of unfair labour practice (1988)?

The legislator could not possibly have intended these consequences. This provision, it is submitted, simply means that where the acts in the definition of lock-out are committed to induce or compel employees to agree to purposes other than the stated purposes in the definition such acts are prohibited. An example is where employees' services are terminated or their contracts breached in order to induce or compel them to associate with a particular political party or to give up their union membership. A mere breach of contract or any of the other acts without a stated purpose would not constitute a criminal offence.

Another important question that arises is whether it would be a criminal offence if an employer shuts down its business temporarily or discontinues parts of it for safety reasons? As long as the justification is safety and there is no ulterior motive to induce or compel employees to agree to something (especially something not stated in the definition of the lock-out) such action will be justified in common law

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160 Section 65(1A) contains the equivalent provision with regard to employees. This provision is clearer for it prohibits concerted action for any purpose other than the stipulated purposes in the definition of "strike". A good example is a political stay-away.

on the basis of temporary impossibility of performance.[161]

Section 66 of the LRA[162] also contains very important provisions regarding the motivation behind an employer's actions. Any employer who dismisses any employee or reduces his rate of remuneration or alters his terms or conditions to his disadvantage (or relatively to other employees) because such employer believes, rightly or wrongly, that such employee has given information which he is under the LRA obliged to give[163] or that he has participated in the lawful activities of a trade union[164] is guilty of the offence victimization.[165]

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161 One of a manager's duties in terms of the Mines and Works Regulations to the Mines and Works Act 27 of 1956 is for example to "take all reasonable measures to provide for the safety and proper discipline of persons employed at the mine or at the works" (reg 2.9.3). This regulation provides additional justification in the mining industry. Jammy "Of Go-slow and Fast Responses" 1991 Industrial Law Journal (SA) 12: 482 484 argues: "As long as the work-force was deliberately retarding normal production, the company was legitimately entitled to prevent it from working at all. And if, as a consequence of that prevention, wages were not earned and were therefore not paid, the employees concerned were the authors of their own misfortune."

Although justification for such an argument may be sought under the auspices of the unfair labour practice, in the inverse situation where employees refuse to work because the employer does not comply with its contractual obligation, this "shut-out" tactic can be dangerous (see Jammy 484 where he quotes cases and terms the strategy a "shut-out"). Firstly, a closure (exclusion) coupled with a demand to "comply with existing conditions of employment" could satisfy the definition of lock-out in s 1 of the LRA in which case the unfair labour practice would not apply. Secondly, if a demand to comply is not a demand for the purpose of the lock-out definition, it would be prohibited by s 65(1B) of the LRA. The employer will have to find objective operational justification such as vis maior to justify its actions on the basis of impossibility of performance and issue no demand at all. In appropriate circumstances employee actions could constitute vis maior. Alternatively it will have to base its action on the exceptio non adimpleti contractus which will be difficult where employees tender "normal services" and in any event the employer will not be able to respond to employees' failure to work normally with an opposing breach of contract.

162 Similar provisions are contained in s 18 of the Basic Conditions of Employment Act 3 of 1983, s 18 of the Machinery and Occupational Safety Act 6 of 1983 and s 25 of the Wage Act 5 of 1957.

163 s 66(1)(a).

164 s 66(1)(c).

165 Section 66(1)(b) also includes a refusal by an employee to repay remuneration or accept a receipt for remuneration not received. These acts are prohibited under s 52(2) and (3).

Although the actions resemble those of a lock-out this section does not specifically contemplate illegal lock-outs since no mention is made of attempts to induce or compel. The emphasis here is on employer reaction to certain legitimate acts of its employees and not on its initiative to induce or compel a new state of affairs.

It will however be an illegal lock-out if the employer does any of the above things in order to induce or compel (either explicitly or not) an employee not to do any of the things mentioned in section 66.[166]

It is important to note that a contravention of section 66 or section 65(1B) would have constituted an unfair labour practice under paragraph (f) of the definition of unfair labour practice (1988).[167]

It is interesting to note that selective re-employment is not one of the actions mentioned in section 66 and can therefore not constitute a criminal offence under that section (or an unfair labour practice as a contravention of that section under paragraph (f) of the old definition of

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166 It will be illegal under s 65(1B).

167 In terms of s 66(2) the minister may direct that the compulsory arbitration provisions of s 46 shall apply to disputes arising from matters dealt with under s 66(1)(a), (b) and (c) if the dispute is such as is referred to in s 43(1) (ie previously "termination"). This is correct since such disputes constitute disputes of rights and should be referred to adjudication. If they were to be taken up as unfair labour practices (under par (f) of the 1988 definition) they would have had to go to the industrial court unless the parties agreed that they would not in terms of s 46(9)(b) and (d). (The peremptory "shall" has now (1991) been changed to "may". See the comments in n 151 above.)

When the LRA was changed in 1988 the three grounds for s 43 applications fell away and were substituted by one ground only, namely the unfair labour practice (which then included in the definition itself the other grounds). The net effect was that the minister's power to direct fell away for all practical purposes since all unfair labour practices had to follow the route to the industrial court.

With the 1991 definition of unfair labour practice the pre-1988 version was accepted again without changing s 43. It has therefore perhaps become necessary to change s 66(2) accordingly.

unfair labour practice (1988)). Selective re-employment as part of a "lock-out" for the wrong purpose, for example trade union activities, would however be prohibited under section 65(1B) and would therefore also have constituted an unfair labour practice (1988).[168]

Section 65A provides that whenever there is a discontinuance of work as a result of a dispute concerning terms and conditions of employment (presumably as a result of both strikes and lock-outs) the employer must inform the inspector. A specific form is prescribed for this purpose in the regulations to the LRA (annexure LR 33).

Doctors, dentists, psychiatrists and nurses may not strike or participate in a go-slow.[169]

Lastly, section 74 contains certain presumptions with regard to evidence. Whenever an employee is charged

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168 under both pars (f) and (n). The motivation of the employer can be important in cases where the lock-out is ostensibly for the right purpose but is in reality designed to get rid of, for example, union members. In such cases the "real" purpose has to be established subjectively. This can be very difficult if not impossible. In this regard it is instructive to consider the position in American law. See in general Morris The Developing Labour Law ch 22 1033-60 especially 1035-7 1044-5. In NLRB v Great Dane Traders Inc 388 US 26 (1967) 34 the following formula appears: "First if it can reasonably be concluded that the employer's discriminatory conduct was `inherently destructive' of important employee rights, no proof of an anti-union motivation is needed and the Board can find an unfair labour practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is `comparatively slight', an anti-union motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that it was motivated by legitimate objectives since proof of motivation is more accessible to him."

Although reference to other legal systems may be instructive it must be remembered that the lock-out is specifically regulated in the LRA which is not the position in the United States and some other legal systems. Our courts will have less of a free hand to develop the law regarding lock-outs than elsewhere which is a salutary state of affairs since collective bargaining should as far as possible be left to the parties themselves.

169 See Van Jaarsveld & Coetzee 264 and the authority relied on.

under section 65 it shall be presumed until the contrary is proved that the action was in pursuance of a combination and for a purpose stated in the definition of `strike'.[170] A similar provision applies to employers. It is presumed until the contrary is proved that the act mentioned was for a purpose specified in the definition of lock-out.[171]

Whenever a person is charged with contravening the ballot requirements of section 65(2)(b) a statement by an inspector that the majority of members did not vote in favour of the strike or lock-out will be accepted as proof of that fact until the contrary is proved.[172]

The 1991 amendments to the LRA introduced the following two provisions inter alia:

> "Section 17 of the principal Act is hereby amended by the substitution for paragraph (a) of subsection (11) of the following paragraph:
>
> (a) to grant urgent interim relief until an order is made by the industrial court in terms of section 43(4);
>
> (aA) to grant an interdict or any other order in case of any action that is prohibited in terms of section 65."
>
> A completely new section 17D was introduced:
>
> "(1) A court of law, and for the purposes of this section also the industrial court, shall not grant

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170 s 74(10).

171 s 74(11).

172 s 74(12).

an interdict or any other order in order to restrain any person, trade union or employer from instigating, inciting or participating in a strike or lock-out unless 48 hours' notice of the application for such interdict or other order has been given to the respondent: Provided that the court concerned may permit a shorter period than the said period of 48 hours if -

(a) the applicant has given notice to the respondent in the prescribed manner of the applicant's intention to apply for the issuing of an interdict or other order;

(b) the respondent is given a reasonable opportunity to be heard before a decision regarding that application is taken; and

(c) the applicant has shown good cause why a shorter period than the said period of 48 hours should be permitted:

Provided further that if at least 10 days prior to the commencement of a proposed strike or lock-out notice of such proposed strike or lock-out has been given to the applicant in the prescribed manner, the applicant shall give at least 5 days' notice to the respondent of an application for an interdict or other order."

The effect of these provisions is simply that while section 17(11)(a) applications can still be brought on the basis of the unfair labour practice concept, they may not be brought in respect of strikes and lock-outs that comply with section 65. Such an application may be brought specifically in terms of the unfair labour practice as an interim measure until section 43 can be used, and in respect of action in contravention of section 65.

The notice periods contemplated in section 17D are only in respect of section 17(11)(a) applications and not in

respect of strikes and lock-outs. This can be deduced from the use of the word "if" throughout and the focus on interdicts and orders in respect of strikes and lock-outs. Annexure LR 50 - a form which gives notice to implement a strike or lock-out - is therefore optional in the sense that it may be used if any party wishes to notify the other of intended industrial action.

4.4 Indemnification Against Losses Suffered due to a Lock-out

Section 79 of the LRA is worded as follows:

"(1) No civil legal proceedings shall be brought in any court of law against any employee, employer, registered trade union or employers' organization, or against any member, office-bearer or official of any such union or organization in respect of any breach of contract, breach of statutory duty or delict (other than defamation) committed by that employee, employer, union or organization, or by that member, office-bearer or official on behalf of that union or organization, in furtherance of a strike or lock-out: Provided that this indemnity shall not apply to any act committed in furtherance of any strike or lock-out in which, or in the continuation of which, any employee, employer or other person is by section 65 forbidden to take part, or to any act the commission of which is a criminal offence."

The 1988 version of section 79(2) read:

"Subject to the indemnity in subsection (1) any member, office-bearer or official of a trade union, employers' organization or federation who interferes

with the contractual relationship between an employer and an employee resulting in the breach of such contract shall be liable in delict and, until the contrary is proved, be deemed to have been acting with due authority on behalf of the trade union, employers' organization or federation concerned."

The amended version (1991) now reads:

"(2) Subject to the indemnity in subsection (1) any member, office-bearer or official of a trade union, employers' organization or federation who interferes with the contractual relationship between an employer and an employee resulting in the breach of such contract shall be liable in delict."

The effect of section 79 in South Africa has been commented on quite extensively but most of the comments are rather fragmentary and inconclusive.[173] An attempt will be made to analyse some of the most important aspects of the indemnity provided in section 79 in order to show its effect on industrial power and the collective bargaining process from an employer point of view.[174] In other words, its implications for the lock-out will be emphasized.

Section 79 deals with an "indemnity". Indemnity means security from damage or loss or legal exemption from

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173 See inter alia Cameron, Cheadle & Thompson 86-8; Thompson 642N-642P; Van Jaarsveld & Coetzee 267; LLB 51-2; Shilling 4; Le Roux Reassessment 104-5; 1989 IR Data 8 (1): 1; "The Uses (and abuses) of Lock-Outs" 1985 IR Data 5 (5): 16; Moodley 2; Prior 465; Claassen 77.

174 This is highly desirable since the consequences of lock-out action have not been analysed adequately in South Africa and also largely elsewhere in the world. In South Africa lock-outs are regulated in detail on a parity basis with strikes. Ordinary rules of interpretation (such as using the literal meaning of the words in the LRA as a point of departure) will therefore go a long way towards establishing the intended legal position in South Africa (see Claassen 77 and ns 9-10).

incurred liabilities or penalties.[175] What the section in effect does is exempt employers and employees from the ordinary legal consequences that would follow from the acts listed in the definitions of lock-out and strike. For example, an employer refuses access to employees to work and refuses to pay them in an attempt to induce them to accept its demands. From a common-law contractual point of view the employees would, in principle, be able to cancel the contract and claim damages or keep the contract intact[176] and claim reinstatement and damages. Section 79 indemnifies the employer against such claims for damages where the lock-out is legal. Significantly, it does not prevent the employees from resigning or the employer from dismissing striking workers. The indemnity only covers civil claims such as claims for damages and specific performance and not other contractual remedies such as cancellation of the contract. The purpose of the indemnity is quite clear. It provides a safeguard against certain legal consequences in order to enhance the bargaining position of the parties. In short, it creates the means (the power) to induce effectively by adjusting the dependencies of the parties in common law.

The indemnity is valid against any "civil legal proceedings" in "any court of law" for "any" breach of contract, breach of statutory duty or delict (other than defamation)". Civil legal proceedings are proceedings that arise out of private relations amongst citizens as opposed to criminal proceedings where the state prosecutes individuals for offences against society at large.[177]

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175 Chambers Twentieth Century Dictionary, The Concise Oxford Dictionary.

176 Although the Supreme Court has been loathe to order specific performance in cases of wrongful dismissal or termination, the industrial court has been more willing to grant specific performance (or reinstatement) under its unfair labour practice jurisdiction. As will be seen below, s 79 also provides indemnity against the statutory duty to act fairly. Where termination therefore formed the basis of the lock-out, civil claims for reinstatement should not be entertained in the industrial court.

177 An example of the former is a contract and of the latter prosecution for theft.

Do "civil legal proceedings" include proceedings in the industrial court in terms of the unfair labour practice concept? It is submitted that such proceedings are included; if not this would make nonsense of the clear intention of the legislator to create power to facilitate the bargaining process. Firstly, proceedings in terms of the unfair labour practice are civil proceedings for they concern the relationship between employer and employee.[178] The industrial court has not been granted criminal jurisdiction;[179] therefore the necessary inference is that it only has civil jurisdiction which by further necessary inference includes jurisdiction in actions in terms of the unfair labour practice which are exclusively entrusted to the industrial court[180] (with further appeal possibilities to the labour appeal court and the Appellate Division).[181]

Secondly, although it has been held that the industrial court is not a court of law strictu sensu[182] it must be considered to be a court for the purposes of section 79. This is so because of the right of appeal which lies to the labour appeal court which is a division of the Supreme Court[183] and the further right of appeal to the Appellate Division,[184] both of which are courts of law. It does not make sense to interpret section 79 to exclude actions in the industrial court for such actions on appeal are certainly

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178 See the unfair labour practice definition.

179 See s 17 of the LRA in general. Since the industrial court is a creature of statute it has no powers outside of s 17.

180 s 17(11)(f).

181 s 17(21A)(a) and s 27C(1)(a). See also s 17C(3) which treats an appeal on the unfair labour practice from the labour appeal court as a "civil action".

182 See inter alia lengthy discussions by Van Jaarsveld & Coetzee ch 17 282 et seq; Thompson 609 et seq especially 616-616C and the authorities referred to.

183 s 17(21A)(a), (c) and (d).

184 s 17C(1)(a).

civil actions in a court of law.[185] Two further reasons why the industrial court is included under section 79 are the fact that it is consistently referred to as a court throughout the LRA (including sections 17, 43, 46 and 79) and not as an administrative body or anything else, and also that its powers include the making of orders for reinstatement and compensation.[186] It would be absurd to exclude actions in the ordinary courts when the same objectives can be achieved in the industrial court. For example, a breach of contract will always also be an unfair labour practice because it unfairly affects the relationship between employer and employee.[187]

Thirdly, the unfair labour practice concept is regulated by statute. An unfair labour practice does not constitute a breach of contract or a delict but, for the purposes of section 79, it must be regarded as a "statutory duty" to act fairly. Therefore, even though it may be argued that the 1988 definition of the unfair labour practice included legal strikes and lock-outs[188] the indemnity

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185 s 17C(3).

186 s 46(9)(c).

187 See the preamble and pars (d), (k) and (o) of the unfair labour practice definition (1988) and the 1991 definition in general.

188 See the discussion in par 4.2 above. See also Cameron, Cheadle & Thompson 71 who seem to accept without motivation that s 79 only contemplates civil actions in the ordinary courts ("injunctive relief or compensation") but not in the industrial court. This line of argument does not take cognizance of the fact that s 79 also indemnifies against a statutory duty (to act fairly), that the industrial court (with appeal possibilities to the labour appeal court and the Appellate Division) is also a "court" for the purposes of s 79 and that actions in terms of the unfair labour practice are civil actions. Injunctive relief or compensation or reinstatement should therefore not be possible under s 17(11)(a), 43 or 46(9) where such civil action arises out of a legal strike or lock-out and no criminal offence is committed.

Trollip 85 states: "I believe that the interim reinstatement of employees whose contracts of employment had been terminated with the purpose of inducing or compelling them to agree to or comply with demands or proposals concerning terms or conditions of employment made by an employer would be incompetent, in that this would have the effect of defeating the very indemnity envisaged in the LRA in relation to lock-out terminations. Hopefully our

(continued...)

protected employers and employees who took legal industrial action from civil actions on the basis of the unfair labour practice in the industrial court, the labour appeal court and the Appellate Division. Therefore as long as a lock-out is legal no civil court of law (including the industrial court under section 17(11)(a), 43 and 46(9)) may interfere with the bargaining process unless, of course, the actions in furtherance of the lock-out constitute criminal offences in which case the indemnity does not apply. Where the act in furtherance of a strike or lock-out is intimidation or assault for example, the indemnity does not apply.

The following people and bodies are protected by the indemnity: any employee, employer, registered trade union or employers' organization or any member, office-bearer or official of any such union or organization.[189]

The actions that are indemnified are breaches of contract,[190] breaches of statutory duty[191] or delicts

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[188](...continued)
courts will understand that industrial relations are a power, and not a legal, dynamic." This statement is correct, but it should be extended to include any other action in furtherance of a lock-out and the industrial court's jurisdiction under s 46(9) as well.

It must also be remembered that the criminal sanction in s 53 only attaches to determinations once they have been made and not to the definition of the unfair labour practice directly; therefore actions in furtherance of a lock-out which fall within the definition of the unfair labour practice concept are not excluded from the ambit of the indemnity because they are criminal offences. In short, to commit an unfair labour practice is not to commit a criminal offence.

Industrial court orders can also be executed like orders of the Supreme Court (s 17(15)) which is a further indication that it should be regarded as a court of law for the purposes of s 79.

[189] It is interesting to note that only registered trade unions and employers' organizations are protected by the indemnity and not unregistered ones. Section 5(3) of the LRA also provides that no person shall, by reason only of the fact that he is a member, office-bearer or official of a registered trade union or employers' organizations, be liable for any of the liabilities and obligations of the union or organization.

[190] For what these are compare De Wet & Van Wyk ch 17 142 et seq and the definition of lock-out and the discussion in par 3.2 above.

(excluding defamation)[192] in furtherance of "a strike or lock-out".

These actions first and foremost include the actual actions specified in the definition of the lock-out as well as other actions falling within these categories that are not criminal offences.[193] The word "furtherance" means "a helping forward".[194] In other words, all actions that are breaches of contract and statutory duties and delict (excluding defamation) that are designed to make the lock-out more effective are protected against civil actions in any court as long as they are not in contravention of section 65 or are other criminal offences. For example a unilateral suspension of employees without pay with the purpose of inducing employees to accept management's demand with regard to a change in conditions of employment will be a breach of contract and an unfair labour practice (breach of statutory duty) and a delict and should enjoy the indemnity provided in section 79.

Section 19(1)(b) of the Basic Conditions of Employment Act 3 of 1983 prohibits an employer" to do any act or permit any act to be done as a direct or indirect result of which an employee is deprived of the benefit or of any portion of the benefit of any remuneration so payable". This provision, like other provisions of that Act,[195] is

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191(...continued)

191 Breaches of statutory duties that are not criminal offences are hard to think of. A good example would be the duty to act fairly in terms of the unfair labour practice concept.

192 For a general discussion on the law of delict see McKerron The Law of Delict.

193 For a similar view see Thompson 6420.

194 Chambers Twentieth Century Dictionary, The Concise Oxford Dictionary. These acts can be of an immediate once-off nature like a call to participate in industrial action or of a continuing nature such as a failure to pay.

195 Section 19(1)(e) prohibits deductions from an employee's remuneration without his written consent or in accordance with an order of court; s 19(2) prohibits any delay in the payment of wages. Section 11(1) provides that if an employee does not work on a public

(continued...)

supported by a criminal sanction in section 25. It can therefore be argued that any act prohibited by the Basic Conditions of Employment Act in furtherance of a strike or lock-out will not enjoy the indemnity provided in section 79.[196]

The counter-argument is however more acceptable since it fits in better with the intention of the legislature behind section 79. The "criminal conduct component" of section 79 cannot be readily reconciled with the terms of other statutes[197] or vice versa. When the legislator provided the criminal sanction in the Basic Conditions of Employment Act, it did not contemplate the provisions of section 79.

What the legislator obviously had in mind was not to provide an indemnity against wilful damage to property, assault, intimidation, fraud, etc. These are criminal offences and cannot be tolerated in furtherance of a strike or lock-out.

It is absurd to argue that the legislator also had in mind the provisions of the Basic Conditions of Employment Act,[198] especially in view of the fact that the definition of lock-out and the indemnity under section 79 existed long

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195 (...continued)
holiday which falls on a day which is normally an ordinary working day, the employer must pay an amount not less than the normal daily wage. The statute does not provide for the removal of this obligation during lock-outs. Section 14(1) prescribes certain time-limits for lawful termination that must be adhered to and that remuneration must be paid during those notice periods (s 14(3)). Section 14(2) provides for notice in writing and on specified days. Furthermore notice may not run concurrently with ordinary, military or sick leave (s 14(2)(b)(i), (ii) and (iii)). Termination by pay in lieu of notice is however possible in terms of s 14(4).

196 For such an argument see Cameron, Cheadle & Thompson 86-8. See also 1992 Contemporary Labour Law 1 (6): 71 74 and Campbell in general.

197 Cameron, Cheadle & Thompson 87.

198 See n 195 above.

before the Basic Conditions of Employment Act was promulgated in 1983. It could not possibly have intended that lock-outs (and resultant changes in conditions of employment) could only be implemented on certain days, and not while certain employees were on ordinary, sick or military leave![199] It could further not have intended to deviate from the parity basis upon which strikes and lock-outs are regulated in the LRA.

The Basic Conditions of Employment Act must be reconciled with the LRA so as to allow for the proper functioning of the latter Act. Section 1(3) of the Basic Conditions of Employment Act specifically provides that the LRA is not affected by its (the former's) operation. Insofar as the Basic Conditions of Employment Act therefore purports to interfere with the regulation of collective bargaining in the LRA it should be regarded as pro non scripto.[200]

Where a lock-out is based on termination, section 14(5) allows for termination of the contract without notice for any cause recognized by law as sufficient. The LRA provides for termination as an act for the purpose of the lock-out as well as a breach of contract and other acts or combinations thereof. Therefore a termination without complying with section 14 of the Basic Conditions of Employment Act (for example, by giving one week's notice to monthly paid employees) should also be sufficient as an act (for it combines termination with a breach of contract).[201]

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199 Compare the provisions of s 14(2) where the lock-out is based on termination. See also ns 27 and 81 above and the discussion in par 3.2.3 above in general.

200 For a similar approach see LLB 52 and now conclusively NTE Ltd v Ngubane & others (1992) 13 ILJ 910 (LAC). For a contrary view see Campbell.

201 Cameron, Cheadle & Thompson 87 argue that s 14(5) contemplates summary dismissal for bad conduct at common law. This view could be correct but it is limited. Summary dismissal in common law can also be wrongful in the sense that no justification whatsoever exists, in which case a repudiation without justification (by dismissal) could also be contemplated (that is a breach of contract for the purposes of an act constituting one

(continued...)

It should be remembered that wage determinations and promulgated industrial council and conciliation board agreements[202] which are all supported by a criminal sanction may also tend to limit the indemnity in section 79. Employers who want to make certain that they are protected by the indemnity can apply for exemptions from the relevant provisions in the Basic Conditions of Employment Act[203] and wage regulating measures such as industrial council agreements and wage determinations.

A further question which comes to mind is whether the indemnity also applies to the breach of a peace clause in a collective agreement, such as a recognition agreement, which is a contract. These agreements usually contemplate adherence to the provisions of section 65 (and cannot do otherwise since these provisions are peremptory). To the extent that such agreements contain purely contractual provisions the indemnity would apply if those provisions are broken in furtherance of a strike or lock-out. Because of the peremptory language of section 79 itself[204] it seems as if the parties will not be able to contract out of the indemnity.[205]

201(...continued)
of the two elements of the lock-out). (Compare LLB 52 and the discussion on the NTE case in par 3.2.3 above especially the section on repudiation.) However, the legislator would have used dismissal if it meant dismissal. By using termination it meant termination as contemplated in the lock-out definition inter alia and not to be interfered with by s 14 of the Basic Conditions of Employment Act (s 1(3)). See also n 200 above.

202 Industrial council and conciliation board agreements when promulgated are backed up by a criminal sanction in terms of the LRA itself (ss 48 and 53) and can therefore limit the indemnity. If a promulgated industrial council agreement contains provisions similar to those in the Basic Conditions of Employment Act (eg ss 14 and 19), then the indemnity (in s 79) will not apply since such provisions would be the result of collective bargaining in terms of the LRA.

203 s 34.

204 "No civil legal proceedings shall ...."

205 Since dismissal or resignation are not civil legal proceedings but ordinary contractual remedies they may be regulated contractually by, for example, agreeing to a moratorium
(continued...)

As referred to a number of times above the indemnity does not apply to contraventions of section 65[206] and criminal offences.[207]

Section 79(2) creates a statutory delict subject to the indemnity in section 79(1). Anybody interfering with the contractual relationship between an employer and employee resulting in a breach of contract shall be liable in delict.

In terms of the 1988 version of section 79(2) any member, office-bearer or official of a trade union, employers' organization or federation who interfered with the contractual relationship was deemed until the contrary was proved to have acted with due authority on behalf of the trade union, employers' organization or federation concerned. This was a further attempt by the legislator to restrict illegal industrial action. The provision received much criticism especially from trade unions. The result was that the new section 79(2) reverted to the common-law position with regard to the onus of proof, namely that a party who alleges something in principle bears the onus to prove it.

Section 79 supports collective bargaining by creating power through an indemnity against civil actions where actions in furtherance of strikes and lock-outs are legal. This is done on the basis of parity between employers and employees from a free enterprise, pluralist and voluntarist point of departure. Once collective bargaining at statutory forums is exhausted the parties may resort to collective self-help subject to certain restrictions (for

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205(...continued)
on mass dismissal. The unfair labour practice jurisdiction of the industrial court will also be applicable to such stipulations.

206 See the discussion in par 4.3 above.

207 For a comprehensive discussion of criminal law see inter alia Burchell & Hunt South African Criminal Law and Procedure and De Wet & Swanepoel Strafreg.

example, as long as they do not commit criminal offences). No court, including the industrial court is allowed to interfere with the process or results of legal industrial action either by way of interdicts or orders for reinstatement or compensation.

The net effect of the immunity in section 79 is to qualify contract in that civil claims in respect of damages or for specific performance may not be brought in any court of law. This includes actions in the industrial court on the basis of the unfair labour practice. The result is the reduction of the dependency of the employer on its employees (or vice versa depending on the labour market) and the enhancment of employer power beyond that enjoyed in common law in order to allow the employer to participate meaningfully in the collective bargaining process. The hierarchical and economic power discrepancies between the employer and employee in common law and the latter's lack of security of employment are discussed in chapter 3. Section 79 forbids certain common-law remedies and therefore can be regarded as taking the power discrepancies beyond the position in common law in some respects

4.5 **Timing of the Lock-out**

When a lock-out is legal in the sense that it complies with the definition of lock-out and the provisions of section 65[208] of the LRA it can be implemented at any time whether in an "offensive" or "defensive" way.[209] There are no prescriptions in the LRA with regard to offensive and defensive lock-outs or strikes. The terms offensive and defensive are therefore merely descriptive and not terms of

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208 See in general the discussion in par 4.3 above.

209 Offensive lock-outs are sometimes referred to as "pre-emtive" lock-outs (Trollip 83). The distinction is sometimes used in foreign legal systems, compare for example Morris 1037-46 1052-60 and Hepple 26 30.

art. A controversy[210] however exists in South Africa whether a defensive lock-out in response to a strike is possible in view of the following dictum in Walker v De Beer 1948 (4) SA 708 (A):

> "It is, however, clear on a perusal of the Act that the Legislature intended to draw a distinction between a lock-out and a strike and that it did not intend that the same set of facts should constitute both a lock-out and a strike."[211]

In this case the essential facts were that the employer refused to re-employ his workers in an attempt to induce them to accept a reduced rate of pay. The workers simultaneously refused to accept re-employment unless it was at the old, higher wage rate.

Brassey[212] approaches the problem as follows: Unlike the court[213] he suggests that the employees merely refused to work because they did not want to commit themselves to work at a lower rate. In other words, they were not busy with a strike themselves, but were merely refused to buckle under employer pressure. With regard to the passage from Walker v De Beer quoted above he states:[214]

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210 Compare inter alia Trollip 83; Van der Merwe 259-64; Claassen 82-3; Claassen "Die Regsposisie van Werknemers by 'n Staking in die Arbeidsreg" 1984 THRHR 17: 83 (Claassen Regsposisie); Thompson 642E; Moodley 3-4; Van Jaarsveld & Coetzee 265-6 and especially Brassey in Brassey, Cameron, Cheadle & Olivier 112-6.

211 Walker & De Beer 715-16. This case was decided under the 1937 act. The definitions of strike and lock-out were subsequently changed by omitting the requirement "a dispute regarding conditions of employment or other matters" from both definitions. Section 64 of the 1937 Act does not have an equivalent in the new LRA.

212 in Brassey, Cameron, Cheadle & Olivier 112-16. For a similar view, see Thompson 642E and Claassen 83. These views are, with respect, correct in that a strike and a lock-out can take place simultaneously.

213 and Thompson 642E. Brassey's interpretation in Brassey, Cameron, Cheadle & Olivier 113.

214 Brassey, Cameron, Cheadle & Olivier 114.

> "Now, as we know, the set of facts that constitutes a strike is collective action of employees to compel an employer or employers to agree. What constitutes a lock-out is action by employers to compel employees to agree. That the former cannot constitute the latter is obvious. It is so obvious, in fact, that no one - least of all so august a body as the Appellate Division - would see any need to state it. One concludes, therefore, that the words were intended to mean something else. But what?"

Brassey[215] then continues to argue that the words cannot mean that "the same stoppage" cannot constitute both a strike and a lock-out because it can as each side may be refusing to work for a different reason. Also, the words cannot mean that a stoppage "over the same issue" cannot constitute both a strike and a lock-out because an employer may be locking out and employees may be striking in respect of a wage demand at the same time. The strike and lock-out will exist until one side capitulates and offers to resume work.

He concludes that the words can only mean that a stoppage over "a single demand" cannot be both a strike and a lock-out at the same time.

In a situation where, as Brassey reads Walker v De Beer, employees refuse to work simply because they are not prepared to work at reduced rates and not in an attempt to induce or compel the employer to accept the old rates, it is clear that a single demand exists (that of the employer) and that the action in process is a lock-out.

The courts, in order to establish whether a strike or lock-out is in existence inquires who made the demand that

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215 Brassey, Cameron, Cheadle & Olivier 114.

led to the dispute. If the employer made it, it is a lock-out, if the employees made it, it is a strike. This approach was established under the old (1937) definitions of strike and lock-out which contained the phrase "in consequence of a dispute regarding conditions of employment or other matters":

> "... that the word `dispute' in the definition of `strike' does not refer to a dispute which arises as a result of action taken by employers to alter the conditions of employment which were in existence at the time or immediately prior to their action .... [T]he definitions of `lock-out' and `strike' must be read as a whole and ... there must be some relationship between the `dispute' and the `demands'".

Brassey explains:[216]

> "As its context makes clear, this passage explains how to distinguish between a strike and a lock-out when the facts of the case satisfy the requirements of both.[217] It is not authority for the proposition that there can never be a strike if the dispute originates in a demand of the employer; still less that there can never be a strike if the dispute originates in his unilateral change in terms and conditions of employment."

Confusion still existed.[218] The legislator responded

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216 Brassey, Cameron, Cheadle & Olivier 115.

217 Brassey in Brassey, Cameron, Cheadle & Olivier seems to have a different interpretation to the facts than at 114, that is not a mere refusal to work, but a refusal in order to induce.

218 See R v Mtiyana 1952 (4) SA 103 (N). Here, the employer changed the time of payment of wages from the morning to the afternoon. This action was not coupled with a demand and

(continued...)

by changing the definitions of strike and lock-out in 1956 by dropping the phrase "in consequence of a dispute regarding conditions of employment or other matters", and adding clause (b)(ii)(bb) to the definition of strike and (d)(ii) to the definition of lock-out.

Where, therefore, as Thompson[219] appears to read Walker v De Beer, the employees refuse to work collectively because they want to compel the employer to pay the old, higher wage rates, one is no longer dealing with a single demand, but with two separate demands in terms of the new definition. The employer demands reduced rates and the employees demand that the employer refrain from giving effect to any intention to change terms or conditions of employment, or, if such a change has been made, to restore the terms or conditions to those which existed before the changes were made.[220] In other words, on this interpretation of the facts, two demands are at stake and therefore a strike and a lock-out exist simultaneously. Thompson's interpretation of the facts of Walker v De Beer should therefore no longer present any problems in practice.[221]

218(...continued)
was therefore not a lock-out. The accused stopped work after the change. Although the factual situation did not resemble Walker v De Beer, Holmes J relied on it and held that a "strike arises where the employees demand some changes in their conditions of employment and they refuse to work unless their demands are met. A strike does not arise where the employers seek to induce a change in the conditions of employment". See also R v Cangan 1956 (3) SA 366 (E) 367.

219 Thompson 642E.

220 par (b)(ii)(bb) of the existing definition of `strike' in the LRA.

221 Nor should the situation, as Brassey interprets the facts of the case (n 213 above), where the employees simply refuse to work without a demand, present any problems. There is clearly only one demand and that is from the employer and therefore the action is a lock-out.

The courts remained confused, however,[222] and so did others:

> "Die praktiese onbestaanbaarheid van gelyktydige kontrakbreuk deur teenoorgestelde partye sluit aan by die mening uitgespreek in die beslissing Ngewu & others v Union Co-operative Bark and Sugar Company Ltd, dat 'n bepaalde stopsetting van werk ('n spesifieke arbeidsgeskil dus) nie 'n staking en 'n uitsluiting tegelykertyd kan wees nie. Soos hierbo geredeneer is stakings en uitsluitings immers verskyningsvorms van kontrakbreuk, normaalweg in die vorm van repudiëring."[223]

The lock-out is an entity consisting of two elements, an act and a purpose. A strike on the other hand consists of an act, a combination and a purpose. These strategy mechanisms, although dependent on the mechanics of contract for their proper functioning, are independent entities of power. If any one of the elements is missing it is no longer a strike or a lock-out. Acts, such as breaches of contract in furtherance of a strike or a lock-out, should therefore not be considered in isolation, but as part of the strike or lock-out. It is therefore incorrect to say that "stakings en uitsluitings is immers verskyningsvorms van kontrakbreuk". Strikes and lock-outs as concepts have never been and will never be forms of breach of contract such as repudiation mora debitoris or mora creditoris. Breaches of contract merely form one of the constituent elements of these concepts (that is an act).

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222 Compare Freinkel v Garment Workers Union of SA 1961 (1) SA 507 (W) and Ngewu & others v Union Co-operative Bark & Sugar Co Ltd, Masondo & others v Union Co-operative Bark & Sugar Co Ltd 1982 (4) SA 390 (N) and Brassey's comments in Brassey, Cameron, Cheadle & Olivier 116.

223 Van der Merwe 261. See also Trollip 83; Van Jaarsveld & Coetzee 265-6. The industrial court has now held that strikes and lock-outs are possible at the same time, see SACWU v Plascon Inks & Packaging Coatings (Pty) Ltd (1991) 12 ILJ 353 (IC) and Ngubane & others v NTE Ltd (1991) 12 ILJ 138 (IC).

The legislator, by making use of contractual mechanics, has designed powerful weapons in the bargaining process by restricting the ordinary remedies concomitant with breaches of contract.[224] For example, an employer may refuse to pay in an attempt to induce employees to accept its offer (for example a 15% increase) in a wage dispute. The power of the employer lies in the fact that it causes hardship to the employee whilst it is protected from civil claims for damages in terms of section 79. Employer power further lies in the fact that employees, because of a scarcity in jobs, will be loathe to opt for other contractual remedies such as acceptance of the repudiation and cancellation, leaving the employer free to employ other people who are prepared to work in accordance with its demands. Where jobs are in abundance, employer power may be reduced since the employer may find it difficult to fill vacancies from the open market.

Employees on the other hand may refuse to work in an attempt to induce the employer to accept their demand (for example a 25% increase). Their power lies in the fact that they cause economic hardship to the employer without being vulnerable to civil actions for damages because of the indemnity provided in section 79. Their power may further vest in the fact that the employer will be loathe to accept their repudiation and dismiss them because of a number of reasons associated with its business.

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224 In a typical wage dispute which happens at a particular moment it is not at all hard to conceive of opposing breaches of contract at the same time. Van der Merwe 261 disagrees: "Dit is bykans onmoontlik om gevalle te bedink waar dit kan gebeur dat teenoorgestelde kontrakspartye op een en dieselfde oomblik kontrakbreuk pleeg. Die party wat eerste kennis neem van die ander se kontrakbreuk, sal in elk geval met die toepassing van 'n bietjie inisiatief hierdie kennis so kan aanwend dat hy as die onskuldige party beskou word.

Die erkenning van gelyktydige kontrakbreuk deur verskillende partye bring 'n verdere probleem: watter een moet dan deur die reg tegemoetgekom word?"

The irony is that the legislator by creating strikes and lock-outs specifically allows the parties to commit breaches of contract to enhance their bargaining power and s 79 indemnifies parties taking legal industrial action from civil remedies.

At any one time the power created by the legislature for the employer and the power created for the employee potentially exist for utilization in the bargaining process. Although both powers are created by using the mechanics of contract and centre around the availability and payment for work, this does not mean that the powers are to be utilized on a first come first served basis. They are opposing powers, which can be at work simultaneously. The mere fact that they are coincidentally structured on opposing breaches of contract is irrelevant. On the contrary, the legislature foresaw the simultaneous use of strikes and lock-outs in their definitions. For example employees may choose a refusal to work as the basis for their strike while an employer may rely on termination as the basis for its lock-out.

In the wage dispute above the conflicting demands represent an increase, one for 15% and one for 25%. The outcome of the allocation process is a function of power. The law assists in the institutionalization process by utilizing contractual rules (and qualifying them) to create power in the form of strikes and lock-outs. The extent of the power can only be quantified once it is implemented. During the process of implementation it depends primarily on market factors influencing the availability of work and the ability to pay which will determine the outcome of the power struggle and the rate and incumbent for the job. In other words, market factors determine whether any particular party will make use of its contractual remedies (that are not precluded by section 79) such as resignation or dismissal (both being acceptances of repudiation).

Van der Merwe is also wrong in treating "'n stopsetting van werk" as a "spesifieke arbeidsgeskil". A "stopsetting" is an act for the purpose of a strike (or lock-out) and a "arbeidsgeskil" is the subject-matter of the negotiation process and consists of a demand and a refusal to accept such a demand.

Strikes and lock-outs in summary can exist simultaneously in the following situations:

(a) the same act for different purposes;
(b) different acts for the same purpose; and
(c) different acts for different purposes.

Where there is an act coupled with a demand (by one party) together with an act and no demand (by the other) it should be easy to establish on the facts whether the act coupled with the demand is a strike or a lock-out depending on whether the employees or the employer has resorted to such a combination. A further factor which can be indicative of whether a strike or a lock-out exists is whether the employer or the employee holds the initiative as to the resumption of work (where a stoppage of work is the only act in question). In cases where employees, for example, refuse to work and the employer uses termination as the basis for the lock-out in response, it is clear that a lock-out is in sway. In this way it should be possible to distinguish between a strike and a lock-out in all cases, whilst it should be kept in mind that both can be in existence simultaneously.

From the discussion above it is therefore clear that strikes and lock-outs can be implemented both offensively and defensively on a parity basis in South Africa, provided the provisions of section 65 are complied with and the actions in furtherance of strikes and lock-outs are not criminal offences (if the indemnity in section 79 is to apply).

4.6 **Termination of the Lock-out**

When does a lock-out end? The first answer is when either of the two constituent elements of the lock-out is no longer present (that is, either the act or the purpose). For example, the employer resumes its business, allows employees to work normally and pays them after a lock-out during which

it discontinued business, refused access to work and failed to pay. Here the act element of the lock-out no longer exists and therefore no lock-out exists. Alternatively, the employer terminates services coupled with a demand to agree to certain conditions of employment. It now withdraws the demand. Again no lock-out exists. If the employer wishes to continue with the termination it will be termination for the purposes of the definition of the unfair labour practice concept and subject to the sanction of the industrial court.[225]

A distinction should be drawn between termination of the lock-out and settlement of the dispute which forms the subject-matter of the lock-out. Disputes of interest are usually settled by agreement. If no agreement is reached in the above example, the lock-out will be terminated, but the dispute will continue.

The second answer to the question when a lock-out ends is immediately evident: when the dispute is settled (by agreement). The very purpose of collective bargaining (to which the lock-out is an aid) is to reach consensus. Once the contract between the employer and its employees is novated by agreement the dispute of interest is settled and the parties continue working together under the new set of substantive rules.

The third answer lies in the severance of the relationship itself. The employer is prepared to terminate services as part of the lock-out. It gives notice of termination coupled with a demand that its offer be accepted before the notice period expires. The employees refuse to accept. Their contracts now terminate permanently and the employer can look for alternative employees in the open market. Where the employer decides to make use of re-employ-

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225 See LLB 49-50 for a similar approach, see also Nel & Harper 4 who agree, except that they do not seem to foresee the third method of termination, namely termination as part of the lock-out, as a termination thereof as they do not discuss it. See also Olivier 628.

ment as a further leg of the lock-out, it can decide on the period for which its offer for re-employment is open for acceptance. Employees failing to accept the offer lose their jobs permanently. The employer is then free to employ from the open market. Of fundamental importance is that the employees have a choice throughout. If they fail to accept the offer under threat of termination they explicitly or implicitly choose not to continue with a relationship with that particular employer. They may feel that they have alternative employment opportunities and therefore that they are not ultimately dependent on a particular employer. They may therefore be more powerful. Should they not have such alternatives available and they need to work, then they will probably choose to accept the employer's final offer. The law does not demarcate the employment relationship (or allocation context) absolutely, if it did little competition (if any) would remain.

It must be remembered that the lock-out is a power mechanism designed to promote collective bargaining. Whether an employer is willing to lose its workforce permanently depends on economic factors such as market forces, availability of alternative labour, logistics, training costs and a host of other non-legal factors. No court, including the industrial court, is allowed to interfere in the process of economic power play in the competitive environment of a free enterprise economy. This is the intention of the South African legislator in the LRA too.

4.7 Lock-outs, Retrenchments and Dismissals Distinguished

Although the distinction between the above concepts emerges clearly from the discussion in this and previous chapters, it is necessary to state the difference specifically in order to emphasize the true nature of the lock-out and to understand its function and place as a power mechanism properly.[226] Understanding the concepts clearly in principle and how they are regulated by the law will go a long way towards eliminating the confusion that is still rife.

A dismissal is a reaction by an employer to a serious breach of contract by employees whether individually or collectively, conduct related or not. Security of employment is not regulated solely by contract but is also regulated in terms of the act based unfair labour practice jurisdiction of the industrial court. No additional source of rights and duties, called the continuing employment relationship, exists.[227]

Retrenchment (redundancy), whether individual or collective, is a form of termination where the employer takes the initiative by giving notice or pay in lieu of notice against the background of operational and capacity related justification. Once again contract is not the only source of regulation, but guidelines providing for security of employment have emerged in terms of the act based unfair labour practice concept. And no rights and duties emerge in terms of a continuous employment relationship.[228]

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226 See the discussion in ch 2 par 5.3.2; ch 3 par 6.4 and pars 3.2.3 and 4.2 above.

227 See the discussion in ch 3 par 4.5 above.

228 See n 227 above.

The lock-out is something completely different. It is a strategic power mechanism at the disposal of the employer designed to exert pressure on employees in order to induce or compel agreement in disputes of interest on the employer's terms.

In essence, the legislator has created power by allowing the employer to refuse employees work or not to pay them, or to breach the contract in any other way, or to terminate services or not to offer re-employment.[229] The mechanics used are exclusively those of contract, apart from the fact that an indemnity against ordinary contractual consequences is provided in section 79 in order to enhance the power of the employer even further. (The same indemnity applies to employees on strike.) In other words, the lock-out as a power mechanism allows the employer to compete more effectively in a free enterprise environment where the allocation of scarce resources is characterized by conflict, competition and choice.

It is imperative to realize that choice lies at the heart of the lock-out. Employees can decide to accept employer demands or not and they can eventually decide whether they want to sever the allocation context rather than accept employer demands in a lock-out based on termination. The bottom line is that they must decide how dependent they are on the employer and the latter must decide, in turn, how dependent it is on its employees in a particular market.

Dependencies, or the power realities real or perceived, determine the eventual choice of the parties regarding the outcome of the allocation contest within the allocation context or, eventually the very termination (permanently) of the allocation context in search of more

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229 See par 3.2 above.

acceptable alternatives in a particular market.[230]

The lock-out consists of two elements, an act and a purpose. The moment one of these two elements is missing the lock-out terminates.[231] Statements like the following are therefore confused and confusing:

> "If Indian Ocean Fertilizers is right, therefore, the principle it lays down should apply equally to strikes. This will mean that, like workers locked out, strikers cannot be dismissed before the employer has exhausted all possible reasonable alternatives."[232]

This statement confuses lock-outs with retrenchments and retrenchments with dismissals. What happened in the Indian Ocean Fertilizers case[233] is that the services of employees were terminated after the lock-out terminated. In other words, the termination was not connected to a purpose and therefore it was not a lock-out and clearly it was an unfair labour practice unless sufficient operational justification existed and proper procedures followed as required with retrenchment.

To situate the exhaustion of alternatives within a mass dismissal context is also conceptually wrong because the employer reacts to a breach of contract and does not take the initiative. In other words, the seriousness of the breach determines whether dismissal is justified and not the extent to which alternatives have been exhausted. The underlying

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230 Allocation context means the employment relationship as demarcated by the law. See the discussion in ch 2 par 5.3.2 above.

231 See par 4.6 above.

232 Brand 32.

233 (1991) 12 ILJ 822 (IC) 826.

rationale in retrenchments is operational requirements and in dismissals it is non-adherence to the contract of employment. If the lock-out were properly understood as a power mechanism the following conclusion would not be so absurd:

> "Indian Ocean Fertilizers seems to reveal an inconsistency in this stance. As was mentioned above, the company threatened to dismiss the workers so as to force them to accept its offer - a classic form of lock-out. Had the company carried out this threat, the resulting contractual termination would, given the lock-out exemption, have been immune from judicial scrutiny. So too, if Borg-Warner is right, would any ensuing outright dismissal, since the contracts would have come to an end. On this basis, all an employer has to do to make the mass dismissal watertight is to dismiss by way of a lock-out first. This is obviously absurd and, given his attitude in Indian Ocean Fertilizers, Mr De Kock would be the first to say as much."[234]

Brand fails to distinguish between the dynamics of the lock-out based on termination and termination pure and simple. Termination of the latter kind always has to comply with the dictates of fairness whether implemented in isolation or after a lock-out. Termination as an act forming part of a lock-out as one of its elements is not subject to the scrutiny of the industrial court and no civil action can be brought in respect of it in any other court in terms of section 79.

If, therefore, the employer feels powerful enough to separate from its employees unless they accept its demands, the law allows this. A permanent termination as part of a

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234 Brand 32.

lock-out, where employees refuse to budge and the employer can get along without them, is therefore not absurd. On the contrary, it is the clear intention of the legislator.

Whether it is acceptable that employers should be allowed so much power by the law is an entirely different question. The fact that they do enjoy that amount of power is a result ultimately of the pluralist assumption of equal bargaining power underlying the LRA[235] and the consequent regulation of strikes and lock-outs on an ostensibly equal basis by making use of contractual mechanics. The fiction of equality of bargaining power inherent in the classical paradigm of contract is responsible for the huge power discrepancy in real terms although parity seems to exist on the surface.[236]

To realize that a power imbalance exists is one thing, to rectify it is another. It is indeed "the fixation with contract that creates the problem", but the following confuses rather than assists:

> "If the relationship is seen as decisive the problem goes away. The relationship-based approach acknowledges that the employment relationship continues despite the termination of the contract if it was terminated in the expectation that it would subsequently be renewed. In such a case there may be a severing of the contract, but there is no dismissal since the parties regard themselves as still bound to each other. It is this enduring relationship with which the ULP jurisdiction is concerned - the substance of the tie, not its

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235 For a discussion on pluralism see ch 1 par 1.1.2 above. See also ch 4 above for a discussion of the pluralist philosophy underlying the LRA and Davis Voluntarism 62-8.

236 See the discussion in ch 3 par 3 and par 4.4 above.

contractual form."[237]

Firstly, power play as part of negotiation is an immediate process. The parties therefore do not know what the outcome of the process will be and it is therefore useless for the courts to postulate as part of an act based jurisdiction that the parties have the universal expectation that the contract will be renewed in all cases. This is clearly fictitious, for it may be that the employer, where employees refuse to budge, is prepared to sever the relationship permanently in search of alternative, more affordable labour. Competition in a capitalist environment ultimately allows for this.

Secondly, the unfair labour practice under the auspices of which this relationship apparition is constructed, is not applicable to the lock-out, and rightly so, because the law should not interfere with the outcome of the bargaining process. It is therefore hard to see, whatever the nature of this continuing relationship may be, how it finds application in the case of a lock-out in the first place.

The "substance of the tie" is the dependency of the parties on each other not some fictitious "relationship". The need for labour and the need to work may continue purely factually beyond the legal parameters of the relationship as demarcated by contract. Thus an employer may, as part of the continuation of a lock-out based on termination, offer re-employment to some or all of its employees (for a period entirely within its discretion) because it needs them and cannot make use of alternative labour or get along without them. The employer is however under no legal obligation, as part of a continuing employment relationship, bound to offer re-employment to all. When it offers re-employment as part

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237 Brand 32 44.

of a lock-out it can also decide how long the offer stands. Failure to accept re-employment by those to whom it is offered within the stipulated time also leads to permanent loss of their jobs.

The relationship fiction does not make the problem go away. On the contrary, it exacerbates the problem by introducing a further legal fiction on top of contract and thus removing the law even further from the power realities involved in collective bargaining.

If an adjustment of the power discrepancy between strikes and lock-outs is required, it must be done by the legislator in clear unequivocal terms as part of the restrictive function[238] of the law in the regulation of power. Adjudication can then function effectively in respect of binary[239] procedural disputes of rights[240] and not in a polycentric[241] web of hindsight, confusion and speculation as part of ad hoc act based tinkering[242] with the specific circumstances of each case.

5 CONCLUSION

The following conclusions are drawn taking into account the discussion above and the opinions of some comparative writers on the use of the lock-out

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238 See ch 2 par 2 for a discussion on the functions of the law.

239 Binary is used in the sense of two dimensional, that is, either right or wrong. See the discussion in ch 2 par 4.1.2.1 above.

240 A procedural dispute of rights is a dispute about the application of an existing procedural rule or right. See ch 2 pars 3 and 5.3 above.

241 Polycentric means many faceted. See the discussion in ch 2 par 4.1.1 above.

242 See the discussion in ch 3 par 3.4 above for the distinction between promise and action and the meaning of "ad hockery".

internationally.[243]

First, the lock-out in South Africa is regulated primarily by means of legislation relying for its proper functioning on common-law contractual principles.[244] Although the concept of fairness is used to develop guidelines regarding the promotion of collective bargaining and the protection of security of employment, it is not applicable to the implementation of a legal lock-out.[245] If a lock-out is legal it is free from interference by the courts.[246] Extensive regulation of the lock-out by statute is rare in other parts of the world. South Africa must therefore be seen to be an exception.[247] Since the legislator relies heavily on contractual mechanics in the regulation of the lock-out and since the freedom to lock-out does not belong exclusively to a collectivity of employers

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243 See inter alia Mischke "Industrial Action in German Law" 1992 Industrial Law Journal (SA) 13: 1; Schregle "Labour Law and Industrial Relations in the Third World" in Blanpain Comparative Labour Law and Industrial Relations; Gamillscheg "Conflict of Laws in Employment Contracts and Industrial Relations" in Blanpain Comparative Labour Law and Industrial Relations; Aaron "Settlement of Disputes over Rights" in Blanpain Comparative Labour Law and Industrial Relations; Clarke "Industrial Conflict: Perspectives and Trends" in Blanpain Comparative Labour Law and Industrial Relations; Birk "Industrial Conflict: The Law of Strikes and Lock-outs" in Blanpain Comparative Labour Law and Industrial Relations; Hepple The Making of Labour Law in Europe: A Comparative Study of Nine Countries up to 1945; Weiss Labour Law and Industrial Relations in the Federal Republic of Germany; Weiler Reconcilable Differences: New Directions in Canadian Labour Law; Blanc-Jouvan "The Effect of Industrial Action on the Status of the Individual Employee" in Aaron & Wedderburn Industrial Conflict: A Comparative Legal Survey; Blanc-Jouvan "The Settlement of Labour Disputes in France" in Aaron Labour Courts and Grievance Settlement in Western Europe; Schmidt "The Settlement of Employment Grievances in Sweden" in Aaron Labour Courts and Grievance Settlement in Western Europe; Ramm "Labour Courts and Grievance Settlement in West Germany" in Aaron Labour Courts and Grievance Settlement in Western Europe; Betton The Right to Strike in Community Law; Morris The Developing Labour Law: The Board, the Courts and the National Labour Relations Act 2.

244 See the analysis of the LRA in pars 3 and 4 above and the discussion of contract and contractual mechanics in ch 3 pars 3-5 above.

245 See par 4.2 above.

246 This includes civil actions in the industrial or ordinary courts. See pars 4.2 and 4.4 above.

247 See Birk 410.

(such as an employers' organization) but to any one or more employers, it can be said that the law regarding lock-outs in South Africa exhibits a strong individualistic as opposed to an exclusively collectivist character.[248]

Second, the South African legislature chose to regulate lock-outs on a parity basis with strikes. This is a result of the pluralist assumptions of equality of bargaining power underlying the LRA.[249] Lock-outs can furthermore be utilized, as is the case with strikes, both offensively and defensively.[250] The lock-out is therefore not only a defence mechanism in reaction to industrial action by employees, but a weapon in the hands of the employer with which it can actively promote its interests by taking the initiative where necessary. The lock-out is intended as the true equivalent of strike action in South Africa, not unilateral implementation of wages or the employer's ability to change conditions of employment unilaterally.[251] The position in South Africa can be compared to the regulation of the lock-out in Germany and Sweden. The point of departure in these countries is that strikes and lock-outs are weapons of equal value in industrial conflict which have to be regulated comprehensively. To a certain extent, although the lock-out is not regulated in as great a detail, the position in South Africa is similar in some respects to that in the

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248 Birk 410 states: "Collective and individual labour law must be more co-ordinated in order to avoid contradictions. In the case of the strike difficulties result however from the circumstance that individual labour law dominates the simple freedom to strike because according to it, work stoppage means a breach of contract. On the other hand, collective labour law proves to be stronger if a right to strike is granted. Its privilege contains a justification of the non-performance of the obligation to work. Collective labour law transcends individual labour law." See also the discussion in pars 3.1 and 3.2 above.

249 See the discussion in ch 4 above in general and the discussion in par 3 regarding the definition of the lock-out, par 4 regarding s 65 and par 4.4 regarding s 79.

250 The lock-out is usually regarded as a defensive mechanism elsewhere in the world. See Birk 405; Weiss 141-3 and par 4.5 above.

251 According to Weiler 67 the lock-out is not the true equivalent of strike action. See also the discussion in par 3.3 above.

United States of America and Canada. These countries also give unions and employers similar opportunities in industrial conflict, although strike action is given greater protection. The position in countries like Italy and France is completely different. The constitutions of these countries guarantee the right to strike and refuse parity between trade unions and employers' associations on the basis that workers are less powerful than employers. Only the right to strike is therefore privileged and lock-outs remain breaches of contract.[252]

Third, the scope of the lock-out in South Africa is limited to certain specific purposes all of which (with the exception of possible industrial action in respect of unfair labour practices) are in the nature of disputes of interest where the parties seek consensus regarding the creation of new rules.[253] Lock-outs may not be implemented with regard to disputes in essential services.[254] In all other instances the lock-out and its use are entirely in the discretion of the employer which enjoys civil immunity[255] against certain

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252 Compare Birk 407-8 413 and Weiss 141-3.

253 See chapter 2 in general and specifically par 3, ch 4 and par 3.3 above. This is in line with most countries. Birk 416 writes: "Normally the purpose of a strike is not to enforce existing rights but to create them. The strike serves therefore to resolve conflicts of interests between labour and management. Disputes over rights of workers are mostly decided by the courts, especially the labour courts if such exist. The rigorous differentiation between the pursuit of conflicts of interests and conflicts of rights is now always observed. But conflicts of rights may also be served by strikes. This applies particularly to the `unfair-labour-practice-strike' in the USA as a lawful strike caused by the unlawful conduct of the employer. When the workers intend to achieve the reinstatement of an unlawfully dismissed worker, then in the FR Germany only the respective worker has the opportunity to bring his case before the labour court. But strikes for such purposes are not permitted." It is unfortunate that it seems as if industrial action can also be taken in respect of unfair labour practices in South Africa. This is not in line with the model depicted in ch 2 above.

254 See the discussion in par 3.1 above. See also Birk 421 who concludes that protection of essential services against interruption by industrial action in the public interest is common all over the world. See also Schregle 69 who states that developing countries limit industrial action in respect of certain services and actions.

255 See par 4.4 above.

civil common-law consequences and may terminate employment[256] as part of the lock-out. Moreover, the lock-out is not limited in the sense that it may only be used in response to a certain number of employees on strike[257] or certain kinds of employees (except that the employer may not lock out solely on the basis of trade union activities) and it may be used in sympathy with other employers.[258]

Fourth, with regard to the place of industrial managerial power in the overall institutionalization design, it can be concluded that it is procedurally restricted as a last resort in the public interest.[259] In this way negotiation must be exhausted before recourse can be made to industrial action. Where procedures are not adhered to employers can be interdicted in the industrial and ordinary courts or be prosecuted in the criminal courts. Damages based on delict can also be recovered by employees from employers which embark on illegal lock-outs. Adjudication as a means of addressing procedural disputes of rights is therefore adequately provided for although the use of criminal sanction can be regarded as outdated and as excessive interference by

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256 See the discussion in par 3.2 above with regard to termination as a basis for the lock-out. It is clear that security of employment is not protected when termination forms part of the lock-out. This gives a significant power advantage to the employer beyond the termination at will position in common law since it is indemnified against any civil action including actions for reinstatement and damages.

257 The idea of proportionality is not recognized in South Africa (par 3 in general). Compare Weiss 333 and Birk 44 par C.

258 With regard to trade union activities see the discussion of the effect of s 66 on the immunity provided in s 79 (par 4.4 above). Sympathy industrial action is permitted only within certain limits internationally (Birk 417 in respect of strikes). In principle a sympathy lock-out is not prohibited in South African law (par 3 above in general). In general, regarding the scope of the lock-out, the "temporal" and "spatial extent" as well as the "form" are left to the discretion of the employer as long as it acts procedurally correctly (eg by holding a ballot, exhausting bargaining, etc) (Birk 417).

259 Compare ch 2 par 5.4 above.

the state.[260] As mentioned, although the legislator does not do so explicitly and consistently, the subject-matter of the lock-out is largely restricted to disputes of interest.[261]

Fifth, although it is not possible to quantify power in a thesis of this nature, the following may be concluded with regard to the regulation of dependencies by the law. Full freedom of association is allowed[262] and collective bargaining is promoted as the primary institutionalization mechanism and must be exhausted before the lock-out may be implemented.[263] Implementation of the lock-out relies exclusively on contractual mechanics and the common law with the power disadvantages for labour that it entails. Not only can the employer rely on the full impact of its economic and hierarchical power advantage which is inherent in the common-law contractual position, but it enjoys additional protection against ordinary contractual remedies by way of civil actions in any court of law. In this way the employer is free not to provide work or pay or to breach a contract of employment in any other way. It may terminate services and fail to re-employ entirely within its own discretion.[264] The only real counter to employer power that employees enjoy lies in association as a collective labour front in order to increase employer dependency. The law does not do much to assist in

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260 Compare Hepple 211-25 237-41. He states 237: "But when the criminal law was largely removed from the area of industrial conflict, restraints on the freedom to strike, stemming from civil law doctrines emerged. As Halsbury wrote, `The result of removing so large a part of the law of industrial relations from the orbit of criminal law is that the centre of gravity shifts to the law of torts'." Whether this is desirable in South Africa is the subject-matter for socio-legal research. The distinction between private and public law is not so important in labour law and to brand someone a criminal for not adhering to procedures or agreements in an economic power struggle is antiquated.

261 See par 3.2 above.

262 See the discussion in ch 2 par 5.3; ch 3 par 6 and ch 4 above.

263 See par 4.3 above.

264 See in general the discussion in ch 3 pars 3 and 4 and pars 3 and 4.4 above. See also n 256 above.

this regard. Whether the parity between strikes and lock-outs which ostensibly exists in law actually exists in practice is therefore highly unlikely.[265] To the extent that it does not exist in fact, is a matter for empirical research and whether it should be adjusted in a third world economy is a question which should be addressed by the legislature with the participation of all concerned.[266]

In summary it can be said that on the surface the regulation of managerial industrial power largely corresponds with the model developed in chapter 2 with regard to the formation of power, the promotion of negotiation, the utilization of power as a last resort and the demarcation of the allocation context. The proper regulation of the subject-matter (kind of dispute) for power and adjudication requires attention. Most critical of all is an evaluation of the balance of power between employer and employees. To address the power balance properly it is necessary to look beyond the pluralist assumptions underlying the LRA at the actual facts which determine dependencies between employer and employee.[267] Once this is done empirically, a proper role for the law in the adjustment of the power balance can be agreed to and implemented by statute in terms of clearly defined procedural rights.

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265 See the discussion in ch 1 par 1.1.2 above on the assumptions of equal bargaining power inherent in the pluralistic approach to industrial relations and the fact that a particular approach has related consequences in practice.

266 See in general the discussion by Schregle with regard to industrial relations in the third world.

267 See the discussion in chs 1 and 2 above regarding a proper role for the law in this regard. The recent ILO Commission findings do not contain anything directly related to the regulation of the lock-out. Compare Landman "The ILO Commission: Its Findings and the Implications for Future Labour Legislation" 1992 Contemporary Labour Law 1 (11): 117. See also 1992 Employment Law 8 (6).

ENDNOTES

1 SACWU v Plascon Inks & Packaging Coatings (Pty) Ltd (1991) 12 ILJ 353 (IC).

Gubb & Inggs Ltd v SACTWUSA (1991) 12 ILJ 415 (ARB).

Amalgamated Beverage Industries Ltd v FAWU & others (1988) 9 ILJ 252 (IC).

FAWU v Royal Beech-Nut (Pty) Ltd (1988) 9 ILJ 1033 (IC).

Sithole & others v Federated Timbers Ltd (1989) 10 ILJ 517 (IC).

SACWU & others v Noristan Holdings Ltd & others (1987) 8 ILJ 682 (IC).

NUTW & others v Stag Packings (Pty) Ltd & another (1982) 3 ILJ 285 (T).

NUMSA v Eveready SA (Pty) Ltd (1990) 11 ILJ 338 (IC).

NTE Ltd v SACWU & others (1990) 11 ILJ 43 (N).

NTE Ltd v Ngubane & others (1992) 13 ILJ 910 (LAC).

NUTW & others v Jaguar Shoes (Pty) Ltd (1986) 7 ILJ 678 (N).

FAWU v Middevrystaatse Suiwel Koöperasie Bpk (1990) 11 ILJ 776 (IC).

Metal & Electric Workers Union of SA v National Panasonic Co (1991) 12 ILJ 533 (C).

Ngubane & others v NTE Ltd (1991) 12 ILJ 138 (IC).

CWIU & others v Indian Ocean Fertilizer (1991) 12 ILJ 822 (IC).

CCAWUSA & others v Game Discount World Ltd (1990) 11 ILJ 162 (IC).

Ngewu & others v Union Co-operative Bark & Sugar Co Ltd; Masondo & others v Union Co-operative Bark & Sugar Co Ltd 1982 (4) SA 390 (N).

NUMSA, L Maleka & 60 others v Portacamp (Pty) Ltd NH 11/2/1893.

De Beer v Walker NO 1948 (1) SA 340 (T).

De Beer v Walker NO 1947 (4) SA 654 (T).

Walker NO v De Beer 1948 (4) SA 708 (A)

Freinkel v Garment Workers Union of SA 1961 (1) SA 507 (W).

CHAPTER 6

CONCLUSION

1 SUMMARY OF ARGUMENTS

Before proceeding to set out the recommendations of this thesis, it will be useful to recapitulate the arguments thus far:

1.1 The traditional approaches to industrial relations are inadequate as tools for analysing the institutionalization of industrial conflict effectively, since they rest on assumptions that are not valid. Unitarism holds that conflict should not exist between capital and labour. Pluralism assumes equal bargaining power between capital and labour. Radicalism propagates worker control free from subordination.

A better approach is to realize that conflict is inherent in the relationship between capital and labour and that this conflict should be institutionalized by converting it into rules primarily by means of collective bargaining. In the process of institutionalization capital and labour do not enjoy equal bargaining power, because an inbalance of power exists on an economic as well as an hierarchical level. It is not necessary to abolish the capitalist system in order to achieve an acceptable balance of power. The law can be used as a means to adjust the power balance to acceptable levels for both capital and labour in a capitalist system.

This means that the state as a third party has an important role to play as a rule maker on a central level and that institutionalization is not an

entirely voluntary process (involving rule making at a local level only).

1.2 Law can be defined as a set of rules which is enforceable by the state. As such it is a form of power which can serve as a technique for the regulation of social power. In order to effect legitimate institutionalization of industrial conflict the law must give substance to universally recognized fundamental rights such as the right to work, the right to protection, the right to improvement and the right to associate freely, to bargain collectively and to take industrial action. This it achieves by means of its guarantee, auxiliary, regulatory, restrictive and coercive functions.

1.3 The law not only regulates, supports and restricts the exercise of power by the parties themselves, but actively intervenes in determining the amount and use of power in the allocation of scarce resources. The law must not interfere with the outcome of the allocation process, but must endeavour to balance power in such a way that the outcome will be acceptable to both capital and labour. Once the outcome is determined by the parties themselves (preferably through agreement) the law should be available to enforce the rights acquired by the parties for certain periods of time in its coercive capacity. Contractual bargaining is therefore preferable to dynamic bargaining.

1.4 The distinction between disputes of interest (involving the creation of new rules or the allocation of scarce resources) and disputes of rights (involving the application of existing rules or the protection of allocated resources) is very

important with regard to the mechanisms utilized by the law to institutionalize conflict legitimately and effectively.

1.5 In disputes of interest the law should promote rule making negotiation as the preferred form of settlement, supported by industrial power to induce/compel agreement in the final event. In this process the law should only interfere procedurally, not substantively. In other words, the law should promote the formation, utilization and implementation of power procedurally in order to create an acceptable balance of power between capital and labour and by doing so promote an acceptable outcome in the allocation process. This entails recognition of the fundamental collective rights, freedom of association, collective bargaining and the right to take industrial action. It further entails a measure of protection of security of employment in order to limit the use of alternative labour. In this way the law can increase the dependency of capital on labour and through this enhance the power of labour so that it can participate more legitimately and effectively in the institutionalization process. The procedural rules designed to achieve the proper regulation of power should be simple, clear and justiciable as procedural disputes of rights.

1.6 In disputes of rights the law should promote the use of settlement negotiations on a purely voluntary basis as far as possible. Direct access to adjudication should however be allowed in cases where an authoritative exposition of principle is desired. Adjudication as a binary process should however only be utilized where thew principles (rules) to be applied are simple and clear and

therefore capable of effective application. Rules or principles exhibiting polycentric characteristics should not be submitted to adjudication, because strangers to the relationship who are afforded too wide a discretion may introduce bias in the institutionalization process. Adjudication as a binary process should therefore not be used to effect dramatic legal change. This is the task of the legislature.

1.7 In the overall context of institutionalization design, power (in cases of disputes of interest) and adjudication (in cases of disputes of rights) should only be structured as last resorts. Negotiation (both rule making and settlement) should be exhausted first. In this regard a whole range of alternative dispute resolution possibilities are available or can be created by agreement, depending on the nature of the dispute in issue. Care should also be taken to facilitate loop-back possibilities from the use of power and adjudication to settlement by negotiation.

1.8 An analysis of the South African institutionalization system calls first for an assessment of the nature of the employment relationship and particularly the role of contract in such a system.

1.9 Contract as a mechanism to regulate employment has varied in importance from Roman times to the present day, but has never disappeared altogether as a means of distributing scarce resources in a free enterprise environment. As long as the economic system is one of free enterprise capitalism, contract will remain an indispensable part of the legal apparatus of such a system, which consists of

two pairs of institutions, namely private property and contract and freedom of trade and profit making. Promises as a means of regulating future risks will always retain some importance in a world where capital and labour compete in an uncertain environment. To try to eliminate contract is to try to eliminate free enterprise itself.

1.10 Contract is however not a legitimate and effective means of distributing scarce resources between capital and the individual employee. The assumption of equal bargaining power between the parties is fictitious and does not correspond with the factual power discrepancies on the economic and hierarchical levels which exist between capital and labour.

1.11 Attempts to develop a new paradigm of contract with the emphasis on facts (that is, an ex post facto focus on the particular facts of the case by means of adjudication) instead of promises are helpful, but the danger exists of introducing vague concepts such as "public policy" which create more problems than they solve. Ad hoc emphasis on facts rather than principle undermines the ordering function of the law as a set of guiding principles and erodes legal certainty which is essential for proper planning in a free enterprise environment where the assumption of risks on the basis of enforceable promises is indispensable.

1.12 An analysis of the nature of employment shows that subordination is its essential characteristic. No employment relationship is possible without an element of subordination. Contract with its assumption of equality is therefore per definition not capable of describing and regulating the true nature of employment. To view employment as a status

relationship, a form of ownership or as wholly regulated by administrative law principles shows serious shortcomings. Attempts by the industrial court and some South African writers to construct an employment relationship from existing South African law are also unconvincing, confusing and dangerous. They are dangerous because no legal certainty exists with regard to its content and demarcation. This may in turn have serious implications for the proper regulation of security of employment which may impact on the procedural regulation of power. The most realistic approach to the regulation of employment in present day South Africa is still the multiple sources approach (that is, that the rights and duties pertaining to employment are derived from various sources such as the common law, contract, custom, legislation, precedent and collective bargaining). Any attempts at interpreting the Labour Relations Act should therefore take cognizance of this fact and care should be taken to avoid conceptual jurisprudence and the danger of removing legal principles even further from the facts they are supposed to regulate.

1.13 The employment relationship is a relationship sui generis. It is the task of the legislature to regulate the employment relationship effectively and legitimately. Any attempt at doing so should take into account the following factors:

(a) Contract will always be indispensable in a free enterprise economic system because it allows further voluntary creation of some rights and duties by the parties themselves. It should at least serve as a port of entry into the employment relationship.

(b) The power discrepancies inherent in contract should be adjusted in order to promote equitable negotiation (that is, more equality of the bargaining parties) in the distribution of scarce resources as long as the employment relationship continues. The law should intervene procedurally by allowing for the formation, utilization and implementation of power (that is, by promoting freedom of association, collective bargaining and the right to take industrial action) coupled with sufficient protection of security of employment in order to make capital more dependent on labour. By doing so the law will recognize that the employment relationship is dynamic and in need of continuous adjustment. Procedural rules should be clearly formulated in order to render contraventions of such rules justiciable as clear procedural disputes of rights.

(e) Regulation of the employment relationship should also take cognizance of the fact that labour is performed in a hierarchy of rules; therefore recognition of the concept of private bureaucratic power and the introduction of administrative law rules to ensure the reasonable exercise of managerial power are necessary.

(d) Legislation should furthermore demarcate the employment relationship (the allocation context or the relationship within which scarce resources are allocated) clearly by regulating dismissal and termination of

employment by means of clear rules amenable to adjudication.

1.14 The South African legislature has responded to the inadequacies of contract by the introduction of the widely defined, act based, unfair labour practice concept. The Wiehahn Commission envisaged that equity would operate within the Roman-Dutch legal tradition (that is, as a component of lawfulness) to correct law where it is defective owing to its universality. Instead the legislature introduced a concept of fairness which the industrial court distinguished from lawfulness. In spite of this the industrial court did not follow the English equity tradition as a completely separate system of law, but sought guidance from Supreme Court decisions, international guidelines and whatever other guidance it could find. The result is conceptual confusion which manifests itself in dual, confused and ineffective grounds for adjudication with resultant differences in approach between the industrial court, the labour appeal court and the Supreme Court. The Appellate Division theoretically has to adjudicate in terms of a dual system of equity.

1.15 The industrial court has succeeded in the last decade in developing fairly clear guidelines in the area of security of employment. These can and should now be codified by the legislature in clear rules amenable to adjudication. The attempt by the legislature in 1988 was a step in the right direction, but care should be taken to accommodate the interests of both employers and employees legitimately and to incorporate these into legislation by means of proper, clear drafting.

1.16 In the area of collective bargaining the industrial court has been less successful. It is submitted that the legislature (provided access to central rule making is opened to everybody, including the majority of workers who are black) should define the unfair labour practice more clearly and limit its scope to the regulation of freedom of association, and collective bargaining. Other areas such as defamation, racial discrimination, safety, etc, on which the industrial court has pronounced itself, can be more effectively regulated by the common law, legislation, regulations in terms of legislation and collective bargaining. Adjudication as a means of institutionalizing conflict over procedural disputes of rights should be made more effective by elucidating the freedom of association concept in South Africa and by legislating clear procedural guidelines as to how freedom of association, collective bargaining and industrial action should function. The industrial court should only be required to make marginal adjustments to these rules and not to develop a separate system of jurisprudence in vacuo on the basis of a polycentric open-ended power such as the present unfair labour practice concept.

1.17 An analysis of the Labour Relations Act with regard to the nature of disputes and the use of mechanisms to settle them, shows the following. First, the LRA is based on pluralist assumptions about the existence and institutionalization of conflict, primarily by means of collective bargaining. A major shortcoming of the LRA is caused by this incorrect assumption upon which it is predicated, namely the equality of bargaining power between employers and employees. Furthermore, institutionalization of conflict is limited to local rule making whilst

political activity is prohibited. This does not correspond with the reality of industrial relations. The assumption of access to central rule making for everybody in society is part of the pluralist model. This is however not the case in South Africa. Lastly, the idea of voluntarism which forms an integral part of pluralism is seriously marred by the possibility of mandatory extension of industrial council agreements to parties not part of the bargaining process.

Second, the LRA does not define the term "dispute" and does not formally make a distinction between disputes of interests and disputes of rights although it is recognized to some extent by implication. The terms "dispute" as well as "disputes of interest" and "disputes of rights" should be formally defined in order to promote effective and legitimate institutionalization of conflict.

Third, unfair labour practice disputes (which are disputes of rights) are structured in such a way that conciliation has to be exhausted before recourse can be made to adjudication. This is undesirable since direct access to adjudication should be possible if disputing parties wish so. Furthermore, disputes of rights (unfair labour practices) are too widely defined to be suitable subject-matter for adjudication. Specific, clearly defined unfair labour practices are necessary. It is also highly undesirable that the use of industrial power in respect of unfair labour practice disputes is possible.

Fourth, although it is in general not desirable to refer disputes of interest to arbitration,

prescribing compulsory arbitration for disputes of interest in essential services is justifiable in the public interest. Where, however, compulsory arbitration is ignored as in the recent strike by NEHAWU in the health services industry, it may be necessary to scrap compulsory arbitration in order to allow employers to implement legal industrial action as a counter to strike action. This is necessary because in practice the law is more effective in prohibiting industrial action by employers than by large numbers of employers. The reason for this is that it is easier to take legal action against a single employer than against a large number of employees.

Fifth, the use of criminal sanction to support legislation, collective bargaining agreements, determinations and awards should be reconsidered since the role of the state is exaggerated at the expense of participation by means of negotiation by the disputing parties themselves in the settlement of disputes.

Sixth, as far as the regulation and structure of industrial power in the institutionalization process is concerned, it can be concluded that adequate provision is made for the formation, use and implementation of industrial power. This is done by guaranteeing freedom of association and creating collective bargaining structures supported by the possibility that industrial power may be implemented to induce agreement. It is correctly structured as a final settlement recourse in disputes of interest after the exhaustion of rule making negotiation. However, the possible use of industrial power in respect of unfair labour practices is undesirable. Further, treating the regulation of strikes and

lock-outs on a parity basis as part of a pluralist premise has serious implications for the balance of power between employer and employee.

Seventh, opportunity is allowed for the parties to settle disputes by means of negotiation and the use of alternative dispute resolution mechanisms at any stage. Loop-back and cooling-off periods are provided for in the LRA to assist negotiation and it is possible to supplement mechanisms by means of relationship agreements based on contract (for example the peace clause in a recognition agreement).

1.18 When the actual regulation of the lock-out itself is considered, the following can be concluded. First, it is regulated primarily by legislation using contractual mechanics. Once a lock-out is legal, it is not subject to the scrutiny of the courts and can be used as a power mechanism to promote the settlement of disputes of interest.

Second, the South African legislature treats the lock-out on a parity with the strike as a result of its pluralist point of departure. Lock-outs can be used both offensively and defensively as is the case with strikes. Although the strike and the lock-out are regarded by the legislature as equally powerful mechanisms, the lock-out is a far more powerful tool since termination of employment as part of the lock-out is possible, with the result that locked out employees enjoy very little security of employment. This makes employers less dependent on them.

Third, the scope of the lock-out is largely limited to certain stipulated purposes all of which are in the nature of disputes of interest. An

undesirable exception is the possibility of locking out with regard to an unfair labour practice dispute.

Fourth, the lock-out as a power mechanism is procedurally restricted for use as a last resort. Enough opportunity exists for settlement of disputes by negotiation before use can be made by an employer of industrial power.

Fifth, the employer is given more than the full benefit of its power advantage in common law on both a hierarchical as well as an economic level, in that it is given an immunity against certain contractual remedies of the employee in legal lock-out situations. It is further free to terminate services permanently as part of the lock-out. It is therefore submitted that the employer enjoys a significant power advantage over employees.

Sixth, a proper literal interpretation of the LRA shows that it is clear on most aspects of the lock-out which purport to give rise to problems in practice. Examples are the following:

(a) The lock-out is defined clearly in section 1 of the LRA.

(b) It is clear who may make use of it and for which purposes.

(c) A lock-out may be used offensively (where the employer acts first) and defensively (in reaction to or simultaneously with a strike) as long as the clear procedures in the LRA are adhered to.

(d) An employer is not obliged to perform any of its contractual obligations during a legal lock-out.

(e) Termination of employment as part of a lock-out is final - it is justified on the basis of choice in a free market and not on the basis of conduct, capacity or operational circumstances - no nebulous "employment relationship" continues beyond contract.

(f) Employers are immune to civil actions (such as for damages or reinstatement) in respect of actions in furtherance of a legal lock-out in the ordinary courts and the industrial court (in terms of its unfair labour practice jurisdiction) as long as such actions are not in contravention of section 65 or constitute criminal offences.

(g) A lock-out terminates when any one or both of its elements are missing, when the dispute is settled or when the employment relationship is terminated by choice as part of the lock-out.

(h) A lock-out is the intended managerial action to counter strikes and is a powerful tool in the hands of employers. As such it is a strategy mechanism designed to induce/compel agreement in a free market where capital and labour compete in the allocation of scarce resources with the final option to both parties of leaving their particular allocation context in search of better alternatives in the market. It is essentially a power mechanism based on the dependency of

a particular employer on particular employees in a particular market. When termination of employment takes place as part of a lock-out it is justified on the basis of choice and not conduct, capacity or operational circumstances. The possibility of permanent termination is necessary as an ultimate form of inducement. Employees must realize that they should only refuse a particular final offer supported by termination if they can afford to relinquish their jobs in search of better alternatives in the market.

2 CONCLUSION

An institutionalization model allowing for the effective and legitimate use of the law to assist in the institutionalization process has been developed making use of legal material of mostly North American and English origin. The model focuses on the proper use of managerial industrial power in the institutionalization of industrial conflict and serves as a basis for evaluating the regulation of managerial industrial power in South Africa. The model can be summarized along the following lines.

The model accepts as a point of departure that conflict is inherent in the relationship between capital and labour because they compete in a situation of scarce resources. This conflict manifests itself in disputes of interest, involving the creation of rules or the allocation of scarce resources, and disputes of rights, involving the application of existing rules or the protection of allocated resources.

It is suggested that in the case of disputes of rights, the law should allow settlement negotiations on a purely voluntary basis at any stage from the time the dispute

originates to its final settlement by adjudication. Settlement negotiations should however not be exhausted as a matter of compulsion, but direct access to adjudication should be available if the disputing parties wish to have their rights enforced. This is necessary since the parties have had an opportunity to allocate resources between them legitimately by means of bargaining and should as a matter of the effective regulation of conflict concerning rights, not be forced to do so again. A contractual bargaining model (where agreements are enforceable for fixed periods of time) is therefore suggested because it is more effective than dynamic bargaining.

In the case of disputes of interest, it is suggested that the law should intervene only at a procedural level, formulating clear procedural rules (amenable to effective adjudication as procedural disputes of rights) to regulate the use of industrial power. In this way the outcome of the allocation process is not determined directly by the law, but merely influenced indirectly by adjusting the power balance between capital and labour procedurally in order to ensure a more acceptable power balance which in turn will promote a more equitable distribution of scarce resources.

Power between parties is a function of their mutual dependence on each other. In order to adjust the quantum of power between capital and labour the law must therefore adjust their mutual dependence on each other. Since capital is always more powerful than labour, the former must be made more dependent on the latter. This the law can achieve firstly by allowing freedom of association which enables individual employees to unite against capital. Secondly, where capital is still unwilling to negotiate with labour, the law should actively promote collective bargaining by forcing the parties to bargain collectively. Thirdly, capital should be made more dependent on labour by providing greater

security of employment, making it more difficult for the employer to use of alternative labour.

The law should not only regulate the quantum of power procedurally, but should also determine the subject-matter or the nature of the dispute for the settlement of which power may be used. Effective and legitimate institutionalization of conflict requires that the use of industrial power should only be allowed for the settlement of disputes of interest (or economic disputes involving the allocation of scarce resources or the creation of new rules). This requires a clear distinction between the two types of disputes and the formulation of specific procedural rules for the institutionalization of each.

Lastly, power should only be used as a last resort in the public interest. Here it has been shown that the law should regulate the exhaustion of rule making negotiation procedurally before recourse can be taken to the implementation of industrial power in order to induce or compel agreement.

When the model developed here is applied to the situation in South Africa the following can be concluded: The general approach to industrial relations envisaged by the LRA, the courts, and industrial agreements (such as recognition agreements) is a pluralist one.

Pluralism assumes that all members of society have access to central rule making mechanisms. This is not the case for the vast majority of workers in South Africa and this constitutes the biggest problem for the proper institutionalization of conflict. Access to central rule making mechanisms should be addressed as part of the constitutional negotiations for a new political dispensation.

Pluralism further assumes equality of bargaining power between capital and labour, which does not exist in fact. This has important implications for the regulation of the quantum of power operative between capital and labour. When contract as the traditional means of regulating the employment relationship is analysed more closely, it is clear that contract fails to address the inequality of bargaining power which exists between capital and labour on an economic as well as a hierarchical level. It also fails to provide security of employment for the individual employee. By regulating strikes and lock-outs on a parity basis, through the use of contractual mechanics, the legislature fails to address these power discrepancies. By making it possible for management to terminate employment as part of the lock-out and providing immunity against civil claims in section 79, the LRA further enhances the quantum of power which capital enjoys. The lock-out is therefore a more powerful tool than the strike in South Africa. Whether this is expedient is a function of empirical research in a particular society.

When the subject-matter or nature of disputes designated for settlement by a particular settlement mechanism is considered, problems with institutionalization design become apparent. The LRA does not define the term "dispute" nor does it define or make a formal distinction between disputes of interest and disputes of rights. To a certain extent this distinction is recognized by implication, but not consistently. It is, for example, possible to use industrial power to settle unfair labour practice disputes (disputes of rights) and to settle disputes of interest by means of adjudication. It is further compulsory to exhaust settlement negotiations before use can be made of adjudication in the industrial court. It is desirable that the legislature clearly defines the terms "dispute", "dispute of interest", and "dispute of rights" and structures appropriate settlement mechanisms around this distinction in line with the model envisaged above.

The position of power is however structured properly. It may only be used as a last resort, after exhaustion of the negotiation procedures in the LRA. Provided it is implemented in terms of the statutory prescriptions, the use of power is not subject to the scrutiny of the courts under the unfair labour practice jurisdiction or otherwise. This is desirable. With regard to institutionalization design it can therefore be concluded in general that the South African system largely corresponds to the model developed in chapter 2. The lock-out is further regulated in clear detail and as long as a literal interpretation of the LRA is followed, few problems should remain with the implementation of the lock-out in practice.

Finally, the way in which the legislature seeks to redress the problems associated with contract as a means of regulating the employment relationship is a matter for concern. Although some success has been achieved in the area of security of employment in the courts (by introducing the rules of natural justice and other procedural dictates into employment law), the legislature should regulate security of employment in clear detail, for example as in the United Kingdom. This area of the law can then safely be entrusted to adjudication and be removed from the sphere of power play.

The development of fundamental concepts which are essential to the collective bargaining process, such as freedom of association, should not be subjected to the whims and fancies of an outsider adjudicating in a situation of polycentricity. The present widely defined act based unfair labour practice concept is not amenable to effective adjudication. The unfair labour practice concept should be limited to the regulation of freedom of association and collective bargaining. It is submitted, however, that the legislature should create clear procedural rules to promote bargaining. Adjudication can then be used effectively to

enforce these rules. Thereby dual, confused, inconsistent and biased jurisdictions and decisions can be avoided.

The annexure to this chapter contains outlines of certain definitions which can serve as a point of departure in the formulation of keyy concepts.

3 ANNEXURE

The following outlines for definitions are provided as a point of departure in the regulation of these concepts by statute. Clear, properly integrated definitions require much more detailed attention than is possible in a work of this nature. In particular these definitions will have to be reconciled with the Labour Relations Act as a whole once it has been revised, if at all.

1 "Dispute" means a clear claim and a clear refusal of such a claim or a formal declaration of a dispute regarding anything of mutual interest between employer and employee.

2 "Dispute of interest" means a dispute regarding the creation of new rights and duties.

3 "Dispute of rights" means a dispute regarding the enforcement of existing rights and duties.

4 "Duty to bargain" means the duty to bargain collectively with any collective body representing a majority of the workforce in any particular bargaining unit on behalf of its members or otherwise agreed with the same or other bodies.

5 "Freedom of association" means the freedom to associate or not to associate with a collective body

without compulsion by means of conditions of employment or otherwise to associate or not.

6 "Employment relationship" means the relationship between a particular employer and employee as entered into by contract and regulated by such contract and other sources of rights and duties applicable to the employer and employee.

7 "Unfair labour practice" means any unfair interference with freedom of association and the right to bargain collectively, but shall exclude strikes and lock-outs. (More detailed regulation should be attempted once clarity is reached on the exact nature of freedom of association in the new political dispensation).

8 The definitions of "strike" and "lock-out" are adequate provided provisions such as sections 65(1A) and 65(1B) are changed to the effect that strikes and lock-outs may only be implemented with regard to "disputes of interest".

9 With regard to "dismissal" and "termination" the 1988 amendments to the unfair labour practice definition in s 1 of the LRA can be used as a point of departure:

"`Dismissal' means dismissal by reason of any disciplinary action against one or more employees, without a valid and fair reason and not in compliance with a fair procedure: Provided that the following shall be regarded as acceptable:

(i) the dismissal of an employee during the first six months of his employment with a particular employer or during such shorter

period as may have been agreed upon: provided that such dismissal does not take place without compliance with a fair procedure;

(ii) the dismissal of an employee where an employer fails to hold a hearing or a disciplinary enquiry and the industrial court thereafter decides that it could not reasonably have been expected of an employer to hold such a hearing or enquiry;

(iii) the dismissal of an employee where an employer fails to hold a hearing or disciplinary enquiry and the industrial court thereafter decides that such employee was granted a fair opportunity to state his case and a hearing or enquiry would in the opinion of the court not have had a different effect on the dismissal;

(iv) any dismissal which takes place after substantial compliance with the terms and conditions of an agreement relevant to the dismissal; or

(v) the selective re-employment of dismissed employees, providing such re-employment takes place in accordance with fair criteria and not on the ground of an employee's trade union activities."

"`Termination' means the termination of the employment of an employee on grounds other than disciplinary action, unless -

(i) such termination of employment takes place during the first six months of such employee's employment with a particular employer or during such period as may have been agreed upon in accordance with any

applicable agreement, wage regulating measure or contract of service; or

(ii) (aa) prior notice of such termination of employment in accordance with any applicable agreement, wage regulating measure or contract of service has been given either to the employee, or if such employee is represented by a trade union or body which is recognized by the employer as representing the employees or any group of them, to such trade union, body or group; and

(bb) prior consultation in regard to such termination of employment took place with either such employee or where the employee is represented by a trade union or body recognized by the employer as representing the employees or any group of them with such trade union, body or group; and

(cc) such termination of employment takes place in compliance with the terms of an agreement or contract of service, regulating the termination of employment of the employee whose employment is terminated; and

(dd) such termination of employment takes place in a case where the number of employees in the employment of an employer is to be reduced, according to reasonable criteria with regard to the selection of such employees, including, but not limited to, the ability, capacity, productivity and conduct of those employees and the operational requirements and needs of the

> undertaking, industry, trade or occupation of the employer."

It is submitted that other areas of employment such as safety, race and sex discrimination, defamation, suspension, etc should be regulated in terms of the common law, collective agreements and specific legislation (supported by appropriate regulations).

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SACWU & others v CE Industrial (Pty) Ltd t/a Panvet (1988) 9 ILJ 639 (IC)

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Zenzile & others v Administrator of the Transvaal & others (1989) 10 ILJ 34 (W)

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Zulu v Empangeni Transport ltd (1990) 11 ILJ 123 (IC)

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LIST OF UNION ACRONYMS

ACTWUSA	-	Amalgamated Clothing & Textile Workers Union of SA
BAISEMWU	-	Black Allied Iron, Steel, Engineering & Metallurgical Workers Union
BASODTWU	-	Black Allied Shops, Offices & Distributive Trade Workers Union
BAWU	-	Black Allied Workers Union
BCAWU	-	Building, Construction & Allied Workers Union
BCAWUSA	-	Building, Construction & Allied Workers Union of SA
CCAWUSA	-	Commercial Catering Allied Workers Union of SA
CWIU	-	Chemical Workers Industrial Union
FAWU	-	Food & Allied Workers Union
FBUSA	-	Food Beverage Union of SA
GWU	-	General Workers Union
HRWU	-	Hotel & Restaurant Workers Union
MAWU	-	Metal & Allied Workers Union
MAWUSA	-	Metal & Allied Workers Union of SA
MWASA	-	Media Workers Association of SA
NAAWU	-	National Automobile & Allied Workers Union
NUM	-	National Union of Mineworkers
NUMSA	-	National Union of Metalworkers of SA
NUTW	-	National Union of Textile Workers
PPWAWU	-	Paper, Printing, Wood & Allied Workers Union
PWAWU	-	Paper, Wood & Allied Workers Union
SAAWU	-	SA Allied Workers Union
SABMAWU	-	SA Black Municipal & Allied Wokers Union
SACTWU	-	SA Clothing & Textile Workers Union
SACTWUSA	-	SA Clothing & Textile Workers Union of SA

SACWU	-	SA Chemical Workers Union
SEAWUSA	-	Steel, Engineering & Allied Workers Union of SA
TGWU	-	Transport & General Workers Union
TWIU	-	Textile Workers Industrial Union
UAMAWU	-	United African Motor & Allied Workers Union