

HAS THE RIGHT TO STRIKE OUTLIVED its USEFULNESS IN THE MODERN WORLD?

As a young man recently out of university, in London, in the late 1960's, I joined the Commission on Industrial Relations (CIR). The CIR which evolved into the institution now known as the Advisory Conciliation and Arbitration Service (ACAS), was established as a consequence of the findings of the Donovan Royal Commission which published its report in 1968.

The Donovan Commission had been appointed to investigate the reasons for the high levels of strike action in the UK during the post second world war period leading to the UK being termed "the sick man of Europe" when its performance in industrial relations was assessed. The commission was avidly in favour of the promotion of collective bargaining in the UK stating that collective bargaining was "a right which is, or should be, the prerogative of every worker in a democratic society." In its findings the Donovan Commission suggested that strike proneness in the UK was to a large extent due to the inherent conflict between the then formalized system of industry level bargaining and the then informal industrial relations system at enterprise level. The Donovan Report found that the two systems were based on assumptions that were bound to create tension and unrest. The formal industry level process assumed that it is possible to negotiate and resolve most, if not all, industrial relations issues in a single written agreement which could then be applied throughout an industry. It was further assumed that the central organs of the trade unions and employer's associations had the capacity to ensure that the terms of any agreement were observed by their members, and finally it was assumed that the function of the industrial relations system at enterprise level was primarily one of interpreting and applying the industry agreement to local circumstances, and the provision of a basis for joint consultation between management and employees. On the other hand, Donovan observed that the largely informal system of enterprise bargaining was based on the contrary assumptions and in particular that many industrial relations issues were specific to the enterprise regulated by "custom and practice" at the workplace with management and shop stewards having a relatively high degree of autonomy to reach decisions independent from their centralized organization. The informal enterprise system was also based on the assumption that the distinction between the process of negotiation and the process of joint consultation is often blurred. The Commission concluded that the inherent conflict between the two systems could not be resolved by forcing the informal system to comply with the assumptions of the formal, industry level system, but only by management and trade unions accepting the reality and importance of enterprise level issues, and by jointly developing enterprise level industrial relations systems on a more formalized basis. Donovan noted that for many companies at the time, their major industrial relations policy decision was to join an employer's association, and comply with agreements negotiated on their behalf, often resulting in the absence of a comprehensive company industrial relations policy. Company boards of directors therefore frequently left industry wide agreements to their employer's association while delegating the task of dealing with workers within the framework of these agreements to subordinate managers. Indeed it was a specific recommendation of Donovan that it was essential for companies to develop clearly defined industrial relations policies for the introduction and maintenance of orderly industrial relations systems at enterprise level, compatible with the corporate business strategies of the organization in question. In so doing, management are given clear objectives in respect of employee relations policies while employees and their representatives know where they stand in

relation to the overall intentions and objectives of the company. The Donovan report concluded that to tackle the issue of strike-provess in the UK at the time required a complete review of its industrial relations system rather than changes in the law seeking to restrict the right to strike. Collective bargaining remained the preferred approach to resolving the inherent conflict between employers and labour, with labour exercising its right to join trade unions to bargain on its behalf. Worldwide it is a natural tendency for employers to favour a unitary approach to labour relations while trade unions tend to oscillate between pluralistic and radical approaches.

Of course, what Donovan didn't anticipate was that many companies in the UK would come to follow the example of many of their counterparts in the United States and adopt policies, either overtly or covertly, to suppress any attempt at unionization within their organizations by making it as difficult as possible for unions to develop and maintain membership, and even if this happened, to refuse to grant the unions concerned recognition for the purpose of collective bargaining. A more subtle approach by many large corporations on both sides of the Atlantic, in circumstances of high profitability and the need for highly skilled labour together with the capability to invest in its development, was the introduction of highly sophisticated personnel policies and procedures, thereby suggesting to employees, that this "substitution" for unionization, again either overtly or covertly, meant that there was no need to join unions in the organizations in question. In other words not all employers bought into the philosophy that collective bargaining is the preferred process to resolve conflicts of interest between employer and employee.

When I joined the CIR, one of its most prominent senior commissioners was Professor Alan Flanders. Flanders was one of the leading British academics in industrial relations during the 1960's and 70's and he had a major influence on government thinking at the time. He was a member of the so called "Oxford school" who promoted a philosophy of "ethical socialism". This "school" also recognised that a meaningful analysis of any industrial relations system entailed the need for a multi-disciplinary approach not only relying on economics and the law but also politics, history, psychology and sociology. It was Flanders who believed that it was perhaps more accurate to describe the process of collective bargaining as a process of joint regulation by management and trade unions be it at industry or at enterprise level, and it was Flanders who coined the memorable phrase- "in the absence of the right to strike collective bargaining becomes collective begging". If this is the case, and the veracity of this statement will be considered later, then the title of this paper should perhaps be- "Has collective bargaining outlived its usefulness in the modern world?". Like the proverbial horse and carriage according to Flanders – "strikes and collective bargaining" – you can't have one without the other.

As with all definitions Flanders' reference to "joint regulation" will differ in interpretation dependent on your approach to industrial relations. For example, approaches differ in respect of how employment organizations are perceived. A unitary perspective based on the assumption that an organization is an integrated group of people with a single/loyalty structure and a set of common values, interests and objectives shared by all members, may have difficulty with the concept of "joint regulation", given that managerial prerogative is regarded as legitimate and opposition to it is seen as irrational. Similarly a radical perspective based on the assumption that the employment relationship is merely an exploitation by the owners of capital of those who have to earn by means of their labour perceives the establishment

of processes and institutions of " joint regulation " as an enhancement of management's position by strengthening its legitimacy thus collective bargaining becomes an established, and supportive part of the capitalist system rather than a challenge to it. It is perhaps only a pluralistic perspective, based on the assumption that an organization is composed of individuals who coalesce into a variety of distinct sectional groups, each with its own interests, objectives and leadership (either formal or informal) that is comfortable with the concept of "joint regulation." The organization is perceived as multi-structured and competitive in terms of groupings, leadership, authority and loyalty, and these competing claims have to be managed in the interests of maintaining a viable collaborative structure, that is potentially comfortable with the concept of" joint regulation ". In societies purporting to be operating as democracies governments tend to buy into the pluralistic approach to industrial relations with varying degrees of enthusiasm accepting a right to strike and that the role of the law is primarily one of defining the limits of socially acceptable collective actions and use of power. It is perhaps worth noting that this level of tolerance is less in evidence when it comes to employment in the public sector where government is either directly or indirectly the employer and, where frequently, governments seek to place restrictions on strike action by means of essential service legislation. Governments around the world take a variety of approaches in determining what is, and what is not an essential service and as a consequence who is, and who is not permitted to strike. While some countries religiously follow ILO guidelines in defining essential services as "services the interruption of which endangers the life, personal safety or health of the whole or part of the population" many countries such as the US, Canada and Australia have "back to work mechanisms" enshrined in their legislation to end strike action when it is deemed that the continuation of a strike would have the potential to create a national emergency. Indeed, after last year's five month strike in the platinum sector, South Africa began a debate about whether or not certain long term strikes should be deemed "dysfunctional" and the subject of "back to work mechanism". On the other side of the coin we have the People's Republic of China, arguably the world's largest economy, certainly when measured in terms of manpower, where strike action is seen to be counter-revolutionary. There is no longer a need for a radical approach to labour relations as the political regime has replaced capitalist exploitation with a system regulated by, and on behalf of, the people. However, it should be noted that this dogma has been relaxed to some extent in recent years. It is, therefore, critical when asking the question as to the relevance of strike action, to also consider the political and economic development of the country in which the question is being asked. For example, many developing countries battling with service delivery problems to meet even the most basic needs of the population may have a significantly different view as to what is an "essential service" to that which exists in developed countries.

However, determining whether or not strike action is relevant in today's world is not necessarily a question of politics and economic development. It also raises the question of whether or not strikes serve their intended purpose or whether their unintended consequences, make them of less relevance than in the past. Conflict within an industrial relations system may be viewed from three perspectives. Firstly, it may be viewed as a direct challenge to the internal order and stability of the social system creating a fear that without such order and stability the system will degenerate into anarchy and lawlessness. Alternatively conflict can be viewed as a necessary prelude to the development of a new social order, or thirdly, it can be seen as an important element in the maintenance and stability within

the existing social system, providing the means for identifying and balancing the different interests within a dynamic and constantly developing social system.

The balance of conflicting interests is to a large extent determined by the relative power of the parties involved in the negotiations in question. The relative degree to which workers and the employer are willing and able to sustain a strike is their strike leverage. Workers who by means of strike action can actually halt the employer's business activity clearly have a potentially bargaining lever as opposed to workers who find their strike action undermined by replacement labour. Even if workers are able to halt business activity, their strike leverage is weakened if it does not result in a consequential loss of sales. Employers may be able to maintain sales through stockpiling prior to strike action, or in the case of industry level bargaining where competitors also face strike action where the sales and profits may be temporarily postponed rather than permanently forgone. Strike leverage is also affected by the degree to which either workers or the employer can draw on or generate alternative income sources during a strike. Obviously, workers in unions offering strike benefits can better afford to stay out on strike than those in other unions, similarly employers who have substantial savings or alternative income sources from other business activities can more easily absorb the costs of a strike.

Strike leverage in the public sector is not necessarily tied to the employer's ability to withstand a loss of sales. Many public sector operations do not charge explicitly for services and secure revenue through rates and taxes. Nor does the public sector typically face competition resulting in a loss of market share during a strike. However while a public sector employer may not lose income during a strike, a strike can certainly anger the employer's constituents, namely, the public. The public's willingness to sustain public sector strikes seems to sway with political winds. In liberal times public sentiment may be sympathetic to strike action particularly where public sector workers are perceived as being underpaid. However in tough economic times striking workers in the public sector are often seen by the public as an obstacle to their calls for lower taxation and increased regulation of the pricing of public utilities.

The propensity to strike will, obviously, be affected by the attitude of society towards industrial action. Notwithstanding strike proneness in the UK during the 1970'S and successive government attempts to introduce pay policies and/or social compacts between business and labour in attempts to regulate an inflation fuelled economy things came to a head with the so called "winter of discontent" between December 1978 and May 1979. The "Winter of Discontent" was a phrase borrowed from Shakespeare's Richard 111 by the unlikely person of Larry Lamb, then editor of the Sun newspaper, to describe the mood of Britain in the early months of 1979, when at one point one and a half million workers were on strike against Government pay policy. The Conservative party led by Margaret Thatcher used images of uncollected rubbish covered in snow piled high in the streets, of health workers withdrawing their labour from hospitals, of the " dead left unburied ", to great effect in their May General Election campaign. The Thatcher government translated society's attitude to strike action at the time into "public interest" and that "public interest" into formal social control through the creation or modification of the legal framework surrounding strike action. This, of course, was not the only reason for the decimation of collective bargaining in the UK. While I had already left for South Africa before what Mrs. Thatcher in her memoires - "The Downing Street Years ", calls "Mr. Scargill's Insurrection" I followed the events of the

miners' strike in 1984 - 1985 with more than a little interest. In her memoirs Mrs. Thatcher comments as follows-

"The strike certainly established the truth that the British coal industry could not remain immune to the economic forces which applied elsewhere in both the public and private sectors. In spite of heavy investment, British coal has proved unable to compete in world markets and as a result the British coal industry has now shrunk far more than any of us thought it would at the time of the strike.

Yet the coal strike was always about far more than uneconomic pits. And so its outcome had a significance far beyond the economic sphere. From 1972 to 1985 the conventional wisdom was that Britain could only be governed with the consent of the trade unions. No government could really resist, still less defeat, a major strike; in particular a strike by the miners' union. What the strike's defeat has established was that Britain could not be made ungovernable by the Fascist left. "

Whether or not you agree with the "unitary" sentiments expressed by Mrs. Thatcher or Mr. Scargill's view of a "radical" approach to labour relations, it is certainly true that the issues surrounding strike action are not always those that are tabled at the bargaining table prior to the commencement of a strike. Nor is strike activity immune from unintended consequences. The Scargill insurrection "heralded a downward spiral in the enthusiasm for collective bargaining in the UK particularly in the private sector. In this regard it is noteworthy that one of collective bargaining's primary objectives i.e. the redistribution of wealth by ensuring that the owners of capital pay "a fair day's pay for a fair day's work" has not been sacrificed in its absence. In 2011 the Gini coefficient, the internationally recognised measure of income inequality, fell in the UK to its lowest level since 1986. It has become increasingly apparent that redistribution of wealth is largely dependent on a government wishing to ensure through its taxation and service delivery policies such redistribution, provided that the government in question presides over an economy which is sufficiently flourishing to provide that government with a strong tax base in order to implement its redistribution policies. Currently in the UK, the median income for the top 10% of couples with two children is approximately eight times higher than that of their counterparts in the bottom 10%. The Gini coefficient when I came to South Africa in 1982 was a different story altogether.

The Wiehahn Commission Report in reviewing South African labour law and public policy in respect of labour relations found in 1979 that - " It would be a nonsense to place employers in the untenable position of having to first negotiate with registered unions at industrial council level and then with their liaison committees at enterprise level, and finally with black unregistered trade unions outside of the statutory system. The immediate post-Wiehahn period, from 1980 to 1985, saw the government recognizing, however tentatively, the need for reforms in the hope of accommodating and integrating the black trade union movement into the country's official labour relations system. These reforms were met by a largely suspicious and hostile reaction from the traditional trade union movement representing largely non-black worker interests and a confused mix of emotions from employers on how to deal with the new challenges. However by 1985, with the launch of the new super-federation of emerging trade unions - COSATU, it had become apparent to both government and employers that the demands for labour reforms were increasingly linked to demands for political reform. The following years up to the

country's first free general election on 27th April 1994 saw little more than a battleground with ever increasing union militancy, government clampdowns through states of emergency, and employers being increasingly tested in terms of political allegiance as well as economic resolve. These were the years of massive strikes and stayaways against the backdrop of a rapidly deteriorating economy and increasing violence. The need for political change, if there was to be hope for economic survival became increasingly apparent to most, if not all, members of government. The introduction of the 1995 Labour Relations Act, South Africa's first piece of democratic domestic legislation was introduced in the hope that it would bring to an end, the country's highly adversarial approach to industrial relations. In the event this did not happen. COSATU pursued its ambitions through collective bargaining primarily at industry level while either ignoring or in some cases outright opposing the provisions of Chapter V of the Labour Relations Act - Workplace Forums, and its provisions for joint regulation at enterprise level. COSATU also left unresolved, the question of whether or not it was in the interests of its members to maintain close links with the ANC and as a consequence the government of the day. Strikes continued in South Africa as the nature of employment was changing around the world.

A vital attribute of any viable collective bargaining system is its ability to adapt to changing pressures and problems. Much of the recent trends in industrial relations may be characterized as an environment experiencing high levels of international competition through globalization, technological change reducing the need for unskilled labour, increasingly high levels of unemployment particularly amongst the young, a decrease in union membership and an increase in so called "atypical employment ". Much of economic growth in recent years has been jobless growth. Clearly collective bargaining, and its partner, strike action, must adapt to today's labour market. In the 1960's world markets were generally characterised, in the private sector, by production-driven supply with long runs and consequential economies of scale, echoing the words of Henry Ford – "You can have any colour you like as long as it is black". In other words in the private sector the producer was King. Of course, it is not only the private sector that has the ability to create jobs, at least in the short term. Throughout history there have been many examples of grand scale public works programmes. Legend has it that some 300,000 people were employed over a ten year period in constructing the Great Wall of China. The Egyptian pyramids, the last remaining wonder of the ancient world, constructed around 2500 BC., represents a massive public works programme. While the jury is still out on whether these wonders of the world were the result of slave labour or wage-slave labour, we know from governments throughout the ages have generated employment through the development of infrastructure to support their economies and social needs. However, the sustainability of Keynesian economics i.e. spending your way out of economic recession has come under increasing critical scrutiny in recent years. Public sector programmes whether the building of roads and bridges, providing health and education services, or meeting society's needs for security and safety be it in the form of armed forces, policing, or fire brigades while common in today's society, have to be paid for through taxes. With increasing population levels i.e. demand for services and high unemployment i.e. less tax, the dilemma becomes increasingly obvious.

In the private sector investment in job creation is based primarily on the work required to produce goods and services to the consumer in a competitive market. Since the 1970's the private sector market has become increasingly "consumer" rather than "producer" driven. Consumerism is based on the

theory that the most profitable businesses will be those who can supply the customer with the most attractive products and services at value for money prices. This consumer-driven system requires business to design strong brands at value for money prices often resulting in outsourcing in search of a "best price" for labour. In an era of globalization, developing economies around the world, given their relative labour costs, provide attractive locations for the supply of a variety of products and services ranging from clothing and textiles to pharmaceuticals and from automobile manufacture to call centre services.

The world today possess technology much in advance of that a few decades ago, but the world has yet to balance the increased productive capacity brought about by this new technology against the vast challenges of unemployment, inequality and poverty. The challenge for collective bargaining and associated strike action is that if it remains consumption driven i.e. how to we share up the existing cake? , the chances are that the process will be viewed as increasingly irrelevant. The economic needs now are for flexibility, multi-skilling, and workgroups who can supervise and quality control themselves. Collective bargaining if it is to be relevant in respect of these new needs will need to focus on investment in human resources in the form of training and development not just on the rate for the job. We know that times are changing, we know that increasingly, employers are seeking " knowledge" workers and that the demand for labour is focused on flexibility and affordability. We also know that capital is much more geographically flexible than labour. Workers are having to come to terms with the reality that in seeking work they are likely to be offered non-permanent and variable work opportunities. Job security and loyalty to one employer in the hope of long term career opportunities will be traded for opportunities to develop skills, leading to workers increasing their employability in respect of their own personalized career plans. Collective bargaining if it is to remain relevant will need to adapt to these new challenges.

Of course there are still many industries, particularly in developing economies that remain dependent on large scale manpower, such as the mining industry in South Africa, although even here investment in new technology is being introduced thereby making the industry less manpower dependent. I had the privilege, some might say dubious privilege, of being part of the CCMA's mediation team during last year's strike in the platinum sector. Commencing on 23 January 2014 and ending on 25 June 2014, the strike cost employers R24 billion in lost revenue and employees R10, 6 billion in lost wages. In the words of Lonmin's chief executive Ben Magara on signing the three year settlement that brought an end to the strike - "It is not necessarily a time to celebrate. Clearly there are no winners in this strike. "

It was this strike closely followed by a four week long strike in the metal industry which was arguably protracted only by a dispute as to whether or not the industry level agreement provided scope for enterprise level negotiations in addition to the formal sector agreement i.e. shades of Donovan all those years ago that stimulated debate in this country about the relevance of strike action. It certainly stimulated debate as to whether interest arbitration might be an effective substitute for strike action. Certainly interest arbitration might be effective and even desirable as opposed to strike action in circumstances where the desired bargaining outcome of the parties is a degree of maintenance of the existing system and its associated terms and conditions of employment. However if collective bargaining is viewed as a process for change to the existing order then Flanders' assessment that there can be no

meaningful collective bargaining process without the right to strike remains as pertinent as ever. In other words the right to strike will remain relevant while there remains a desire on the part of workers to change the social order in which they work. The challenge for such workers and their leadership is to use the right to strike sparingly and strategically, if not, it is they that will become irrelevant as employers find ways to operate without them, not the right to strike itself.